A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

&c.

VOL. II.

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A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

AND

DIGEST OF PROOFS,

IN

CIVIL AND CRIMINAL PROCEEDINGS.

THIRD EDITION,

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

BY THOMAS STARKIE, ESQ.

OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL.

VOL. II.

A B A — M U R

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LAW OF EVIDENCE.

VOL. II.

PROOFS ON PARTICULAR ISSUES.

ABATEMENT.

THE proof of the affirmative of the issue on a plea in abatement is, from the very nature of the plea, usually incumbent on the defendant (*a*). This natural order is subject to inversion, either it seems in respect of the form of the issue, according to which the plaintiff takes the burthen of proof upon himself; as where the replication to a plea in abatement for non-joinder in assumpsit, alleges that the defendant undertook *solely* to pay (*b*); or, which more frequently happens, in consideration of the plaintiff having to prove the amount of his damages. In strictness the question as to damages does not arise until the issues have been disposed of, and it might seem to be more convenient to try the issues first, for if the defendant succeed the inquiry as to damages is unnecessary. The course of practice is otherwise, and so far as any precise rule can be collected it seems to be this, that if the amount of damages be in dispute, the plaintiff is entitled to begin, although the proof of the issue joined may be incumbent on the defendant (*c*); but that if the damages be merely nominal, or can be ascer-

(*a*) See tit. ORDER OF PROOF, *supra*, Vol. I. In *Fowler* v. *Costar*, M. & M. 241, in an action on a bill of exchange, and the non-joinder of a joint contractor pleaded; Lord Tenterden permitted the defendant to begin, observing that where it appeared by the record or statement of counsel, that there was no dispute about the sum to be recovered, the damages being either nominal or mere matter of computation, [illegible] the affirmative was on the defendant, he ought to begin.

(*b*) See *Young* v. *Bairner*, 1 Esp. C. 103.

(*c*) Indebitatus assumpsit for goods sold, plea non-joinder of others as defendants, Lord Denman held that the plaintiff was entitled to begin, but that the defendant might do so if he would admit the amount claimed; *Morris* v. *Lotan*, 1 M. & R. 233. In *Lacon* v. *Higgins*, 3 Starkie's C. 178, the defendant having pleaded her coverture to an action for goods sold, her counsel were permitted by Abbott, L. C. J. to begin, on condition of admitting the amount. In *Roby* v. *Howard*, 2 Starkie's C. 555, non-joinder having been pleaded to a declaration for laying out the plaintiff's money on an insufficient security, the same learned Judge was of opinion that the plaintiff's counsel ought to begin, since it was incumbent on the plaintiff to prove his damages. See also *Stansfield* v. *Levy*, 3 Starkie's C. 8; *Fowler* v. *Costar*, M. & M. 241. In some instances, the question as to beginning appears to have been regarded as one for the discretion of the court, *Burrell* v. *Nicholson*, 1 M. & R. 304. Bayley, J. at the York Summer Assizes 1821, directed that the defendant should begin, and that the question of damages should, if necessary, be tried afterwards. See *Young* v. *Bairner*, 1 Esp. C. 103; *Jackson* v. *Hesketh*, 2 Starkie's C. 518. In the case of *Hutchinson* v. *Fernie*, 3 M. & W. 305, the court intimated that a clear case of erroneous direction in this respect, would be a ground of new trial. In the case of *Stansfield* v. *Levy* above cited, Abbott, L. C. J. held that where the plaintiff is allowed to begin, he may confine himself to proof of damages, and reserve his case in reply to the plea.

tained by mere computation, or are admitted by the defendant on whom the proof of the issue lies, he is entitled to begin (*d*).

Plea of nonjoinder.

A plea in abatement, that the defendant made the promise jointly with another, is supported by evidence that the defendant made the promise jointly with an infant; for the plaintiff ought to plead and prove that the infant has avoided his promise (*e*). Upon a plea that *A.* and *B.*, assignees of *C.*, a bankrupt, ought to have been joined, it is not sufficient for the defendant to prove that they have acted as assignees; he must prove that they were so, either by the production of the assignment, or by proving an admission by the plaintiff to that effect (*f*). A bill delivered by the plaintiff for business done for the insured, the defendant being one, in which he debits the defendant with three-sevenths only of the whole amount, is *primâ facie* evidence (the defendant having pleaded in abatement) that the action was brought to recover his share only (*g*).

If the plaintiff contract with the defendant *alone*, without knowing that he has other partners, proof by the defendant, upon a plea in abatement for non-joinder, that he had secret partners, would not be a sufficient defence in support of the plea (*h*).

Any acts by the defendant, tending to show that he treated the contract as several, not joint, are evidence for the plaintiff. Where the defendant had written letters to the plaintiff, promising to pay the money in question, and without making mention of any partners, Lord Ellenborough, upon issue to bar on a plea of non-joinder, held that the evidence was conclusive as to separate liability (*i*). One signing an instrument in his own name for others may frequently be sued alone, although the others may also be liable (*k*).

The plaintiff may, on motion, compel the defendant to give him a particular of the places of residence of the alleged co-partners. *Taylor* v. *Harris*, 4 B. & A. 93. The plaintiff will fail, if it appear that any other than those named in the plea jointly pro mised. *Godson* v. *Good*, 6 Taunt. 587.

(*d*) *Lacon* v. *Higgins*, 3 Starkie's C. 178.

(*e*) But a contract by an infant, for goods sold to trade with, is absolutely *void*. *Thornton* v. *Illingworth*, 2 B. & C. 826. *Gibbs* v *Merrill*, 3 Taunt. 307. Where one churchwarden sued another for money paid for the affairs of the church, it was held, on a plea in abatement, that it was unnecessary to join the vestrymen who had signed a resolution for the repairs, without any intention of becoming responsible, the two churchwardens having jointly given the orders. *Lanchester* v. *Tucker*, 1 Bing. 201. And where one of two chapelwardens alone orders goods, it is sufficient to sue him alone; for the plaintiff knows no one but the person who gives him the order. *Shaw* v. *Hislop*, 4 D. & R. 241. See also *Eaton* v. *Bell*, 5 B. & A. 34. *Horseley* v. *Bell*, 1 Brown's C. C. 101. Amb. 770. *Sprott* v. *Powell*, 3 Bing. 478. *Brooke* v. *Guest*, 3 Bing. 481. As to the non-joinder of defendants in actions against carriers, see tit. CARRIERS; and *Bretherton* v. *Wood*, 3 B. & B. 54. *Ansell* v. *Waterhouse*, 2 Chitty, 1.

(*f*) *Pasmore* v. *Bousfield*, 1 Starkie's C. 296. *Robinson* v. *Henshaw*, 4 M. & S. 475.

(*g*) 1 Starkie's C. 296.

(*h*) *Doo* v. *Chippenden*, cor. Ld. Kenyon, Ch. J. at Westmr. sittings after Hil. T. 1790, upon a plea in abatement cited in Mr. Abbott's treatise, 92. *Baldney* v. *Ritchie*, 1 Starkie's C. 338. See tit. PARTNERSHIP, *infra*. If a party contract with two, he may sue them only: if after the contract is made he discovers that they had a secret partner who had an interest in the contract, he is at liberty to sue the latter jointly with them, but he is not bound to do so. *De Mautort* v. *Saunders*, 1 B. & A. 398, overruling *Dubois* v. *Ludert*, 5 Taunt. 609. And see *Mullett* v. *Hook*, 1 M. & M. C. 88. And see tit. PARTNERSHIP. On a plea in abatement in an action for work and labour, of the non-joinder of eighteen others, members of a joint company, Abbott, L. C. J. held that declarations by one of the eighteen, before action brought, that he was a shareholder, was evidence of the fact for the defendant. *Clay* v. *Langslow*, 1 M. & M. 45; *tamen quære*.

(*i*) *Murray* v. *Somerville*, 3 Camp. 99. n.

(*k*) See tit. AGENT.—BILL OF EXCHANGE. A promissory note, beginning "I promise to pay," was signed by a member of a firm for himself and his partners, and it was held that he was liable to be sued severally. *Hall* v. *Smith*, 1 B. & C. 407; *March* v. *Ward*, Peake's C. 130; *Clarke* v. *Blackstock*, Holt's C. 474; *Sayer* v. *Chaytor*, 1 Lutw. 696.

By the statute 3 & 4 Wm. 4, c. 42, s. 9, to any plea in abatement in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

And by section 10, in all cases where after such plea in abatement, the plaintiff shall, without proceeding to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants were liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any defendant who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement (*l*).

The plaintiff must be prepared to prove his damages (*m*). Damages.

Where a peer is named as a commoner, he may plead his misnomer in abatement, since the title is part of his name, and he ought to be tried by his peers only (*n*); but he ought to set forth the writ, &c. upon the plea, because it is but a dilatory plea, and must be tried not by the country but by the record. But a plea that the defendant is a peeress by marriage must be tried by the country, since it involves a question of fact extrinsic of the record (*o*). Misnomer.

Upon a plea of peerage under letters patent, they must be produced under the great seal (*p*). In Knowles's Case, upon an indictment for murder, the defendant pleaded that his grandfather was created Earl of Banbury by letters patent under the great seal of England, which he produced in court; the Attorney-general replied, that on, &c. the defendant petitioned the Lords in Parliament to be tried by his peers, and that the Lords disallowed his claim; the defendant demurred, and the demurrer was allowed, on the ground that the refusal of the Lords could not operate as a judgment (*q*).

If the defendant in a criminal proceeding plead a misnomer, the King may reply that he is known by the one name as well as the other (*r*); but in an appeal such replication was not allowed (*s*).

Upon a plea of *misnomer*, where the defendant avers that he was *baptized*

(*l*) See *Clay* v. *Langslow*, 1 M. & M. C. 45, *supra*.

(*m*) *Weleker* v. *Le Pelletier*, otherwise the plaintiff will be entitled to nominal damages only.

(*n*) *i. e.* In case of Treason or Felony, 2 Hale, 240. 6 Co. 53. *Countess of Rutland's Case*, 35 H. 6, 46.

(*o*) 6 Co. 53. 2 Hale, 240. See Starkie's Crim. Pl. 295.

(*p*) 2 Salk. 509.

(*q*) *R.* v. *Graham*, 4 St. Tr. 410. See *The Earl of Strathmore* v. *The Countess of Strathmore*, 2 J. & W. 543.

(*r*) 2 Hale, 238. By the statute 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by reason of any plea of misnomer, or want of addition, or of wrong addition, if the court shall be satisfied by affidavit or otherwise of the truth of the plea; and it shall order the indictment or information to be amended, &c.

(*s*) 1 H. 7, 29. 21 Ed. 3, 47. 2 Hale, 238.

by the name of *A. B.*, he must give proof of such baptism, although he was not bound so to allege it; and it is not sufficient to shew that he has always been called and known by that name (*t*). A defendant in either a criminal or civil proceeding will in general be concluded in a new action, or upon a fresh indictment, as to the name or addition which he has set forth in his former plea (*u*).

Competency.

If in assumpsit the defendant plead in abatement that the promise was made jointly with *E. F.*, the latter will be a competent witness for the plaintiff; for if the plaintiff were to succeed, although the record would prevent the plaintiff from recovering a second time in a joint action, the witness would still be liable to an action at the suit of the defendant for contribution (*x*); for the record would not be evidence against the latter; and if the plaintiff were to fail, the witness, if a partner, would still be liable to be sued by the plaintiff in an action against himself and the former defendant, and would be ultimately liable to pay his own share. The witness, if he be a partner, is at all events liable to pay his own proportion of the debt (*y*). It seems, however, that *E. F.* would not have been a competent witness for the defendant, in order to prove that he was a joint contractor, without a release (*z*), where he would be liable to contribute towards the costs of the action in case the defendant failed. But a release from the defendant would at all events make him competent, for then he would not be liable to contribution; and it would be his interest that the plaintiff should recover against the defendant alone, rather than that he should fail, in which case he might still bring a joint action.

The defendant, upon an indictment for perjury, may prove in bar that the action in which the evidence was given, on which the perjury is assigned, had abated before the trial of such action, by the death of a co-plaintiff after issue joined, no suggestion having been entered on the record pursuant to the statute 8 & 9 W. 3, c. 11, s. 6 (*a*).

ABUTTALS. *See* TRESPASS.

ACCEPTANCE. *See* BILL OF EXCHANGE.

ACCESS. *See* BASTARDY.

ACCESSORY.

Principal in the first degree.

It will be convenient here to consider the evidence applicable to both *principals* and *accessories*. Principals, in cases of felony, are of two degrees. A principal in the first degree is the absolute perpetrator of the crime, and is either actually present when it is perpetrated, or commits it whilst absent by an innocent agent or instrument (*b*). A principal in the second degree is

(*t*) *Weleker* v. *Le Pelletier*, 1 Camp. 479. See Com. Dig. ABATEMENT, [F.] 17. *Walden* v. *Holman*, 6 Mod. 115; 1 Salk. 6.

(*u*) 2 Hale, 248. See Crim. Pleadings, 2 Ed. 313. A plea of misnomer is no longer allowed in a personal action. 3 & 4 W. 4, c. 42, s. 11; and see the provision, s. 12, as to the use of initials.

(*x*) Lord Ellenborough seems to have been of opinion that in this event the witness would have been in a worse situation than he would have been in had the plaintiff failed on account of his liability to contribute towards the costs of the former suit.

(*y*) *Hudson* v. *Robinson*, 4 M. & S. 475; and see *Cossham* v. *Goldney*, 2 Starkie's C. 414.

(*z*) *Young* v. *Bairner*, 1 Esp. C. 103; and see the observations of Lord Ellenborough, 4 M. & S. 480, and of Bayley, J. Ib. 484; and see *Goodacre* v. *Breame* Peake's C. 174; and *Birt* v. *Hood*, 1 Esp C. 20; and see also tit. INTEREST OF WITNESS, and PARTNER.

(*a*) *R.* v. *Cohen*, 1 Starkie's C. 511.

(*b*) Hale, 615, 616. 2 Haw. c. 29, s. 11

one who is present, aiding and abetting the fact to be done (*c*). An accessory *before* the fact is he, that being absent at the time of the felony committed, doth yet procure, counsel, or abet another to commit a felony (*d*). A man may therefore be convicted as a principal in the first degree, upon evidence that he committed the fact when absent, without the more immediate intervention of any guilty agent. As where *A.* persuades *B.* to drink poison, by recommending it as a medicine (*e*); or where he sends the poison by a third person, ignorant of its quality (*f*); or incites a madman to destroy another; or a child to set fire to a house (*g*). To prove one to be principal in the second degree, it must be shown *first*, that he was *present* when the offence was committed. But it is not necessary to shew that he was actually standing by, within sight or hearing of the fact; it is sufficient if he was near enough to lend his assistance in any manner to the commission of the offence. As where one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*h*). So if several set out together, or in small parties, upon one common design, whether of murder or felony, or for any other unlawful purpose, and each takes the part assigned to him, some to commit the fact, they are all, in contemplation of law, *present* when the fact is committed (*i*). So, if several come to commit a burglary, and some enter, and the rest watch, all are principals (*k*). So, where a constable's assistant attempted to apprehend a number of persons in a house, under a warrant for a riot and battery, and fourteen of the rioters issued from the house and killed the constable's assistant, it was held that those within the house, if they abetted and counselled the riot, were, in law, *present*, aiding and assisting, as well as those who issued out and actually committed the assault five roods from the house (*l*). And, *in general*, if a party be sufficiently near to encourage the principal in the first degree with the expectation of immediate help or assistance in the execution of felony, he is in point of law *present*. Lord Dacre and others (*m*) came to steal deer in the park of Mr. Pelham; Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; and it was held that it was murder in them all, and they died for it. So if *A.* and *B.* be present, and consenting to a robbery or burglary, though *A.* only actually commits the robbery, or actually breaks and enters the house, and *B.* be watching at another place near, or be about a robbery

Principal in the second degree.

Proof that he was present.

(*c*) Hale, P. C. 615. Formerly he who struck alone was principal, and those who were present, aiding and assisting, were accessories, who could not be convicted before the attainder of the principal; 1 Hale, P. C. 437. 40 Ass. 25. 40 E. 3. But it has been long settled, that all present, aiding and abetting, are principals; 1 Hale, P. C. 437. Plow. 97. Whether a person is guilty as a principal in the first or second degree, is a question of law. *R.* v. *Royce*, 2 Burr. 2076. If several persons combine to forge an instrument, and each separately executes a part, all are principals, though they are not together when the work is completed. *R.* v. *Bingley and others*, 1 Russ. & R. 446.

(*d*) 1 Hale, P. C. 615. Lord Coke, in his reading on the Statute West. 1, c. 14, says, the word *aid* comprehends all persons counselling, abetting, plotting, assenting, consenting and encouraging to do the act, and who are not present when the act is done; for if present, they are principals; 2 Inst. 182.

(*e*) 4 Co. 44. 2 Inst. 183.

(*f*) 9 Co. 81. Kelynge, 52, 53.

(*g*) *Ann Course's Case*, Foster, 349.

(*h*) Foster, 350. 1 Hale, 537. If two steal in a shop whilst a third remains on the outside to watch and co-operate, he is guilty as a principal. *R.* v. *Gogerly and others*, 1 Russ. & R. 343. In the case of *R.* v. *Davis and Hall*, cited below, though the jury found that the prisoner Hall was near and ready to lend assistance, yet the *evidence* seems to have been insufficient to warrant the finding.

(*i*) Foster, 350. 353. 1 Haw. c. 38. 1 Hale, P. C. 439. Kel. 111.

(*k*) Foster, 350. 1 Hale, P. C. 439.

(*l*) 1 Hale, P. C. 462.

(*m*) 1 Hale, 439. 443. 245. Fost. 354.

hard by, which he effects not, both are robbers and burglars (*n*). Where *Hyde* and *A.*, *B.*, *C.* and *D.* rode out to rob, but at Hounslow *D.* parted from the company; and rode away to Colbrook, and *A.*, *B.* and *C.* rode towards Egham, and about three miles from Hounslow, *Hyde*, *A.* and *B.* assaulted a man; but before he was robbed, *C.* seeing another man coming at a distance, before the assault, rode up to him about a bow-shot, or more, from the rest, intending either to rob him or to prevent his coming to assist; and in his absence, *Hyde*, *A.* and *B.* robbed the first man of divers silk stockings, and then rode back to *C.*, and they all went to London, and there divided the spoil; it was ruled (according to Lord Hale) upon good advice, *first*, that *D.* was not guilty of the robbery, though he rode out with them upon the same design, because he left them at Hounslow, and fell not in with them; it may be he repented of the design, at least he pursued it not. *Secondly*, that *C.*, though he was not actually present at the robbery, nor at the assault, but rode back to secure his company, was guilty as well as *Hyde* and the two others (*o*). It is otherwise where the party is not sufficiently near to render assistance to the principal felons. Where three prisoners were charged with feloniously uttering a forged note, &c., and it appeared that one of the prisoners offered the note in payment at Gosport, the other prisoners being then waiting at Portsmouth for his return: the whole being in consequence of a previously concerted plan, the Judges (after conviction) held, that the two latter prisoners were entitled to their acquittal, since they were not present when the felony was committed (*p*).

In the case of *The King* v. *Stewart and Dickons* (*q*), it appeared that the two prisoners had previously agreed to sell forged notes to James Platt, a witness upon the trial, and that the price had been paid. That after the witness had been at the house of the prisoners for the purpose of receiving the notes, Stewart and the witness went to a public-house, and that afterwards Dickons came and beckoned them out; Stewart then said to the witness, "You see Ann there, whom you have seen at our house; she will deliver the goods to you; I wish you good luck." Dickons, the woman pointed out by the prisoner Stewart, within three minutes afterwards delivered the forged notes to the witness, and the witness did not know whether the prisoners were or were not in sight when the notes were so delivered, nor which way they went. The jury found the prisoners guilty, and stated (the question being left to them by the learned Judge), that the delivery of the notes by Dickons was in completion of the agreement made by the prisoners, and on their account, and not her own. Execution was respited, in order that the opinion of the Judges might be taken upon the question; and all the Judges recommended that a pardon should be applied for in respect of the particular offence (*r*).

(*n*) 1 Hale, P. C. 537. 1 And. 116, &c.; differently reported, Fost. 354. See tit. BURGLARY.—RAPE.

(*o*) 1 Hale, 537.

(*p*) *R.* v. *Soares*, and two others, 2 East, P. C. 974; and see *R.* v. *Badcock and others*, 1 Russ. & R. 249; *R.* v. *Kelly*, Ib. 421; *R.* v. *Morris*, Ib. 270. In the case of *R.* v. *Davis & Hall*, 1 Russ. & R. 115, the two prisoners came to a town with intent to utter a forged note; they left the inn where they had put up together; Davis went into a shop and uttered the note, and Hall joined him near the place, about fifteen or twenty minutes afterwards. The jury found that Hall was at the time of the uttering sufficiently near and ready to render assistance, and found both guilty; but the judges afterwards held the conviction of Hall to be improper.

(*q*) *Coram* Garrow, B., Warwick Lent Assiz. 1818, and afterwards before the Judges, MSS. C.

(*r*) See also *R.* v. *Else*, 1 R. & R. 142.

That he was aiding and abetting.

It must be shewn, *secondly*, that he was *aiding and abetting* (*s*); which words seem to include every species of assistance which one present can give, either in act, or by his assent, and by his encouragement or readiness to further the general purpose (*t*). For if any one comes for an unlawful purpose, although he does not act, he is a principal (*u*). It is not necessary to show that one, indicted as a principal, was present during the whole of the transaction; it seems to be sufficient to show him to be present aiding and abetting when the offence was consummated, although he was not present at the inception. Where the servants of *A.* feloniously removed goods in *A.*'s warehouse, and *B.* several hours afterwards assisted them in removing the goods *from* the warehouse, it was held that *B.* was a principal, since it was a continuing transaction (*x*). So, where the servants of Dyer, who was the owner of a boat (and had been employed to convey on shore a quantity of barilla), without the privity of Dyer, separated part of the barilla from the rest, and conveyed it to another part of the boat, and concealed it under some rope, and Dyer afterwards assisted the others in conveying the part so separated from the boat; it was held, upon the same ground, that Dyer was a principal (*y*).

Principals, whether in the first or second degree, are usually charged as being feloniously present, aiding and abetting (*z*); since where a statute creates a new felony, or takes away the benefit of clergy from those guilty of an existing felony, under particular circumstances, the offence partakes of all the incidents to a felony at common law, and all present aiding and abetting are principals, and may be charged as such (*a*). But where the statute by its description includes that party only who does the very act, one who is principal in the second degree only ought to be acquitted either of the offence generally, or of so much as the particular statute is applicable to.

The allegation, that the prisoner was *aiding* and *abetting*, implies an *assent* to the principal act. This assent must be proved either by some act directly done in furtherance of the commission of the crime, which manifests the assent of the prisoner, as by his keeping watch whilst others in his presence break open a house, or by evidence that he was associated with the rest in the prosecution of one common illegal object, in the execution and furtherance of which the principal crime was committed. If *A.* be present when a murder is committed, and takes no part in it, nor endeavours to prevent it, and neither apprehends the murderer, nor levies hue and cry after him, and the matter be done in private, the circumstances would, it seems, be evidence to a jury, of consent and concurrence on his part (*b*). But here the privacy

(*s*) See Lord Coke's exposition of the word *aid*, 2 Inst. 218, and *supra*, 5; see also Foster, 354; and Minshew, Cowel, Skinner, Spelman, and Dufresne, on the meaning of the word *abet*; from which it appears that instigation alone, without force, is the sense of the word.

(*t*) Fost. 350. 2 Haw. c. 47.

(*u*) 1 Hale, P. C. 374. 443.

(*x*) *R.* v. *Atwell and others*, East, P.C. 768. But where several broke open a warehouse and stole a quantity of butter, and carried it along the street thirty yards, and then the prisoner joined them, and being apprized of the felony, assisted in vending the goods; it was held that he was but an accessory. *R.* v. *King*, Russ. & R. 332. *R.* v. *M'Makim & Smith*, Ib.

(*y*) *R.* v. *Dyer and Disting*, East, P.C. 767, per Graham, B. and Le Blanc, J.

(*z*) Where aiders and abettors are mentioned expressly in the statute, the general allegation appears to be sufficient; see Crim. Pleadings, second edition, 82, 83. 86.

(*a*) See the Coalheaver's case, Leach, 76. Staandf. 44. 3 Inst. 45. 1 Hale, P. C. 613. Fost. 354. *R.* v. *Midwinter & Sims*, Leach, C. C. L. 3d edit. 78. Burr. 2075.

(*b*) Foster, Disc. 3, s. 5.

and secrecy with which the fact was accompanied would be a strong circumstance; for if the homicide had been openly committed before witnesses, as it frequently is, where it amounts *in construction of law* to murder, although *A.*'s conduct might be criminal, it would not render him either principal or accessory (*c*). But in case the murder had been committed in prosecution of an unlawful design, proof that *A.* came to assist and carry that design into execution, would be evidence to convict him as a principal in the second degree (*d*); for in such case the person giving the blow is no more than the instrument by which all strike. In such case, however, it would be essential to prove that the murder was committed in the prosecution of some specific unlawful design in which the prisoner had engaged (*e*); for if the death resulted from the particular malice of the individual who inflicted the blow, and who took the opportunity to revenge himself, the others, who were assembled for a different purpose, would not be involved in his guilt. Three soldiers went to rob an orchard, two got up a pear-tree, the third watched with a drawn sword, and killed the son of the owner, who had collared him; and it was held, that the latter was guilty of murder, but that the two others were innocent, because they came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. But Holt, C.J. said that it would have been otherwise, "if they had all come thither with a general resolution against all opposers," which would have proved that the murder was committed in prosecution of their original purpose (*f*). So where *A.* beat a constable in execution of his office, and being parted from him desisted, and *B.*, a friend of *A.*, rushed in and killed the constable, *A.* not having been engaged after they were parted, it was held to be murder in *B.*, but that *A.* was innocent, since there was no previous agreement to obstruct the constable in the execution of his office (*g*). A general resolution against all opposers, which can be proved either to have been expressly entered into, or which can be inferred from circumstances, as from the number, arms, or behaviour of the parties at or before the scene of action, is strong evidence in cases of this nature (*h*), and shews, when substantiated, that every one present, in the eye of the law, when the offence is committed, is guilty as a principal (*i*). Where, however, *A.*, *B.* and *C.* set out with intent to rob on the highway, and *A.* and *B.* upon the same day commit a robbery, *C.* may show in defence that he had previously abandoned the design, and separated himself from the party, and that there was not, when the offence was committed, any engagement or reasonable expectation of mutual support and defence to affect him (*k*). So if several set out to commit a felony, but being alarmed, run different ways, and one, to avoid capture, maims his pursuer, the rest are not principals (*l*).

Evidence against an accessory before the fact.

An accessory before the fact may be tried either after the conviction of the principal felon or at the same time with him, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not

(*c*) Dalt. 395. Staundf. 40. Fost. Disc. 3, s. 5.

(*d*) Fost. Disc. 3, s. 6. Kel. 116.

(*e*) Fost. Disc. 3, s. 7.

(*f*) Ibid.

(*g*) Per Holt and Rokeby, Js. Hertford Ass. Fost. Disc. 3, s. 7; see also *Plummer's Case*, Ib.

(*h*) Fost. Disc. 3, s. 8.

(*i*) The cases of Lord *Ducre* and *Pudsey*, cited above, were decided on the same principle; the offences of which they stood charged were committed far out of their sight and hearing, yet both were holden to be present. It was sufficient that at the instant the offences were committed by some of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence with those who did the fact. Fost. 354.

(*k*) Fost. Disc. 3, s. 8.

(*l*) *R.* v. *White and another*, Russell & Ry. 9.

been previously convicted (*m*). If the principal has been previously convicted, the conviction may be proved by the record properly authenticated (*n*), which will be *primâ facie* evidence to prove the guilt of the principal (*o*), whether the indictment allege the guilt of the principal expressly (*p*), or, as is the more usual course, recites the record of conviction (*q*). In either case the prisoner may insist on every matter both of fact and of law to controvert the guilt of the principal (*r*), for the accessory is considered as *particeps in lite* (*s*). As against an accessory before the fact, the general allegation must next be proved, that he did feloniously and maliciously incite, move, procure, aid, abet, counsel, hire, and command the principal to commit the felony (*t*). Proof sufficient to satisfy this allegation imports evidence of the knowledge and assent of the prisoner to the commission of the felony, that he at least instigated and incited the principal to commit the crime. With respect to the measure of the incitement and force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose is proved by the result. In principle, it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed although the incitement had never taken place (*u*).

In cases where there is a variance between the crime which the accessory has advised and that which the principal has perpetrated, those criteria must be resorted to which are clearly stated by Sir M. Foster; viz. "Did the principal commit the felony he standeth charged with under the influence of the flagitious advice, and was the event in the ordinary course of things a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or on a different subject (*x*)?"

Wife. A wife may be convicted as a principal felon in uttering a forged certificate for receiving prize money, although she acted in pursuance of her husband's direction; and the husband may be convicted as an accessory before the fact (*y*).

Accessory after the fact. Against an *accessory after the fact*, after proof of the principal felony, either by the record of the conviction of the principal felon or by evidence (*z*), it must be proved, that he, knowing the felony to have been committed, received, relieved, comforted or assisted the felon (*a*), or received the stolen goods (*b*). It seems once to have been held, that the knowledge of the

(*m*) By the st. 7 & 8 G. 4, c. 29, s. 54.
(*n*) See tit. RECORD.
(*o*) See JUDGMENTS, for the reason.
(*p*) As in Lord *Sanchar's Case*, 9 Co. 114. See Starkie's Cr. Pl. 2d edit. 140.
(*q*) See Fost. Disc. 3, c. 2, s. 3.
(*r*) See the reason, tit. JUDGMENTS.
(*s*) Fost. 365.
(*t*) See Crim. Pleadings, 130.
(*u*) According to Lord Coke, to *cause*, is to procure or counsel one to forge; to *assent*, is to agree afterwards to the procurement or counsel of another; to *consent*, is to agree at the time of the procurement, or counsel, and he in law is a procurer; 3 Inst. 169. But an assent after the fact committed makes not the party assenting a principal, 1 Hale, 684.
(*x*) Foster, Disc. 372. Thus if *A.* counsel *B.* to burn the house of *C.*, and *B.* knowing the house of *C.* spares it, and burns the house of *D.*, *A.* is not accessory to this felony.
(*y*) *R.* v. *Morris*, 2 Leach, 696; Russ. & R. 270; and see *R.* v. *Hughes*, cor. Thompson, B. Lancr. Lent. Ass. 1813. Russell, 1478. See tit. HUSBAND AND WIFE.
(*z*) The receiver of stolen property may be tried either as an accessory after the fact, or as a substantive felon, 7 & 8 G. 4, c. 29, s. 54.
(*a*) 1 Hale, P. C. 618.
(*b*) Under the stat. 7 & 8 G. 4, c. 29, s. 54.—See LARCINY.

accessory was to be inferred from the attainder of the principal in the same county (*c*), because every one is bound to take notice of an attainder in the same county; but this notion appears to have exploded (*d*).

Variance. If *A.* be charged as principal in the first degree, and *B.* as aiding and abetting, the indictment will be supported by evidence that *B.* struck the blow, and that *A.* was present aiding and abetting (*e*); and in such case, *B.* may be convicted although *A.* is acquitted (*f*). If *A.* be indicted as accessory to *B.* and *C*, he may be convicted on evidence that he was accessory to *C.* only (*g*). It has been said, that it was otherwise in case of an appeal (*h*); yet there seems to have been no difference in the two cases as to the rules of evidence. One indicted as a principal cannot be found guilty on evidence showing that he was an accessory before the fact (*i*). Wherever a variance is material as to the principal, it is material and available to the accessory (*k*); and *vice versâ*, where a variance is immaterial to the principal, it is immaterial to the accessory (*l*).

ACCOMPLICE.

Competency. It seems to be an universal rule, that a *particeps criminis* may be examined as a witness in both civil and criminal cases, notwithstanding the immorality or illegality of his conduct, provided he has not been convicted of any crime that incapacitates him (*m*).

In civil actions it was formerly held that a witness could not be admitted to allege his own turpitude, or to disprove an instrument to which he was a party or witness (*n*); but the rule is now exploded (*o*), for it is calculated to conceal the truth. The subscribing witnesses to a will have, in several instances, been allowed to give evidence to impeach the will (*p*); and the same rule applies where the instrument is of a negotiable nature (*q*).

A clerk having embezzled his master's property, laid it out in illegal insurances, and he was held to be a competent witness for the master against the insurer (*r*). So a man who has pretended to convey lands to another is a competent witness to prove that he had no title (*s*). A co-assignor of a ship may prove that he had no interest in the vessel (*t*). Parents may give evidence to bastardize their issue (*u*).

(*c*) Staundf. 96. 8 E. 4. f. 3.

(*d*) 3 P. Wms. 494.

(*e*) 9 Co. 67. Ibid. 112, b. 4 Co. 42. 3 Inst. 148. 2 Hale, P. C. 292. 1 Plow. 28. *R.* v. *Wallis*, 1 Salk. 334. *R.* v. *Benson*, 3 Mod. 121. 1 Lord Raymond, 21. Doug. 20.

(*f*) *R.* v. *Wallis*, 1 Salk. 334.

(*g*) 9 Co. 119. 2 Hale, P. C. 292. 2 Haw. c. 46, sec. 196.

(*h*) 2 Inst. 183.

(*i*) 2 Haw. c. 26, s. 178, 9.

(*k*) 2 Haw. c. 46, s. 194. Summ. 265. 2 Hale, P. C. 292.

(*l*) 2 Haw. c. 46. *R.* v. *Macally*, 9 Co. 65. Cro. J. 279. 2 Hale, P. C. 292.

(*m*) See tit. INFAMOUS WITNESS.

(*n*) 4 Inst. 279. Str. 1148. Salk. 461. 689. 3 St. Tr. 427. Burr. 1255. 1 T. R. 296. 3 T. R. 21. 27. This was in conformity with the maxim of civil law, "*Nemo allegans turpitudinem suam est audiendus.*" In the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601, Lawrence, J. observed, "persons are continually allowed to allege their own turpitude, as in cases of simony, compounding felony, sale of offices, &c.; and possibly that maxim may in our law be confined to the cases of plaintiffs making demands *ex turpi causâ*, and to cases of defence in which innocent persons may be prejudiced."

(*o*) 5 T. R. 579. 7 T. R. 601.

(*p*) *Lowe* v. *Jolliffe*, 1 Bl. R. 365. 7 T. R. 604.

(*q*) 7 T. R. 64.

(*r*) *Clarke* v. *Shee*, Cowp. 197.

(*s*) *Title* v. *Grevet*, Lord Raym. 1008.

(*t*) Anon. cited 1 T. R. 301. So a witness may be called to prove that the defendant had been registered as the part-owner of a ship, on the oath of the witness, without his privity or consent, *Rands* v. *Thomas*, 5 M. & S. 224. And where a woman had deposed on oath, at the instance of the defendant, that the prosecutor was the father of her bastard child, it was held that she was a competent witness to prove that the defendant was the father. *R.* v. *Teal*, 11 East, 309.

(*u*) See the cases tit. BASTARDY; but see also *R.* v. *Rock*, 1 Wils. 340.

In the case of *Walton* v. *Shelley* (*x*), it was held that the indorsee of a promissory note was not competent to prove that it was tainted with usury in its creation; but in the latter case of *Jordaine* v. *Lashbrooke* (*y*) it was denied that the former decision was warranted by the previous cases; and it was held, that a party to a bill of exchange was competent to prove it to have been void in its creation (*z*). So in an action for bribery the person bribed is a competent witness, although by the statute (*a*) the party who discovers the bribery of another is exempted from an action, and the witness intends to avail himself of this exemption by way of defence to an action pending against himself for bribery committed at the same election (*b*). No one, however, can be a witness for another whilst he is a party to the record. But a co-defendant may be rendered competent by entering a *nolle prosequi* (*c*); and if there be no evidence to charge one co-defendant in trespass, he may be acquitted under the direction of the court, and give evidence in the cause.

In criminal proceedings.

In criminal cases it is perfectly clear that an accomplice is a competent witness, previous to his conviction of a crime which takes away competency, in all cases, whether of treason (*d*), felony (*e*), or mere misdemeanor (*f*): the doctrine is founded on obvious grounds of policy (*g*), and, perhaps, of necessity. It is also perfectly settled that no promise of pardon, whether it be absolute or conditional, will render an accomplice incompetent (*h*). In some instances accomplices are strictly entitled to pardon. Such was formerly the case with approvers, upon conviction of their associates (*i*). The practice of admitting an approver to appeal (a matter purely within the discretion of the court) had become obsolete in the time of Sir Matthew Hale (*k*), who observed that more mischief had arisen to good men from these approvements, upon false accusations by desperate villains, than benefit to the public by the discovery and conviction of real offenders. Since their discontinuance, and before their final abolition (*l*), the doctrine of approvements had become more a matter of curiosity than use (*m*). Although an approver was sworn to the truth of his appeal (*n*), yet it seems that he was not a competent witness upon the trial. For this proceeding have been substituted the enactments of general statutes, and the reasonable and equitable practice of admitting an accomplice to give evidence under a conditional promise of pardon, in case he make a fair and impartial disclosure.

Competency.

(*x*) 1 T. R. 296.

(*y*) 7 T. R. 601.

(*z*) See *Rich* v. *Topping*, Peake's Cas. 224. Esp. 117.

(*a*) 2 G. 2, c. 24.

(*b*) *Bunn* v. *Rawlings*, Say. 209. *Howard* v. *Shipley*, 4 East, 180. *Edwards* v. *Evans*, 3 East, 431. *Phillips* v. *Fowler*, Say. 289, 290.

(*c*) *Man* v. *Ward*, 2 Atk. 229.

(*d*) *R.* v. *Tonge*, Keb. 17. 1 Hale, P. C. 303. 7 T. R. 709.

(*e*) Leach, C. C. L. 133. *R.* v. *Dr. Dodd*, Leach, C. C. L. 141. *R.* v. *Westbeer*, Ibid. 12.

(*f*) 2 Haw. c. 46. *R.* v. *Cross*, 12 Mod. 520, where the thief was a witness against the receiver. See *R.* v. *Teal*, 11 East, 309: *supra* note (*p*).

(*g*) 1 Hale, 303.

(*h*) *Tonge's Case*, 1 Hale, 304. *Layer's Case*, 10 St. Tr. 259. Lord Hale seems to have been of a different opinion in case of a pardon promised for witnesses against others, 1 Hale, 304; 2 Hale, 280; and in the case of an approver, 1 Hale, 303.

(*i*) Cowp. 339. Leach, C. C. L. 140. But now by the stat. 59 G. 3, c. 46, appeals by approvers, as well as others, are abolished.

(*k*) 2 Hale, 226.

(*l*) By the stat. 59 G. 3, c. 46.

(*m*) If there were a dozen appellees, the approver was bound to fight them all if they waged battle; Haw. b. 2, c. 24, s. 24. 2 Hale, 233, 234. 3 Inst. 130. But as he had the power to make his own selection, there was room for the exercise of much discretion.

(*n*) Staundf. lib. 2, c. 56, p. 145. 1 Hale, 303; but see *Layer's Case*, 10 St. Tr. 259.

These statutes, in cases of coining, robbery, burglary, housebreaking, and horse-stealing (*o*), enact, that if an offender being out of prison shall discover two or more persons who have committed the like offences, he shall be entitled to a pardon of the offences respectively specified in those statutes (*p*).

These statutes, and also others which protect an offending party who discovers another offender, seem to make the latter a competent witness by legislative declaration; for if he were not to be a competent witness, the provisions of the statutes would be almost nugatory and useless; it would be holding out an inducement to offenders to make a discovery, and when made, they would be precluded from the benefit of it (*q*).

In present practice, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to pardon, the usage, lenity, and practice of the court is to stay the prosecution against them; and they have an equitable title to a recommendation to the king's mercy (*r*).

Under such circumstances, there can be no doubt, as to the competency of the accomplice, upon any principle; the condition is not that he shall convict, nor even that he shall give evidence unfavourable to any prisoner, but that he shall make a fair disclosure of what he knows. The *credit* to be given to such a witness is for the consideration of the jury: the acknowledged turpitude of the witness must necessarily stamp his testimony with suspicion; and it is to be the more carefully watched, since such a witness lies under a strong temptation to substantiate the account which he has already given, in the hopes of pardon, and is likely to suppose that his object will be gained by a conviction, and may be frustrated by an acquittal.

No accomplice can be examined against his consent, for he is not bound to criminate himself. Where he is willing to give evidence, it seems to be the more proper course not to include him in the indictment (*s*). The practice is (where the accomplice is in custody), for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential (*t*). The admission of the party as a witness, amounts to a promise

(*o*) Robbery, 4 W. & M. c. 8, s. 7. Coining, 6 & 7 W. 3, c. 17, s. 12. Burglary, housebreaking, and private stealing, 10 W. 3, c. 23, s. 5; repealed by the 7 & 8 Geo. 4, c. 27. 5 Ann. c. 31, s. 4. Uttering counterfeit money, 15 Geo. 2, c. 28, s. 28, which extends to *such* offences only. Illegally buying or receiving stolen lead, iron, or other metals, 29 Geo. 2, c. 30; repealed by the st. 7 & 8 Geo. 4, c. 27.

(*p*) See 4 Comm. 330, 331.

(*q*) See Lord Ellenborough's observations in *Heward* v. *Shipley*, 4 East, 180; *Bush* v. *Rawling*, Say. 289; *R.* v. *Rockwood*, 4 St. Tr. 684-6; *R.* v. *Teasdale*, 3 Esp. 68; *Mead* v. *Robinson*, Willes, 422; where it was held, that the legislature, by holding out inducements, and offering an indemnity, intended to make the discoverers legal witnesses. And *Philips* v. *Fowler*, 8 Geo. 2, cited Willes, 425; *R.* v. *Luckup*, 9 Geo. 2, B. R. MSS. cited Willes, 425, in the note; where, in a prosecution for penalties under the stat. 9 Ann. c. 14, s. 9, the loser of money at cards was held to be a good witness to prove the loss. So in *R.* v. *Johnson*, cited ibid. See INTERESTED WITNESS.

(*r*) *R.* v. *Rudd*, Leach, C. C. L. 140, per Lord Mansfield, Cowp. 339. And see *R.* v. *Lee*, 1 Russ. & R. 261.

(*s*) 1 Hale, 305. Lord Hale there says, the witness is never indicted, because that weakens and disparages his testimony, but possibly does not wholly take away his testimony. See 2 Hale, 234. It is said that if a defendant accuse himself, he may be a witness against his companion. See *Sir Percy Cresby's Case*, 19 J. 1. Noy's Rep. 154.

(*t*) If, however, an accomplice be taken before the grand jury by means of a surreptitious order, the indictment will still be valid. *R.* v. *Dodd*, Leach, C. C. L. 184. And it seems to be a general rule, that the means by which evidence was obtained will be no objection to the evidence itself. A justice of the peace has no authority to

of recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime.

When indicted with others.

An accomplice, as it seems, is a competent witness, and may be examined, if he be willing, although he is indicted along with others, provided he be not put upon his trial at the same time with the others (*u*): for an indictment against several, is several as to each; so he is if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him (*x*). So an accomplice is a competent witness for his associates, as well as against them, although they be severally indicted for the same offence (*y*), whether he is convicted or not, provided he be not disqualified by a judgment.

By a breach of the condition the accomplice forfeits his claim to favour, and is liable to be tried and convicted (*z*) upon his confession.

Where there is no evidence, or but slight evidence, against one of the parties upon his trial, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him to admit his testimony (*a*).

Force of such testimony.

With respect to the force and effect of such testimony, it must, from its very nature, be regarded with great jealousy and suspicion. It is hard (Lord Hale observed) (*b*) to take away the life of any person upon the evidence of a *particeps criminis*, unless there be very considerable circumstances which may give the greater credit to what he swears. In strictness of law, indeed, a prisoner may be convicted on the testimony of a single accomplice (*c*); since, where competent evidence is adduced, it is for the jury to determine on the effect of that evidence. In practice it is usual to direct the jury to acquit the prisoner, where the evidence of an accomplice stands uncorroborated in material circumstances; but this it is said is a matter resting entirely in the discretion of the court (*d*).

pardon an offender, and to tell him he shall be a witness at all events against others. *R.* v. *Rudd*, Leach, C. C. L. 140; Cowp. 331.

(*u*) *Qu.* and see 1 Hale, 305 *supra* note (*s*). See also *R* v. *Ellis*, Macnall. 53.

(*x*) *Lee* v. *Gansel*, Cowp. 1.

(*y*) 2 Hale, 280, cites the case of *Billmore*, *Gray*, and *Harbin*, and *Gunston* v. *Downs*, 2 R. A. 685, pl. 3. That is, as it seems, where they are severally tried for an offence several in its nature; for in such case it seems to make no difference whether they are severally or jointly indicted.

(*z*) In a late instance, a prisoner who had made a confession, after a representation made to him by a constable in the gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *R.* v. *Burley*, *cor.* Garrow, B. Leicester Lent Assizes 1818. And the conviction was afterwards approved by all the Judges. MSS. C.

(*a*) 1 Sid. 237; Trials per Pais, 148. Style, 401. 12 Ass. 12. 34. 2 Haw. c. 46, s. 98; Sav. 34.

(*b*) 1 Hale, P. C. 305.

(*c*) *R.* v. *Attwood*, Leach, C. C. L. 521. *R.* v. *Durham & Crowder*, Leach, C. C. L. 538. Lord Kenyon's observations in *Jordaine* v. *Lashbrooke*, 7 T. R. 601; 1 Hale, P. C. 303, 304, 305.

(*d*) It seems to be clearly settled, that a prisoner may be convicted on the unconfirmed testimony of an accomplice. But as a rule of *discretion* and in practice, it is said, that he ought not to be convicted unless the testimony of the accomplice receive *material* confirmation. Regarding the rule as one of discretion and not of strict law, it can scarcely be understood that it is a rule which the Judge may enforce or disregard at his option, but rather that it belongs to the court to decide, under the circumstances of each particular case, whether they supply a material confirmation of the accomplice's testimony. Now, though circumstances may be infinitely varied, the principle on which the rule is founded, and by which it is to be applied, remains the same. The rule is devised for the protection of the accused. Independently of the rule a jury would not be warranted in convicting upon the testimony of an accomplice, without being satisfied that his testimony was true. But even assuming them to be so satisfied, the rule intervenes to the protection of the accused, and requires that they shall not convict him unless their belief is at least in part founded on *considerable* circumstances (according to Lord

Hale) proved *aliunde*, which coincide with his testimony, and add credit to it. For coincidences in testimony and circumstances, when they consist in particulars which were beyond the reach of premeditation, may not only sanction but compel belief in the *particular statement* made by the worst of men. But then the question arises, is any distinction to be made as to the nature of the circumstances in respect of which confirmation is required—is it sufficient that the accomplice be confirmed simply as to the *corpus delicti*, or are some confirmatory circumstances essential as to the *identity of the offender*? The object of requiring confirmatory evidence must either be to create such a degree of confidence in the sincerity of the accomplice as to render him *generally credible* even as to statements in respect of which he is not confirmed, or to exclude the probability of his attempting to deceive in the *particular transaction* which he details. If the latter be the true principle, some confirmation as to the agency of the accused should seem to be essential; for where there are no circumstances independently of the testimony of the accomplice to implicate the accused, the conviction must necessarily rest on the credibility of the witness. From the language of the Judges on the subject, and particularly that of Thomson, L. C. B. (in the case of *R.* v. *Swallow*, cited below), it should seem that confirmation as to the circumstances of the offence without any as to the *identity of the offender* is sufficient, provided of course the jury be induced to give credit to such a witness. The same inference may it seems be drawn from those cases where it has been held, that where several are jointly tried, and there is confirmation only as to some, others may be convicted as to whom there is no confirmation. See *R.* v. *Jones*, 2 Camp. 133, cited below, and *R.* v. *Dawber*, 3 Starkie's C. 34, and the point is stated to have been expressly decided by the Judges in *Birkett's Case*, Russ. & Ry. C. C. L. 252. It must be admitted, that even assuming that it is sufficient to confirm by circumstances the *general credibility* of the accomplice, yet that mere confirmation as to the circumstances of the offence, although it may show the accuracy of the accomplice's recollection, usually affords a very imperfect test of his *sincerity*. The ordinary motive to deceive, by which an accomplice would be influenced, is the hope of saving himself, and, it may be, a friend who participated in the offence, by the conviction of an innocent person; and the temptation is to misrepresent not as to the circumstances of the offence, but merely as to the agents who committed it. As it is his obvious interest to acquire the confidence of the jury, it is plain that the mere accuracy of his details of the *corpus delicti* can seldom generate any reasonable degree of confidence in his general sincerity. On the other hand, whatever be the rule of law on the subject, it seems that such circumstances as tend to implicate the accused, independently of the testimony of the accomplice, are of far greater weight than those which merely confirm him as to the details of the offence, whether the object be to confer general credibility or to exclude the apprehension of deceit in the particular case. If distinct proof were to be given *aliunde*, that the offence had been committed by *two persons* at the least, even this would effectually exclude a suspicion which might otherwise obtain, *viz.* that the witness sought to secure impunity to himself by imputing guilt exclusively his own to another; still a doubt might remain whether to save a guilty friend he did not in his statement substitute an innocent party; and it would be difficult to extract such a degree of confidence from his mere detail of the *res gestæ*, however accurate, as would warrant belief in his mere unconfirmed statement, though such an apprehension might to a great extent, or even entirely, be removed by circumstances which affected the prisoner personally. It would be easy for an accomplice to convict an innocent substitute for a guilty party, were no evidence requisite to connect the latter personally with the offence, but exceedingly difficult to do so were his powers of effecting mischief to be limited to those against whom circumstantial evidence existed, independently of his testimony and beyond the reach of his artifices. It may be said, that if personal confirmation were essential, and several prisoners were tried at the same time, as to some of whom there was personal confirmation, but not as to the rest, the jury would be bound to acquit the latter, though they convicted the rest, and that it would be inconsistent that on the testimony of the same witness they should believe him as to part and not as to the rest of his story. The answer, however, is obvious, that if the rule be regarded, as it must be, a technical and artificial one, to be applied in protection of a prisoner even though the jury should think the witness faith-worthy, there would be no inconsistency in convicting *A.* as to whom there was personal confirmation, and acquitting *B.* as to whom there was none; the inconsistency would not be greater than if both *A.* and *B.* were to be acquitted, though the jury believed the witness, because there was no confirmation as to either. Indeed a greater degree of inconsistency might result from the opposite doctrine. For personal confirmation being unnecessary, if *A.* and *B.* were to be tried together, and there were confirmation as to *A.* but none of any kind as to *B.*, the latter might nevertheless be convicted if the witness were confirmed as to *A.* and derived credit from such confirmation; and yet if they were to be tried separately, then, notwithstanding the faith-worthiness of the witness, yet, if

there were no confirmation the jury ought to acquit *B.*; so that *B.* might be liable to be convicted or acquitted accordingly as he was tried jointly with *A.* or separately. It is also observable, that if mere confirmation as to the facts immediately connected with the commission of the crime were sufficient, the rule would be of little importance, for it rarely happens that there is not some confirmation as to the *corpus delicti*.

The following are the principal authorities on the subject.—In the case of *Atwood v. Robins, cor.* Buller, Leach, C. C. L. 521, 3d edit., the accomplice was confirmed as to the circumstances of a highway robbery, as to the conversation which took place at the time, and as to the number of robbers, but there was no evidence as to the identity of the other two. The jury having found the prisoners guilty, the learned Judge referred the question to the consideration of the Twelve Judges, on the doubt whether the evidence of an accomplice, *unconfirmed* by any other evidence that could materially affect the case, was sufficient to warrant a conviction, and the Judges unanimously held, that the conviction was legal, and sentence of death was passed. It is remarkable, that in this case the Judges, at least the learned Judge who tried the prisoners, did not conceive the confirmation as to the *corpus delicti* to be that which could *materially* affect the case. In the subsequent case of *Durham & Crowder*, Leach's C. C. L. 538, 3d ed. which occurred very soon afterwards, it was held that the prisoners were properly convicted of a burglary on the sole testimony (as far as regarded the prisoners personally) of a pawnbroker, who had for years been a common receiver of stolen goods. The court seem in this case, as well as the former, to have decided on the ground that no confirmation as to the prisoners was necessary, and that the evidence of an accomplice might be left to a jury, though it was entirely unsubstantiated by any other evidence. It was, however, observed, that Fleming the witness, was to be considered as an accessory after the fact, rather than as an accomplice. If the opinion of the Judges in this case is to be considered as founded on the assumption that Fleming was to be regarded as an accomplice, the decision seems to go the full length of wholly dispensing with the necessity for confirmation, even as a discretionary rule, for there was no confirmation whatsoever of the witness as far as appears, not even as to the *corpus delicti*: and though it is reported to have been said in that case, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law, yet it is difficult to understand how it can be looked upon as any rule at all, if it may be utterly dispensed with and disregarded. In other instances, some confirmation of the testimony of an accomplice has been admitted to be necessary. In the case of *The King v. Despard*, Howell's St. Tr. vol. 28, p. 346, the Attorney-general (Mr. Perceval) says, "It shall not be contended by us that an accomplice does not require to be confirmed by collateral testimony, before a jury should implicitly give him credit." And he adds, "The confirmation that is required for an accomplice, is to show that the story as related by him coincides with other circumstances which are by unexceptionable testimony proved to have existed, and where such circumstances falling in with the testimony of the accomplice cannot so easily be accounted for by any other supposition than that of the truth of the story." In the case of *The King v. Jones*, 2 Camp. 132, Lord Ellenborough says, "No one can seriously doubt that a conviction is legal, though it proceed on the evidence of an approver only. Judges in their discretion will advise a jury *not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed;* but if he is believed, his testimony is unquestionably sufficient to establish the fact which he deposed." In the case of *The King v. Swallow and others*, York Trials, 1813, p. 16, Mr. Baron Thomson stated to the jury as follows:—"If an accomplice is materially confirmed in his evidence by such testimony as the jury think is unimpeachable, then, notwithstanding the character in which he stands before them, he is to be heard and to be credited by them. And you were rightly also informed, that it was not necessary an accomplice should be confirmed in every circumstance he details in evidence—that would be almost a matter of impossibility; and if every circumstance to which he has spoken could be confirmed by other evidence, there would hardly be occasion to take the accomplice from the bar as a prisoner to make him a witness here: that is certainly too much to be expected, and never is required. It is quite sufficient to see that in some material facts the witness who shall have been an accomplice, is confirmed to the satisfaction of a jury; and that confirmation need not be of circumstances which go to prove that he speaks truth with respect to all the prisoners, and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the other prisoners as to whom there may be no confirmation."

In the case of *Birkett and Brady*, Russ. & Ry. 251, it is stated that the Judges were of opinion, that an accomplice did not require confirmation as to the *person* he charged, if he was confirmed as to the particulars of his story.

ACCORD.

Must be pleaded.

AN *Accord and Satisfaction*, before the late alterations in the rules of pleading, was evidence in an action upon the case, under the general issue (*p*); but in an action of trespass a special plea was necessary, as it now is generally. An accord must be shown to have been received in full satisfaction of the thing demanded (*q*); and although the plaintiff has agreed to take it in satisfaction, it will not be a bar to the action, unless it operate in satisfaction (*r*). A less sum cannot operate in satisfaction of a greater (*s*); but it is otherwise where an additional security is given for the payment of a less sum by a third person (*t*). So if a debtor assign over all his effects to a trustee, to raise a fund for the payment of a composition to his creditors (*u*), the general rule is, that the court will see that there has been a reasonable satisfaction (*v*).

As accord and satisfaction must be specially pleaded, the evidence must of course depend upon the nature of the plea, and the issue taken.

When the accord has been proved by means of a witness, or by the admission of the other party, the performance of the terms accordingly must also be proved where it is executory in its nature. After evidence of an agreement between the plaintiff and defendant, with other creditors of the defendant, to accept a composition in satisfaction of their respective debts, to be paid within a reasonable time, it would not be sufficient to prove a tender, and a *refusal* on the part of the plaintiff to accept the composition (*x*). If

So it has been held, that if an accomplice be confirmed as to one or more of several prisoners, another as to whom there is no confirmation may legally be convicted on his testimony. Thus in *R.* v. *Jones*, 2 Camp. 133, Lord Ellenborough observes, "Within a few years a case was referred to the Twelve Judges, where four men were convicted of burglary on the evidence of an accomplice who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion that the conviction was legal, and upon that opinion they all suffered the sentence of the law." The same was ruled by Bayley, J. in the case of *The King* v. *Dauber*, 3 Starkie's C. 34. In the late case of *R.* v. *Wells and others*, 1 Mood. & M. C. 320, on an indictment against a principal and accessories, the testimony of an accomplice was confirmed as to the accessories, but not as to the principal, and it was held that both principal and accessories ought to be acquitted.

For further observations on this important subject, the reader is referred to a very able essay, written by a gentleman of the Irish bar, intituled, "Observations on the Confirmation of the Testimony of Accomplices;" the object of which is to show, that in principle some confirmation as to the *personal identity* of the prisoner is necessary to warrant a conviction.

(*p*) *Huxham* v. *Smith*, 2 Camp. 19. *Lane* v. *Applegate*, 1 Starkie's C. 97. *Paramore* v. *Johnson*, 1 Lord Raym. 566; 12 Mod. 376. It is always a good plea where the action is founded on a covenant, with subsequent damages, *secus* where the debt arises *tempore confectionis scripti*. *Blake's Case*. 6 Co. 44. Accord and satisfaction by one, is a bar for all; Com. Dig. ACCORD, [A.] 1.

(*q*) See Com. Dig. ACCORD, [B.] 1.

(*r*) See *Edgcombe* v. *Rodd*, 5 East, 294, as to what amounts to a legal satisfaction; and Com. Dig. ACCORD, [B.] 1. A judgment without satisfaction is no payment, *Tarleton* v. *Allhusen*, 2 Ad. & Ell. 32. An executory agreement may, after breach, be discharged by accord and satisfaction, B. N. P. 152; or by a valid agreement, substituting a new cause of action for the old, *Case* v. *Barker*; T. Ray. 450.

(*s*) *Fitch* v. *Sutton*, 5 East, 230. *Lynn* v. *Bruce*, 2 H. B. 317. *Heathcote* v. *Cruikshanks*, 2 T. R. 24. Vid. *infra*, note (*x*).

(*t*) *Steinman* v. *Magnus*, 11 East, 390.

(*u*) *Heathcote* v. *Cruikshanks*, 2 T. R. 24.

(*v*) *Cumber* v. *Wane*, Str. 426. *Pinnel's Case*, 5 Rep. 117. Co. Lit. 112. b. Vid. *infra*, note (*x*).

(*x*) *Heathcote* v. *Cruikshanks*, 2 T. R. 24. This was on demurrer to a plea. Where there is an agreement to pay money in satisfaction, it is not enough to show that he has always been ready to pay it, or a tender and refusal. Com. Dig. ACCORD, [B.] 4. *Peyton's Case*, 9 Rep. 79. b. But in *Bradley* v. *Greyory*, 2 Camp. 383, it was held that a creditor who had agreed with other creditors to execute a composition deed, with a release, on receiv-

a plaintiff in an action against several for a tort accept a sum from one to forego the action, he cannot, it seems, proceed against the rest (*y*).

ing a composition, secured partly by the acceptances of a third person, and partly by those of the debtor, could not, after a tender and refusal of the acceptances, sue for the original debt, on the ground that the agreement operated as satisfaction.

See further on this head, *Cumber* v. *Wane*, Str. 426, where it was held that a payment of a promissory note for 5 *l.* could be no satisfaction of a debt of 15 *l.*; *Fitch* v. *Sutton*, 5 East, 230, above cited; *Kearslake* v. *Morgan*, 5 T. R. 513, where it was held that the defendant might plead that he indorsed a promissory note, of which he was payee, to the plaintiff, in satisfaction of the demand. The giving the security of a third person for *part* of a debt only, as for part of a stipulated composition, will be no bar. (*Walker* v. *Seaborne*, 1 Taunt. 526.) But if, upon the faith of an agreement amongst creditors to take less than their whole demand, a third person becomes surety for the amount, a creditor, after receiving the amount, cannot sue the debtor, because it would be a fraud upon the surety. *Steinman* v. *Magnus*, 2 Camp. 124; 11 East, 390. If creditors agree to give time to their debtor for payment of their respective debts, and to take his promissory notes for their amount, they cannot, unless the agreement has been broken by the debtor, sue him for the amount. *Boothbey* v. *Sowden*, 3 Camp. 175. See *Cranley* v. *Hillary*, 2 M. & S. 122. *Bradley* v. *Gregory*, 2 Camp. 383. The defendant agreed to accept a sum to be paid on a day fixed, and a *cognovit* for the residue; after the day passed, the money not being paid, he issued execution against the plaintiff for the whole amount; the plaintiff obtained a Judge's order for his discharge from the arrest on certain terms, but which he did not act upon, but brought his action for the taking in execution beyond the amount mentioned in the cognovit, and recovered large damages; the Court, on the ground of the damages being excessive, granted a new trial. Parke, J. held that the action was not maintainable, the Judge's order upon being drawn up being in the nature of an agreement, and one of the terms being that the plaintiff should not bring any action for the imprisonment. *Wentworth* v. *Bulker*, 9 B. & C. 840. In an action against several, the defendants pleaded a former action brought by the plaintiffs for the same cause against one of the defendants, and that he paid a small sum into court, upon which the plaintiffs taxed and received their costs up to that time, and afterwards discontinued the action, and the defendant received his taxed costs; it was held that the issue in the second action, that the plaintiff accepted the said sum and taxed costs in full satisfaction, was not proved by the fact of the plaintiff having received the costs only, and that the defendant by accepting the taxed costs had assented to the discontinuance of the action. *Power* v. *Butcher*, 10 B. & C. 329 It is not sufficient to show that the plaintiff agreed to receive a composition, and on the defendant's assigning particular debts to creditors to execute a general release, and that all the other creditors accepted the composition and executed the release, without proving a tender of the notes to the plaintiff. *Cranley* v. *Hillary*, 2 M. & S. 120, and see *Walker* v. *Seaborne*, 1 Taunt. 526. *Oughton* v. *Trotter*, 2 N. & M. 71. But it would it seems be sufficient to show that the notes were tendered. *Oughton* v. *Trotter*, 2 N. & M. 71, and see *Bradley* v. *Gregory*, 2 Camp. 383. *Butler* v. *Rhodes*, 1 Esp. C. 236. Creditors agreed to accept payment by the debtor's covenanting to pay to a trustee of their nomination one-third of his annual income; the creditors nominated no trustee, and the agreement was not acted on, but it was held that the agreement though not properly an accord and satisfaction was a good defence under the general issue, it being a new agreement with the defendant, the consideration of which to the creditor was forbearance by all the other creditors. *Good* v. *Cheesman*, 2 B. & A. 329. And where an agreement with creditors has been partly executed, and terms afterwards dispensed with by a part only of the creditors, it was held that a creditor party to the agreement but not to the dispensation could not sue for his original debt. *Cock* v. *Saunders*, 1 B. & A. 46. The plaintiff and other creditors of the plaintiff agreed to take a composition of 5 *s.* in the pound, payable by notes at four and eight months, but there being a dispute between the plaintiffs and defendants as to the balance due, the plaintiffs promised to adjust their account with one of the defendants, and the defendants said they would do as the other creditors did; after some dispute as to the amount, the plaintiffs' attorney offered to pay the composition on the sum claimed by the defendants, which was the sum really due; the plaintiffs' attorney refused and claimed the whole balance, and it was held that the plaintiffs, although no tender had been made, were entitled to no more than the composition upon the balance. *Reay* v. *White*, 1 Cr. & M. 748. But if the debtor wilfully prevent the creditor from receiving the benefit of the composition, the latter is remitted to his right. *Garrard* v. *Wolver*, 8 Bing. 258. So such an agreement may be defeated by evidence of fraud, as if the debtor wilfully withhold from the creditor information respecting his estate. *Vine* v. *Mitchell*, 1 M. & R. 337.

(*y*) *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

An accord in respect of which a party may have remedy for a breach, is binding (*z*).

An agreement after action brought for an unliquidated demand, by which the plaintiff agrees to take a sum in discharge of the demand, is a good consideration for a promise by the plaintiff to stay the proceedings and pay his own costs (*a*).

ACCOUNT.

For the evidence to support a count upon an *account stated*, see Assumpsit.—With respect to the evidence in an *action* of account little need be said, since the proceeding seems to be obsolete. The evidence depends upon the nature of the plea in bar, which alleges that the defendant never was bailiff or receiver to the plaintiff, or that he has accounted, or that the plaintiff has released him (*b*), &c.

Upon a plea that he was never receiver, the defendant cannot show that he received the money from the plaintiff by way of bailment, to deliver to another person, and that he did deliver it accordingly; for he did receive the money although he was to be accountable only conditionally, and therefore the evidence does not support the plea (*c*). Neither under such a plea can he give a release in evidence (*d*). The burthen of proof on such a plea lies upon the plaintiff (*e*). Where he charges the defendant as receiver by the hands of *A.*, it is sufficient for him to prove that *A.* directed the defendant to borrow of another to pay the plaintiff, and that the defendant borrowed accordingly, and that *A.* gave his bond to the lender (*f*).

ACKNOWLEDGMENT. *See* ADMISSION.—FRAUDS, STATUTE OF.

ACQUITTAL. *See* Vol. I. P. II. tit. JUDICIAL INSTRUMENTS.

ACTION, COMMENCEMENT OF, HOW PROVED.—*See* WRIT.—LIMITATIONS.—TIME.

ACTS OF PARLIAMENT. *See* tit. STATUTE.

ADMINISTRATOR. *See* tit. EXECUTOR.

ADMISSIONS.

Nature of admissions.

It is a matter of obvious and daily remark, how much of the materials of evidence in ordinary practice is derived from the admissions, direct and indirect, of the parties themselves, and how difficult it would frequently be, if not impossible, to establish the truth by means of any other evidence. Evidence of this kind admits of great variety both in its nature and application. In many instances the admission is *directly and expressly* made with a view to establish the fact, and in order to supersede the necessity of any other proof; as where it arises upon the face of the pleadings, or is made by matter of record; or by specialty, by which the party is estopped

(*z*) *Cartwright* v. *Cooke*, 3 B. & Ad. 701. An accord is good with mutual promises to perform, although the thing be not performed at the time of the action. Com. Dig. Accord, [B.] 4.

(*a*) *Wilkinson* v. *Byers*, 1 Ad. & Ell. 106; and *semble*, per Littledale, J., so it would in case of liquidated demand. A treaty is proved between two for the renunciation by the one of a right of action against the other: it is also proved that the latter has repudiated all knowledge of such an agreement; the presumption is that none was concluded, and the former may sue on his original right. *Smith* v. *Dickinson*, 3 B. & P. 630.

(*b*) 1 Roll. Ab. 121.

(*c*) 2 Roll. Ab. 683. Selw. N. P. 5.

(*d*) *Willoughby* v. *Small*, 2 Brownl. 24.

(*e*) Hob. 36.

(*f*) *Harrington* v. *Deane*, Hob. 36.

from afterwards denying the admitted fact. In other instances, although there be no direct and express admission for such a purpose, yet if a representation be made of any fact, with a view to influence the conduct of another, or to derive an advantage to the party, and which cannot afterwards be denied without a breach of good faith, such an admission will not only be evidence of the fact, but will usually preclude the party who has made it from insisting upon the contrary. In such cases the admission does not operate merely as presumptive evidence of the actual truth of the fact, which must give way to positive proof of the contrary, but precludes, and as it were *estops the party*, on grounds of policy, from repudiating his own representation, and renders the actual truth of the fact immaterial. In other instances again, such evidence rests simply on the presumption that the party would not have admitted a fact contrary to his own interest, unless it had been true: such admissions are frequently of the most forcible nature, as in the case of a confession of guilt by a prisoner (*g*). It is a most general and extensive rule, that all a man's acts and declarations shall be admitted in evidence whenever they afford any presumption against him: for it is to be presumed that he acted or spoke consistently with his knowledge of the truth. All presumptions founded upon a man's conduct may be referred to this head, for a man's acts and conduct are indications which frequently afford presumptions as strong as express declarations; the very silence of a party will frequently supply a strong inference; as, for instance, where one makes a claim upon another, before witnesses, the justice of which the latter does not deny (*h*).

Admissions made with a view to evidence.

The admissibility and effect of evidence of this description will be considered generally, with respect to the *nature and manner* of the admission itself; and secondly, with respect to the *parties* to be affected by it. In the first place, as to the nature and manner of the admission, it is either made, *first*, expressly with a view to evidence; or, *secondly*, with a view to induce others to act upon the representation; or, *thirdly*, it is an unconnected or casual representation. In general, a party cannot contradict that by evidence which he has admitted on the pleadings; nor can the jury find any fact contrary to such admissions, for they are sworn to try the matter in issue between the parties, so that nothing else is properly before them (*i*).

It is a general rule that what is admitted on record must be taken to be proved, and cannot be disproved (*k*). And also that whatever is pleaded and not denied is to be taken as admitted (*l*). But it seems that where a party

(*g*) Vide *infra*, ADMISSIONS IN CRIMINAL CASES.

(*h*) See as to an admission by a defendant that his trade is a nuisance, *R.* v. *Neville*, Peake's C. 91. Admissions implied from the *acquiescence* of a party, *Neale* v. *Parkin*, 1 Esp. C. 229. *Doe* v. *Pye*, 1 Esp. C. 364. An admission that a debt was not due to an insolvent who had omitted to insert it in his schedule, *Nicholls* v. *Downes*, 1 M. & R. 13.

(*i*) B. N. P. 298. So the payment of money into court admits the character in which the plaintiff sues, and his right to recover at least to the amount of the money so paid. 4 T. R. 579. 2 T. R. 275. See tit. PAYMENT INTO COURT.

(*k*) B. N. P. 298. And see *Evans* v. *Ogilvie*, 2 Y. & J. 79.

(*l*) *Wimbush* v. *Tailbois*, Plowd. 48. 2 Lutw. 1215. B. N. P. 298. In such case the jury cannot find to the contrary. 2 Lutw. 1215. But no more is admitted than is stated. *Williams* v. *Sills*, 2 Camp. 509. *Watson* v. *King*, 4 Camp. 272. *Infra*, tit. COVENANT. *Dunston* v. *Tresider*, 5 T. R. 2. *Infra* tit. TRESPASS. The plea of non-assumpsit does not admit any immaterial allegation in the inducement. *Bennion* v. *Davison*, 3 M. & W. 642. Nor any title but such as is stated in the declaration. Where the declaration states letters of administration which on the face of them are void, the

Admissions with a view to evidence.

in pleading admits, because he does not deny, a part alleged by the adversary, it is not to be taken as if proved in evidence, so as to warrant such inferences as might have been made had the fact been proved in evidence (*m*). A plea of the general issue usually admits the title of the plaintiff to sue in the special character of executor or administrator (*n*); in respect of a cause of action arising in the life time of the testator or testatrix. In an action by a husband and wife, the plea of the general issue admits the marriage (*o*). In an action on the case for negligent driving of a carriage by the defendant's servant to the injury of the plaintiff's person, the ownership of the carriage and the fact of its having been driven by the defendant's servant is admitted by the plea of not guilty (*p*).

An admission upon a plea does not operate as an admission with respect to the proof of an issue upon any other plea (*q*); and although the form of protestations is still adhered to in pleading, for the purpose of precluding the inference (*r*) that the party pleading one matter meant to admit another, they seem to be but of little use at the present day.

By letting judgment go by default the defendant admits a cause of action, and therefore he cannot afterwards insist on fraud on the part of the plaintiff (*s*). Where a plea to a count in indebitatus assumpsit is pleaded as to a precise sum, that sum, although laid under a *videlicet*, is admitted to to be due, and must be covered in order to warrant a verdict for the defendant (*t*). So where a party has solemnly admitted a fact under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites (*u*). Thus, if one deed be recited in another, which latter

plea of the general issue does not admit a title sufficient to enable the plaintiff to recover. *Adams* v. *Savage*, 6 Mod. 134. A new assignment of unnecessary violence to a plea by the defendant of an entry to abate a nuisance, admits the nuisance. *Pickering* v. *Rudd*, 1 Starkie's C. 56.

(*m*) Per Alderson, B. in *Edmonds* v. *Groves*, 2 M. & W. 642, *supra*. But note, that it was unnecessary in that case to decide the point. The defendant pleaded, by way of set-off, that the plaintiff made his promissory note payable to *A. C.*, and that the administrator of *A. C.*, indorsed it to the defendant. Replication that the supposed cause of action did not accrue to the defendant within six years. The making of the note and the indorsement were held to be admitted by the replication, and also that the defendant might avail himself of a memorandum of the payment of interest written on the note by *A. C.* to bar the Statute of Limitations. *Gall* v. *Copere*, 1 Ad. & Ell. 102.

(*n*) See tit. EXECUTOR.

(*o*) See tit. HUSBAND AND WIFE.

(*p*) *Emery* v. *Clarke*, 2 Mo. & Ry. 270. *Taverner* v. *Little*, 5 Bing. N. C. 678. *Wolfe* v. *Beard*, Q. B. cited 2 Mo. & R. 261.

(*q*) Vol. I. p. 337. Nor can a notice of set-off or particular of it be used as evidence on the other side. Ib. And see *Miller* v. *Johnson*, 2 Esp. C. 602. *Stracy* v. *Blake*, 1 M. & W. 168. The statements in a plea held bad on demurrer are not evidence for the plaintiff on the general issue. *Montgomery* v. *Richardson*, 5 C. & P. 247. Neither a plea nor demurrer to a bill in equity is evidence by way of admission against the defendant in another transaction. After a demurrer to a bill in equity overruled, the party may still go on and answer; and consequently the demurrer is not to be taken as an absolute admission of the facts charged. And on the same principle a plea in equity cannot be so, for it amounts merely to a statement of circumstances to prove that, supposing the facts charged to be true, the defendant is not bound to answer. *Tomkins* v. *Ashby*, 1 M. & M. 32. A plea in a discontinued action is not evidence against the defendant in another action. *Allen* v. *Hartley*, Doug. 20. A demurrer admits those facts only which are well pleaded.

(*r*) See Co. Litt. 124, b. Doct. Pl. 295. 2 Will. Saund. 103, n. 1. *Montgomery* v. *Richardson*, 5 C & P. 247. *Firmin* v. *Crucifix*, Ib. 98.

(*s*) *East India Company* v. *Glover*, 1 Stra. 612.

(*t*) *Cousins* v. *Paddon*, 2 C. M. & R. 547. But the plea is for this purpose divisible. Ib. And see *Green* v. *Marsh*, 4 Dow, P. C. 669.

(*u*) B. N. P 298. See Vol. I. Ind. tit. ESTOPPEL. In other cases, although the parties may be estopped, the jury are not. *Goddard's Case*, 2 Co. 4, b; B. N. P. 298.

is proved to be executed by the party, the recital will be evidence of the execution of the recited deed (*x*). In the case of *Shelley* v. *Wright* (*y*) it was held that the obligor of a bond was estopped from averring against the obligee, that he had not received certain sums of money for the obligee, recited in the condition of the bond to have been so received by him. So a recital of a lease in a deed of release is evidence of the execution of such a lease (*z*). So the date of a lease is evidence that it was executed the same day (*a*). But the whole of a recital is to be taken; and therefore if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender (*b*). Where a covenant to lay out a sum in an annuity recited that the covenantor had given a bond for the payment of the money, the recital was held to be evidence of the bond (*c*). The subscription of a paper by one as a witness is not of itself proof of acquiescence in the contents (*d*).

So in an action against a master for not inserting the true consideration in an indenture of apprenticeship, the recital in that part of the indenture executed by the defendant, that *A. B.* put himself apprentice, &c. is evidence of the fact against the defendant (*e*). So a grant to a corporation by a particular name is evidence as against the grantor, that the corporation was at that time known by that name (*f*). But a recital will not operate as an estoppel, or as evidence against one who was neither a party to the deed, nor claims under a party (*g*). Although he may claim title under a deed containing such recital (*h*). Where a counsel in a cause admits a fact, even by inference, it is to be taken as proved (*i*).

Admissions which have been acted upon.

Secondly, there is a strong line of distinction between admissions or conduct upon which a party has induced others to act, or by means of which he has acquired some advantage to himself, and those admissions which have been made without any reference to the matter litigated, and which are not immediately connected with it: in the former case the party is usually concluded absolutely by such an admission; as where he makes an

(*x*) See tit. RECITAL.—DEED; and 1 Salk. 186. The recital of an ancient charter in a modern one is evidence. Per Abbott, J. *Gervis* v. *Great Western Canal Company*, 5 M. & S. 78.

(*y*) Willes, 9. See also *Cossens* v. *Cossens*, Willes' R. 25. And see *Bowman* v. *Taylor*, 4 N. & M. 264. *Rees* v. *Lloyd*, Wight. 123.

(*z*) Per Holt, J. *Ford* v. *Gregy*, 1 Salk. 186. Com. Dig. ESTOPPEL, [B.] 5. *Crease* v. *Barrett*, 1 C. M. & R. 919.

(*a*) 1 Salk. 485. In trespass against a sheriff, a bill of sale, reciting the writ, the taking, and the sale of the goods, is evidence against him of these facts. *Woodward* v. *Larking*, 3 Esp. C. 286.

(*b*) 2 Vent. 171. 1 Com. Dig. EVIDENCE, [B.] 5. A recital in a bond that the parties had agreed to execute a bond in the sum of 500*l.* does not confine the bond to that sum if actually executed in the penal sum of 1,000*l.* *Ingleby* v. *Swift*, 3 M. & S. 488. 10 Bing. 84.

(*c*) 2 P. Wms. 432. *Marchioness of Annandale* v. *Harris*.

(*d*) 1 Esp. C. 57. Where a party executed a deed (for raising money on an annuity) reciting a will, and that the trustees had not sold, and that he was in possession by their permission; held that such admission was evidence to show that he was not the legal owner of the estate. *Doe* v. *Coulthred*, 2 Nev. & P. 165.

(*e*) *Burleigh* v. *Stibbs*, 1 T. R. 465.

(*f*) *Mayor of Carlisle* v. *Blamire*, 8 East. 493.

(*g*) 1 Salk. 186. Com. Dig. EVIDENCE, [B.] 5. Ibid. ESTOPPEL, [A.] 2. But it may be secondary evidence where the original is lost. 1 Salk. 286. Com. Dig. EVIDENCE, [B.] 5. But it operates against those who claim under the party. *Fitzgerald* v. *Eustace*, Bac. Ab. Ev. 647. 2 P. Wms. 432.

(*h*) A deed conveying an estate to *B.*, but to which *B.* is no party, recites the bankruptcy of *A.*; *B.* conveys the estate by a deed which contains no such recital; the former deed is not evidence against *B.* of the bankruptcy of *A.* in a suit as to other lands. *Doe* v. *Shelton*, 3 Ad. & Ell. 265.

(*i*) *Stracy* v. *Blake*, 1 M. & W. 168. As to admissions by an attorney, see tit. ATTORNEY.

admission for the purpose of trial (*k*). Where a man has cohabited with a woman, and treated her in the face of the world as his wife, he cannot afterwards object to a creditor who supplied her with goods, that she is not his wife (*l*). So where a man has held himself out to the world in a particular character, he cannot afterwards divest himself of it, in order to claim that to which under the assumed character he is not entitled (*m*). A man who acquiesces several years in a commission of bankrupt, and solicits the votes of creditors in the choice of assignees, cannot afterwards dispute the commission (*n*). So a petitioning creditor cannot dispute the debt in an action at the suit of the assignees (*o*). So a defendant is estopped, by the recognizance of bail entered into for him by the name by which he is sued, from pleading a misnomer, although he is no party to the recognizance (*p*); for in these and other such cases the party, by taking the benefit of the act, has conclusively adopted it. So a tenant cannot dispute his landlord's title, nor can a copyhold tenant dispute the title of the lord of the manor (*q*). A tenant is concluded by the statement which he makes to his landlord, as to the time of entry (*r*). Respondents obtaining a respite of an appeal cannot afterwards object the want of notice of appeal (*s*). Where one being asked his name previous to the suing out of process, represents it to be *John*, he cannot, in an action of trespass against the sheriff, insist that his name is *William* (*t*). So where a man has made a deliberate admission *in rem.*, by giving his promissory note, or by entering into a bond, or other obligation, for the amount of goods sold, he is conclusively bound by it in the absence of fraud, or perhaps, of mistake; for the very intent and purpose of the acknowledgment is, that it shall operate as conclusive evidence against the party (*u*). Where, however, a receipt has been given for money, it is not so conclusive but that the party may show that it was given under a mistake (*x*), and that he did not receive the sum or thing in question. So a parish certificate is evidence, for all the rest of the world, against the parish which granted it, and conclusive as to the parish to which it was directed (*y*). Where a plaintiff signed himself *M. D.* it was held that he was to be taken for a physician, and that he could not maintain an action for fees (*z*). So it has been said that proof of the bankrupt's submission to a commission is evidence against him of his being such (*a*), as, if he obtain his discharge as a bankrupt under a Judge's order (*b*). But the

(*k*) Such an admission must either be proved to have been signed by the attorney on the record, or by the authority of the party himself. See Vol. I. and Ind. tit. ADMISSIONS.

(*l*) *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Camp. 245. *Munro* v. *De Chemant*, 4 Camp. 215.

(*m*) *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Camp. 245.

(*n*) *Like* v. *Howe* and *Rogers*, 6 Esp. C. 20. *Flower* v. *Heebee*, 2 Ves. 286.

(*o*) *Harmer* v. *Davis*, 1 Moore, 300.

(*p*) *Meredith* v. *Hodges*, 2 N. R. 453.

(*q*) *Doe* d. *Nepean* v. *Budden*, 5 B. & A. 626. See tit. USE AND OCCUPATION, and tit. EJECTMENT.

(*r*) *Doe* d. *Eyre* v. *Lambley*, 2 Esp. C. 635.

(*s*) *R.* v. *Justices of Carmarthenshire*, 4 B. & Ad. 503.

(*t*) *Price* v. *Harwood*, 3 Camp. 108; and see *Bass* v. *Clive*, 4 M. & S. 13.

(*u*) See *Nash* v. *Turner*, 1 Esp. C. 117. *Solomonson* v. *Turner*, 1 Starkie's C. 51. Vid. *infra*, ASSUMPSIT.

(*x*) *Stratton* v. *Rastall*, 2 T. R. 366. *Benson* v. *Bennett*, 1 Camp. 394. *Bristow* v. *Eastman*, 1 Esp. C. 172.

(*y*) 4 T. R. 256. *R.* v. *Headcorn*, Burr. S. C. 253.

(*z*) *Lipscombe* v. *Holmes*, 2 Camp. 441. See *Chorley* v. *Bolcott*, 4 T. R. 317.

(*a*) *Haviland* v. *Cook*, 5 T. R. 655.

(*b*) *Goldie* v. *Gunstone*, 4 Camp. 381. *Mercer* v. *Wise*, 3 Esp. 219. *Watson* v. *Wace*, 5 B. & C. 153. *Secus*, if he make the admission merely in a transaction with third persons. *Heane* v. *Rogers*, 9 B. & C. 577.

mere surrender of the bankrupt is not sufficient, because it is compulsory (*c*). The fact that a party has proved a debt under a commission of bankrupt is not even *primâ facie* evidence, in an action by the assignees of the bankrupt against that party, of the requisites to support the commission (*d*); for a creditor has not the means of knowing what was the evidence upon which the party was declared a bankrupt; and by proving the debt he at most gives credit to the petitioning creditor, and the commissioners, that the former has not sued out a commission, nor the latter declared the party bankrupt, without proper grounds (*e*); and it is not reasonable that he should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed. Such admissions (*f*), though they be conclusive, are not *estoppels* in the strict and technical sense, which, to be conclusive, must be pleaded; but are conclusive upon the evidence, on the principles of good sense and sound policy (*g*).

Collateral admissions.

Thirdly. Where the admission or declaration is quite foreign to the question pending, although admissible, yet it is not in general *conclusive* evidence; and though a party may, by falsifying his former declaration or oath, show that he has acted illegally and immorally, yet as he is not guilty of any breach of good faith in the existing transaction, and has not induced others to act upon his admission or declaration, nor derived any benefit from it against his adversary, he is not bound by it: the evidence in such cases is merely presumptive, and liable to be rebutted. Where the admission consists in a loose and careless declaration, if it be evidence at all, it is of little weight (*h*). Proof that *B.* has dealt with *A.* as the farmer

(*c*) Per Ld. Ellenborough, 4 Camp. 382. Neither is he precluded by a petition to the Chancellor to enlarge the time of surrendering. *Mercer* v. *Wise*, 3 Esp. C. 219. Nor by an application to a commissioner to appoint an official assignee. *Munk* v. *Clarke*, 2 Bing. N. C. 299.

(*d*) *Rankin* v. *Horner*, 16 East, 191. *Stewart* v. *Richman*, 1 Esp. C. 108. It had before been held, that the proving a debt under a commission of a bankrupt *estopped* the party from afterwards disputing it. Per Lord Mansfield, *Walker* v. *Newell*, cited 3 T. R. 322.

(*e*) *Rankin* v. *Horner and another*, 16 East, 191. But see *Maltby* v. *Christie*, 1 Esp. C. 340. *Walker* v. *Burnell*, Dougl. 303; 3 T. R. 321.

(*f*) See further Vol. II. tit. PRESUMPTION. An executrix who used the testator's goods as her own, and afterwards as her husband's, cannot object to their being taken in execution for the husband's debt. *Quick* v. *Staines*, 1 B. & P. 293. See tit. SHERIFF. A petitioning creditor cannot dispute the debt in an action by the assignees. *Harmer* v. *Davis*, 1 Moore, 300. A distress on one as tenant is evidence of the tenancy. *Lord Falmouth* v. *Swann*, 8 B. & C. 459. Where *A. B.* executed a warrant of attorney in the name of *C. B.*, held that judgment was properly entered up, and a *fi. fa.* issued and executed against him, by that name. *Reeves* v. *Slater*, 7 B. & C. 873. The obligor of a bond represented to a purchaser that it was a valid instrument, and would be paid when due; he cannot afterwards set up as a defence that it was void, as having been given for a gaming debt. *Davison* v. *Franklin*, 1 B. & Ad. 142. One of a committee of a company empowered by Act of Parliament to carry on certain works, is not estopped by having joined in making calls on subscribers, or by payment of calls, from disputing their validity, if illegal; for such calls being against law, no person could be misled. *Stratford and Moreton Railway Company* v. *Stratton*, 2 B. & Ad. 518. A relator who did not concur in the election of the defendant, although he appeared afterwards to have acted and attended corporate meetings with him, may still sustain the application for a *quo warranto*. *R.* v. *Benney*, 1 B. & Ad. 684; and see *R.* v. *Clarke*, 1 East, 38. *Secus* where he had concurred in the election of others at the time when the same objection to the title of the elected, and of which he sought to avail himself on the motion, was made and overruled. *R.* v. *Parkyn*, 1 B. & Ad. 690; and see *R.* v. *Symonds*, 4 T. R. 223. *R.* v. *Mortlock*, 3 T. R. 300.

(*g*) See the observations of Abbott, L. C. J., 5 B. & C. 155.

(*h*) Burr. 2057; 2 Wils. 399; and Lord Ellenborough's observations, 1 M. & S. 696.

Collateral admissions.

of the post-horse duties is evidence in an action by *A.* against *B.*, to prove that he is so (*i*). Upon an indictment under the 27th of Eliz. for remaining in this kingdom forty days after taking orders from the See of Rome, proof that the defendant had officiated here as a Romish priest was held to be evidence of his having taken orders (*k*).

In an action for non-residence, proof that the defendant has acted as the parson, is evidence against him that he is such (*l*). In an action for not setting out tithes, proof that the defendant has paid tithes to the plaintiff is evidence of his title to receive them (*m*). An acknowledgment by the defendant that his trade is a nuisance, is admissible, although not conclusive evidence against him, upon an indictment for setting up his trade at another place (*n*). Proof that *A. B.*, as the proprietor of a newspaper, had given security for the payment of the duties on advertisements, and had from time to time applied to the Stamp-office concerning duties on the paper, was held to be evidence that he was the publisher (*o*). A description by the party as to his situation is evidence against himself that he holds that situation (*p*). And therefore, on an information against a military officer for false musters, the returns themselves in which he described himself to be such officer were held to be evidence of the fact (*q*).

An advertisement by an auctioneer of the sale of the property of *A. B.* a bankrupt, is evidence in an action by him against the assignees that *A. B.* was a bankrupt (*r*). In an action for slandering the plaintiff in his profession as an attorney, the words importing that the plaintiff was an attorney are evidence of the fact (*s*).

Where a lessee covenanted that the lease should be avoided by his bankruptcy, proof of his submission to a commission was held to be evidence of bankruptcy without proof of any act of bankruptcy (*t*).

The oath of a party taken before the commissioners of the income-tax is evidence upon an information under the game-laws (*u*), but not conclusive. So the omission of a debt by an insolvent in his schedule is evidence against him, although it does not estop him from suing (*x*). So in a suit between the lord of a manor and the devisee of a copyhold, the recital of the devise in

(*i*) *Radford* v. *M'Intosh*, 3 T. R. 682. And see *Peacock* v. *Harris*, 10 East, 104. *Lister* v. *Priestley*, Wightw. 67.

(*k*) *R.* v. *Kerne*, 2 St. Tri. 694. *R.* v. *Brommich*, 2 St. Tr. 966.

(*l*) *Bevan* v. *Williams*, 3 T. R. 635.

(*m*) Per Lord Kenyon, 3 T. R. 635; 4 T. R. 367, per Buller J.

(*n*) *R.* v. *Neville*, Peake's C. 91.

(*o*) *R.* v. *Topham*, 4 T. R. 126.

(*p*) *R.* v. *Gardner*, 2 Camp. 513.

(*q*) Ibid.

(*r*) *Maltby* v. *Christie*, 1 Esp. C. 340. *Booth* v. *Coward*, 1 B. & A. 677. *Inglis* v. *Spence*, 1 Cr. M. & R. 432. So where the defendant, with a view to a commission, made affidavit that the party had become bankrupt. *Ledbetter* v. *Salt*, 4 Bing. 623.

(*s*) *Berryman* v. *Wise*, 4 T. R. 366. *Pearce* v. *Whale*, 5 B. &. C. 39; and see Vol. II. tit LIBEL. In a *qui tam* action against a collector of taxes, it is not necessary to give in evidence his warrant. Proof that he has acted as collector is sufficient. *Lister* v. *Priestley*, Wightw. 67. Accounting with one as farmer of the tolls of a turnpike, who has assumed that character by consent of those concerned, estops the party from disputing the validity of his title, when suing by account stated for those tolls. *Peacock* v. *Harris*, 10 East, 104. In an action against overseers, acts done by them in that capacity are evidence of their being overseers. *Merrill's Lessee* v. *Whitechurch*, Salisbury assiz. 1817. But they are not concluded by the acts of former overseers, without regular proof of their appointment. Or by the act of a co-defendant previous to the commencement of his overseership.

(*t*) *Doe* v. *Hodgson*, *cor.* Abbott, L. C. J. Sitting after Easter T. 1823.

(*u*) *R.* v. *Clarke*, 8 T. R. 120. So a return under the stat. 1 & 2 G. 4, c. 87, of corn in the possession of a party, as sold and delivered to *B.*, does not preclude him from showing that it was delivered to *D.* on account of *B*, but that *B.* was not to have possession before payment. *Woodley* v. *Brown*, 2 Bing. 527.

(*x*) 3 Camp. 13.

the admittance is evidence of the devise against the lord, although it would not have been so against the heir (*y*). Collateral admissions.

In an action for bribing of one who had a vote at an election, the very offer to bribe is evidence against the defendant that the party solicited had a right to vote (*z*).

In the case of *Morris* v. *Miller* (*a*) it was held, that, in an action for criminal conversation, an admission by the defendant that he had committed adultery with the wife of the plaintiff was not sufficient, without proof of a marriage in fact. But when this doctrine was urged in a subsequent case (*b*) the Court observed, as to the case of criminal conversation, "To be sure, a defendant's saying in jest, or in loose rambling talk, that he had lain with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously and solemnly recognized that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving a marriage."

Answers in Chancery, as has been seen, operate as admissions upon oath (*c*). It seems, however, that an admission by the defendant, even to an answer in Chancery, is merely secondary evidence as to the execution of a deed, and therefore does not supersede the necessity of proving it by the subscribing witness, because a fact may be known to the subscribing witness, which is not known to the obliger, and he is entitled to avail himself of all the knowledge of the subscribing witness relating to the transaction (*d*). But this objection does not apply where the party enters into an admission with a view to the trial of the cause. And it has been held that a declaration by the lessee of a plaintiff in ejectment, that he has assigned a lease, is evidence of the fact (*e*).

So in some other cases, where the subject of admission is usually authenticated and proved in a formal and solemn manner, and the existence of the fact includes legal considerations not likely to be understood by the party, better evidence than his simple oral admission is frequently required; as, where a prisoner upon an indictment for bigamy has admitted the former marriage (*f*); for this, it has been held (*g*), does not supersede the necessity of formal proof of the first marriage.

A mere voluntary affidavit is evidence against the party who makes it as a confession (*h*). So, as has been seen in some cases, a bill in equity is evi-

(*y*) Lord Raym. 735.

(*z*) *Coombe* v. *Pitt*, Burr. 1586; and *Rigg* v. *Curgenven*, 2 Wils. 395. In both those cases the bribee was admitted to vote, which was held to be the strongest evidence of his right to vote; but Lord Mansfield and the rest of the Court (Burr. 1590), held expressly that a man who had given money to another for his vote should not be admitted to say that he had no vote.

(*a*) Burr. 2057. *Qu.* whether this is the same with the case cited 2 Wils. 399, under the names of *Dr. Smith* v. *Miller*?

(*b*) 2 Wils. 399.

(*c*) *Supra*, Vol. I. tit. JUDICIAL INSTRUMENTS.

(*d*) Per Le Blanc, J., *Call* v. *Dunning*, 4 East. 53; *Abbott* v. *Plumb*, Dougl. 205. But it has been held, that a declaration by the lessor of the plaintiff in ejectment that he has assigned a lease is evidence of the fact. *Doe* v. *Watson*, 2 Starkie's C. 230.

(*e*) *Doe* v. *Watson*, 2 Starkie's C. 230. But a party's admission of having executed a bond does not supersede the ordinary proof. *Abbott* v. *Plumbe*, Doug. 205.

(*f*) See tit. POLYGAMY. So where the plaintiff in assumpsit had admitted his discharge under an insolvent act, which was set up as a defence. See 3 Camp. 136. So an admission by the plaintiff at a tavern that he had been discharged as an insolvent was held to be inconclusive, as comprising matter of law as well as of fact. *Summerset* v. *Adamson*, 1 Bing. 73.

(*g*) By Le Blanc, J., York Assizes.

(*h*) Style, 446. *Sacheverel* v. *Sacheverel*, Bac. Ab. Ev. 628. An answer to a bill in

dence against the complainant (*i*). So a paper written by a defendant, though signed by a third person, is evidence against him (*k*).

Indirect admissions.

In general an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. As, for instance, where the existence of the debt, or of the particular right, has been inserted in his presence and he has not contradicted it. So an acquiescence and endurance, when acts are done by another, which, if wrongfully done, are encroachments, and call for resistance and opposition, are evidence, as a tacit admission that such acts could not legally be resisted (*l*).

When notice to quit is served personally upon a tenant, and he makes no objection to the time specified in the notice, it is *primâ facie* evidence of admission and acquiescence (*m*); but if the party cannot, or does not, read the notice when served, no such inference can be made (*n*).

Evidence of this class declines by gradual shades, from the most express and solemn admissions down to expressions and acts which afford but remote and weak presumptions as to the particular fact in question; for it has already been seen, that the conduct of the party himself who knows the truth of the fact, or who may be presumed to know it, is always evidence against himself.

An admission made for the purpose, as it is usually termed, of buying peace, is not allowed to be taken advantage of for the purposes of evidence,

Chancery filed against the defendant by a stranger, may be read to show the admission of a particular fact, though it is not evidence of a judicial proceeding. *Grant* v. *Jackson*, bart. *and others*, Peake's C. 203. An answer in Chancery, stating that the defendant "believes that *H. M.* was possessed of the leasehold premises mentioned in the bill," is evidence against him in an action of ejectment brought by the executor of *H. M.* to show that the testator had a chattel interest in the property. *Doe* d. *Digby* v. *Steele*, 3 Camp. 115. The holder of a bill overdue gives in a blank schedule under an insolvent act. This is not such an acknowledgment that the bill has been satisfied as will discharge the defendant, the acceptor. *Hart* v. *Newman*, 3 Camp. C. 13. See *R.* v. *Feversham*, 8 T. R. 352. A letter by a party in which he speaks of a ship as his own ship, does not conclude him from showing that he used these expressions as agent to a third person. *Tulloch* v. *Boyd*, Holt's C. 487. In assumpsit for a copyhold fine, the defendant is not estopped by the rent reserved by him on the premises from showing the real value. *Lord Verulam* v. *Howard*, 7 Bing. 327, and 5 M. & P. 148; and see *Halton* v. *Hassell*, 2 Str. 1042.

(*i*) Vide *ante*, Vol. I. Ind. tit. JUDICIAL INSTRUMENTS.

(*k*) *Alexander* v. *Brown*, 1 Carr. 288.

(*l*) See the observations of Abbott, Ld. Ch. J. in *Steel* v. *Prickett*, 2 Starkie's C. 471. If *A.* having title to premises in the possession of *B.*, suffer *B.* to make alterations inconsistent with such title, it is evidence to go to a jury of recognition of *A.* of the right of *B.* *Doe* d. *Winckley* v. *Pye*, esq. Principal of Barnard's Inn, 1 Esp. C. 364. And see *Doe* v. *Allen*, 3 Taunt. 78. Covenant by a lessee that the lease shall become void if he become bankrupt, proof of his submission to the commission is evidence, without proving an act of bankruptcy. *Doe* v. *Hodgson*, West. Sitt. after Easter Term, 1823, *cor.* Abbott, L. C. J. The drawer of a dishonoured bill objects to pay the amount, on the ground of his having received no consideration, but says nothing concerning the indorsement; his silence in this respect is not an admission of the handwriting of the first indorser. *Duncan* v. *Scott*, 1 Camp. C. 100. Although what has been said in the presence of a party is admissible in evidence for the purpose of introducing or explaining anything said by him, or even of raising an inference from his silence, the rule does not apply to assertions or declarations made by a third person in the presence and hearing of a party on an inquiry before a magistrate on a penal charge, even although the party might if he had chosen cross-examined that third person or commented on his statement; for in such proceedings a regularity and order of proceeding is adopted which prevent a party from interposing when and how he pleases; and, consequently, the same inferences cannot be drawn from his conduct or his silence as in ordinary cases. *Miles* v. *Andrews*, 1 Mood. & M. 336.

(*m*) See EJECTMENT BY LANDLORD.

(*n*) *Thomas* d. *Jones* v. *Thomas*, 2 Camp. 559. *Doe* v. *Forster*, 13 East, 405. *Doe* v. *Briggs*, 2 Taunt. 109.

since the offer may have resulted not from a consciousness of the truth of the claim, but a desire to avoid litigation (*o*). And, therefore, where it appears to be probable that such was the motive, the evidence is not admissible (*p*). But the offer of a sum of money by way of compensation is admissible, unless it be accompanied with a notification that it is made without prejudice, or is confidential (*q*).

So an admission made conditionally, where the condition has not been performed, or with reference to particular circumstances, or to the particular state of the pleadings, &c., is not admissible in evidence under different circumstances. It was once held, that admissions made upon a reference which turned out to be ineffectual, were not afterwards admissible; but Lord Kenyon said, in a subsequent case, that this was going too far, and that he should receive all such admissions as the party would be compelled to make by a bill of discovery (*r*), and the arbitrator may be called as a witness to prove them. Conditional admissions.

An agreement to admit a fact on the trial applies to every trial which the Court may direct (*s*).

Admissions by a bankrupt upon an examination before commissioners are evidence against him, although he might have demurred to the questions (*t*), because they might subject him to penalties. And so it seems are Compulsory admissions.

(*o*) 3 Esp. C. 113. B. N. B. 236. 1 Esp. C. 143.

(*p*) And therefore it is said, that if *A.* sue *B.* for 100 *l.*, and *B.* offer to pay 20 *l.*, it shall not be received as evidence, for that neither admits nor ascertains any debt, and is no more than saying he would give 20 *l.* to get rid of the action; but that if an account consist of ten articles, and *B.* admit that such a one is due, it will be good evidence for so much. Peake's Ev. 19, citing Bull. N. P. 236. In the case of *Waldridge* v. *Kennison*, 1 Esp. C. 143, Lord Kenyon is stated to have held, that an admission or confession made pending and under the faith of a treaty, and into which the party might have been led by the confidence of an expected compromise, could not be given in evidence to his prejudice; but that, under such circumstances, the admission of a fact, such as the handwriting of the party, which was not connected with the merits, might be received in evidence. The rule does not extend to an offer to refer, for that is not a concession for the purpose of peace, *Thomas* v. *Austen*, 2 D. & R. 359; nor to a treaty which is concluded, *Frogwell* v. *Llewellyn*, 8 Price, 122.

(*q*) *Wallace* v. *Small*, M. & M. 446. *Hill* v. *Elliott*, 5 C. & P. 436. *Watts* v. *Lawson*, Ib. 447. The rule is applicable only to treaties for the purpose of ending suits which are not eventually brought to a conclusion; but does not apply to agreements perfected and executed, although the subject-matter and objects of such agreements may be a compromise of previously existing differences between the parties. *Froysell* v. *Lewelyn*, 9 Pri. 122. The defendant was sued for work done on premises in the occupation of his tenant; and upon an interview between the plaintiff and his attorney, the defendant and his tenant, it was agreed that the tenant out of the rent should pay the debt (which he accordingly did), and that the defendants should pay two-thirds of the costs; this not being done, the plaintiff proceeded in the action. At the trial he failed in proving the defendant's liability for the work, but relied on the arrangement so made as an admission of the debt. Held (per Littledale and Holroyd, J. J., *diss.* Bayley, J.) that, if even it were admissible in evidence, as being upon a negotiation for a compromise, it did not show an original right of action, although it might have been evidence to support a new ground of action on that agreement. *Lofts* v. *Hudson*, 2 M. & Ry. 481.

(*r*) *Slack* v. *Buchanan*, Peake's C. 5. *Gregory* v. *Howard*, 3 Esp. C. 113. *Doe* v. *Evans*, 3 C. & P. 219. *Turton* v. *Benson*, 1 P. Wms. 496. *Harman* v. *Vanhatton*, 2 Vern. 717. *Westlake* v. *Collard*, B. N. P. 236.

(*s*) *Elton* v. *Larkins*, 1 Mo. & R. 196. Although the attorney of the party retract it before the new trial. *Doe* v. *Bird*, 7 P. & C. 6. So a special case settled on one trial, has been admitted as evidence on a second. *Van Wart* v. *Wolley*, R. & M. 5.

(*t*) *Smith* v. *Beadnall*, 1 Camp. 30. *Stockfleth* v. *De Tastet*, 4 Camp. 10. *Gilling* v. *Summerset*, cor. Abbott, Ld. C. J. West. Sitt. after Mich. 1823. *Robson* v. *Alexander*, 1 B. & P. 448. Although part only of what he swore was taken down. *Milward* v. *Forbes*, 4 Esp. C. 172.

all answers made by a witness in examination in a court of justice, although he might have objected to answering the questions (*u*). So is evidence given by the party in court, although he had no opportunity of entering into an explanation of the circumstances under which the fact took place (*x*). So is evidence given under compulsory authority before a committee of the House of Commons (*y*). But a compelled admission is not evidence of an account stated (*z*.) But it will be seen that admissions or confessions extorted by any kind of duress or threats are not evidence in criminal cases.

By a party to the record.

The admission of a *party* on the record is evidence, although he be but a trustee for another, and although it appear from the admission itself that he is such (*a*). And, therefore, an admission by the obligee of an assigned bond, in whose name the action must necessarily be brought, is evidence to bar the action (*b*). And in an action by the consignor of goods, on behalf of the consignee against the captain, it was held that a letter written by the plaintiff was evidence against him (*c*).

And an admission by one who sues as the assignee of a bankrupt, made before his appointment of assignee, is inadmissible against him in that character (*d*).

But the admission by a guardian, although he be the plaintiff on record, is not evidence against the infant (*e*); nor can the answer of the guardian in Chancery be read against the infant (*f*).

In settlement cases, all declarations by rated parishioners are evidence

It has been held that a bankrupt is compellable to answer questions by commissioners, on examination, which may subject him to penalties for gaming or trading as a smuggler, or being a clergyman. *Ex parte Meynolt*, Atk. 200. *Ex parte Barr*, Cooke, 200. And that one who has money of the bankrupt's in his hands, must account for it, though he may subject himself to penalties. *Ex parte Symes*, 11 Ves. 521. Where the examination of the defendant is *primâ facie* admissible for the plaintiff, the opposite party cannot interpose evidence to qualify or show that it was inadmissible, but it ought afterwards to be given as part of the defendant's case.

(*u*) *Infra*, 28.

(*x*) *Collett* v. *Lord Keith*, 4 Esp. C. 212.

(*y*) *R.* v. *Merceron*, 2 Starkie's C. 366.

(*z*) *Tucker* v. *Barrow*, 7 B. & C. 62.

(*a*) *Bauerman* v. *Radenius*, 7 T. R. 663. This was an action by the plaintiffs, who were the shippers of goods on behalf of Van Dycke & Co., against the defendants, for the damaging of goods in the course of the carriage; and the question was, whether a letter from the nominal plaintiffs, from which it appeared that Van Dycke & Co. were the real plaintiffs, and had indemnified them, could be read, in order to prove an admission that the defendants were wholly free from blame. The evidence was rejected upon the trial; but the Court of K. B. were afterwards of opinion that the evidence ought to have been admitted, on the ground that the plaintiff in a cause must be considered as having an interest in the action; and Lawrence, J. observed, that he had looked into the books, and could not find one case in which it had been held that an admission by the plaintiff on record was not evidence. See *Gibson* v. *Winter*, 5 B. & Ad. 96; Salk. 260. *Payne* v. *Rogers*, Dougl. 407, where the tenant, a nominal plaintiff, having given a release to the defendant, the Court ordered it to be given up on an application by the landlord. See *Craib* v. *D'Aeth*, 7 T. R. 670, in note. In Buller's N. P. 237, it is laid down, that the answers of a trustee can in no case be admitted as evidence against a *cestui que* trust.

(*b*) *Craib* v. *D'Aeth*, 7 T. R. 670, in the note.

(*c*) 7 T. R. 668. See note (*a*).

(*d*) *Fenwick* v. *Thornton*, M. & M. 51.

(*e*) *Eggleston* v. *Speke*, 3 Mod. 258. *Cowling* v. *Ely*, 2 Starkie's C. 366. See *James* v. *Hatfield*, 1 Str. 548. So an admission by a *prochein ami* is not evidence against an infant. *Webb* v. *Smith*, 1 Ry. & M. 106. It was held by Lord Eldon, in *Davies* v. *Ridge*, 3 Esp. C. 101, that in an action against two trustees, an admission by one that he had trust property in his hands was not evidence of the fact against the other.

(*f*) *Eggleston* v. *Speke*, 3 Mod. 258. For by the opinion of the Court of K. B., on being consulted by the Judges of C. P., upon a trial at bar, the answer of the guardian is but to bring the infant into court. See Carth. 79; 2 Vent. 72; Lord Raym. 312; Prec. Ch. 229; 1 P. Wms. 344; 3 Bac. Ab. 148; 3 Bro. P. C. 1.

against the parish, for they are parties to the cause (*g*). And it is not necessary to show previously that the party has refused to be examined (*h*). But an admission by a corporator is not evidence in actions against the corporation (*i*), unless it be made in an official capacity.

By party in interest.

So the admissions of the party really interested, although he be no party to the suit, are evidence against him; for the law, with a view to evidence, regards the real parties. Thus, in an action upon a bond conditioned for the payment of money to *L. D.*, it was held, that the declaration of *L. D.* that the defendant owed nothing, was evidence for the latter (*k*). So in an action on a bill of exchange, for the benefit of another (*l*). So the declaration by the under-sheriff, in matters relating to the execution of the office, is evidence against the sheriff, since he is the responsible person (*m*). So it is where the party interested indemnifies a party to the record (*n*). So in actions upon policies (*o*), the declarations of the parties really interested are admissible. So, in an action by the master for freight, is the declaration of the ship-owner (*p*), where the action is brought for his benefit. So where the party in the action is indemnified by another; as when the sheriff is indemnified by a third person, the declarations of that person are evidence against the sheriff (*q*). Where a defendant in trover for a deed admitted that he detained it on the request of another, it was held that the declarations of the latter were properly received (*r*).

By third persons.

An admission or declaration by a third person is, upon principles already adverted to, in general inadmissible. It ceases to be so, where the party making such admission or declaration can be considered as identical in interest and authority with the other, or to be his mere instrument or agent; since, if a man authorize another to make a declaration, it is the same thing in reason and in law as if he had made it himself.

By an agent.

Where a party refers to another for an answer on a particular subject, the answer is, in general, evidence against him, since he makes the referee his accredited agent for the purpose of giving the answer. The defendant in an action for goods sold and delivered, said, "If *Coomes* will say that he

(*g*) *R.* v. *Whitley Lower*, 1 M. & S. 636; 11 East, 578. *R.* v. *Woburn*, 10 East, 395, 402. And therefore a rated inhabitant could not be examined by the adverse party. But now see the stat. 54 Geo. 3, c. 170.

(*h*) 1 M. & S. 636.

(*i*) *Mayor of London* v. *Long*, 1 Camp. 22. *Mayor of London* v. *Jolliffe*, 2 Keb. 295. *Lord Dorset* v. *Carter*, 3 Keb. 300. *R.* v. *City of London*, 1 Vent. 351; 2 Lev. 231; 1 Vent. 254; 2 Vern. 351. Vide etiam *Duke* v. *Aldridge*, 11 East, 584, n.; 7 T. R. 665. *Infra* tit. PARTIES.

(*k*) *Hanson* v. *Parker*, 1 Wils. 257.

(*l*) *Welstead* v. *Levy*, 1 Mo. & R. 138. So as to the declaration of a party from whom the plaintiff received a bill or note where evidence, *Beauchamp* v. *Pacy*, 1 B. & Ad. 89.

(*m*) *Yabsley* v. *Doble*, Lord Raym. 190.

(*n*) *Dowden* v. *Fowle*, 4 Camp. 38. The action was brought against the sheriff for a false return, and was defended by the assignees of the execution debtor; and it was held that the declaration of one of them (being petitioning creditor), that the debt did not amount to 100 *l.*, was admissible in evidence. See also *Young* v. *Smith*, 6 Esp. C. 121.

(*o*) In *Bell* v. *Ansley*, 16 East, 143, Lord Ellenborough observed, though an action on a policy may be brought in the name of the person who effected it, though he be not the person actually interested, yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible evidence against the plaintiff, and what would be a defence against them would, in many instances, be a defence against the plaintiff.

(*p*) *Smith* v. *Lyon*, 3 Camp. 465.

(*q*) *Duke* v. *Aldridge*, *cor.* Lord Mansfield, cited in *Bauerman* v. *Radenius*, 7 T. R. 665. *Supra*, notes (*m*) and (*n*).

(*r*) *Harrison* v. *Vallance*, 1 Bing. 45, and see *Robson* v. *Andrade*, 1 Starkie's C. 372. But yet the mere fact that a party has acted as the agent of another, is not in general sufficient to let in evidence of the declarations of the principal, unless he has indemnified the agent. Thus a declaration by a party under whom [illegible]

did deliver the goods, I will pay for them." Upon the trial it was proved that *Coomes*, on application to him, did say that he had delivered the goods, and the evidence was held to be admissible (*s*). So where an executor referred a creditor of the testator to *J. S.* for information concerning the effects of the testator, it was held that an admission of assets by *J. S.* was conclusive upon the subject (*t*). So, in general, what an agent says, who is employed by another to make a proposal for him, is also evidence against the latter (*u*). So an admission by an agent, in the course of transacting the business which he is appointed to perform by the principal, is, in general, evidence against the principal (*x*). But in such case it is necessary to prove the authority, either expressly or impliedly, as by showing what the usual mode of dealing has been (*y*); for an agent cannot bind his principal, either by act or declaration, beyond the scope of his authority (*z*).

But it seems to be a general rule, that what an agent does or says within the scope of his authority, is binding upon the principal, whose instrument he is; so that not only an agreement made by an agent is binding upon the principal, but so are all the declarations of the agent at the time, which in any manner affect or qualify the nature of the agreement (*a*); but what the agent says at another time, and of his own authority, is not evidence against the principal.

The act or admission of an under-sheriff accompanying official acts, is, in general, obligatory upon his principal, the sheriff, because he is notoriously the agent of the sheriff for transacting all that appertains to the office, and he indemnifies the sheriff, and consequently by his admission charges himself (*b*); but the authority of a bailiff, who is not the general officer of the

plevin makes cognizance, is not evidence for the plaintiff. *Hart* v. *Horne*, 2 Camp. 92.

(*s*) *Daniel* v. *Pitt*, 2 Camp. 366, in note, *cor.* Ld. Ellenborough. And see *Stevens* v. *Thacker*, Peake's C. 187. *Garnett* v. *Ball*, 3 Starkie's C. 160, 1 M. & W. 438. 441. The plaintiff's horse having been injured through alleged negligence on the part of the defendant, in not fencing a shaft, the defendant agreed to pay if a miner jury would say that the shaft was his; held that their so finding was admissible but not conclusive evidence for the plaintiff. *Sybray* v. *White*, 1 M. & M. 435.

(*t*) *Williams* v. *Innes*, 1 Camp. 364. If a party declare that he will be bound by the oath of a third person, and that person makes the oath accordingly, it is binding. Per Bayley, J., Trin. T. 1825; and see *Lloyd* v. *Willan*, 1 Esp. C. 178; Godbolt, 291; 21 Hen. 6, fo. 31, pl. 17. *A.* takes a forged note from *B.*; on its being returned, *B.* says he received the note from *C.*, to whom he refers *A.* for information. *C.*'s statement is evidence against *B.*; *Brock* v. *Kent*, 1 Camp. C. 366, n. *The holder of a bill agrees not to sue the drawee, provided the latter will make an affidavit that the acceptance is a forgery. If the affidavit be made, though false, the holder is concluded, *Stevens and another* v. *Thacker*, Peake's C. 187. See *Brayne* v. *Beal*, 3 Lev. 240, 241. The defendant, in reply to inquiries respecting the account, referred to a party who he said was possessed of his sentiments, and referred the inquirer to him thereon; held to be a sufficient acknowledgment of him as an agent to make his declaration as to the account binding, *Hood* v. *Reeve*, 3 C. & P. 532. And see tit. AGENT.

(*u*) *Gainsford* v. *Grammar*, 1 Camp. 9; and where the agent was the attorney employed by the party, an authority for making the proposal was presumed. Ibid.

(*x*) For the cases relating to this point, and the various distinctions upon the subject, see tit. AGENT.

(*y*) Ibid. And see 7 T. R. 688.

(*z*) *Fenn* v. *Harrison*, 3 T. R. 757. *A.* being the agent of two companies, *B.* & *C.*, makes an admission as the agent of *B.*; this is not evidence against *C.*; *Guthrie* v. *Fisher*, 3 Starkie's C. 151; and see tit. LIMITATIONS; and *Atkins* v. *Tredgold*, 2 B. & C. 23.

(*a*) See AGENT. And see *Palethorp* v. *Furnish*, 3 Esp. C. 511; *Helyar* v. *Hawke*, 5 Esp. C. 74; *Peto* v. *Hague*, 1 Esp. C. 135; *Alexander* v. *Gibson*, 2 Camp. 555. Action against *A.* and *B.* as owners of a ship; an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners, is evidence of ownership. *Marshall* v. *Cliff*, 4 Camp. 133.

(*b*) *Yabsley* v. *Doble*, Lord Raym. 190.

sheriff, must be proved in every particular case, and then his declarations in the course of his agency are evidence (*c*). In *Biggs* v. *Lawrence* (*d*), it was held at *Nisi Prius* (*e*), that where *A.* had ordered goods of *B.*, to be delivered to *C.*, an acknowledgment, in the hand-writing of *C.*, of the delivery, was evidence against *A.* (*f*). But the same point was frequently ruled differently by Lord Kenyon (*g*); and the case was afterwards decided upon another ground, viz. the illegality of the contract. And the admission of the under-sheriff is not admissible unless it accompany an official act, or unless he charge himself, being in fact the real party in the cause (*h*).

Community of interest.

A community of interest or design will frequently make the declaration of one the declaration of all. Thus in the case where partners, or others, possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject-matter, is evidence against the rest (*i*). The admission of one of several makers of a joint and several promissory note, that it has not been paid, is evidence against all (*k*). Such an admission, however, ought to be clear and unequivocal.

Partner.

A declaration by one partner, concerning a subject of joint interest, is evidence against another, although the former be no party to the suit. Thus in an action against some of the members of a firm, the answer of another person, proved to be a partner, was admitted in evidence as an admission against all (*l*).

An admission by one partner, after the dissolution of the co-partnership, is evidence to charge the other partner (*m*); but a declaration made by one of two partners during an existing co-partnership is not evidence to bind his partner as to a transaction which occurred previous to the partnership (*n*), unless a joint responsibility be proved as a foundation for such evidence (*o*). So a declaration made by one partner that he contracted on his own sole account, is evidence against all the partners, to the exclusion of their joint action (*p*). Entries in a book kept by the clerk of an incor-

(*c*) *North* v. *Miles*, 1 Camp. 389. *Bowsher* v. *Cally*, 1 Camp. 391. See tit. SHERIFF.

(*d*) 3 T. R. 454.

(*e*) By Buller, J.

(*f*) The case is wrongly abstracted in the marginal note, 3 T. R. 454; the agent was not employed to *buy* goods. *Qu.* whether the receipt was given at the time of the delivery? In the case of *Fairlie* v. *Hastings*, 10 Ves. jun. 123, this point was treated by the Master of the Rolls as a very material one. It is difficult to conceive how any authority to a person to receive goods for another can make the mere admission of the latter evidence against the owner. No such authority is necessarily to be implied, nor will the fact that it was made against the interest of the party receiving, make his receipt or declaration evidence, where his testimony may be had; neither, as it seems, will the circumstance that the receipt was given at the time of delivery, make any material difference in principle, for such evidence would be admitted not to *explain* the nature of a particular fact known to have occurred, but to prove the *existence* of the act itself.

(*g*) See 7 T. R. 668; Dougl. 751.

(*h*) *Snowball* v. *Goodrick*, 4 B. & Ad. 541.

(*i*) 11 East, 589, per Le Blanc, J. Where a suit is pending against a great number of persons who have a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge, is evidence against him and all the other parties to the suit. See tit. ABATEMENT; *Lucas and others* v. *De la Cour*, 1 M. & S. 249.

(*k*) *Whitcomb* v. *Whiting*, Doug. 652.

(*l*) *Wood* v. *Braddick*, 1 Taunt. 104. *Grant* v. *Jackson*, Peake's C. 203. *Nichols* v. *Dowding*, Starkie's C. 81; and see *Kemble* v. *Farren*, 3 C. & P. 523. See tit. LIMITATIONS.—PARTNERS.

(*m*) *Wood* v. *Braddick*, 1 Taunt. 104.

(*n*) *Catt* v. *Howard*, Guildhall Sittings after Hil. T. 1820, *cor.* Abbott, L. C. J. 3 Starkie's C. 3. *Pritchard* v. *Draper*, 1 Russ. & M. 191.

(*o*) Ibid.

(*p*) *Lucas* v. *De la Cour*, 1 M. & S. 249.

porated company were held to be inadmissible against a member of the corporation in an action on a contract with him, although the act of incorporation directs the clerk to keep such a book; for the ground on which partnership books are admissible in evidence against partners is, that they are books kept by themselves, or by their authority; but the clerk of the company, once appointed, was not subject to the control of any individual member (*q*).

In an action of covenant against two, it was held that the voluntary affidavit of one, upon a subject in which he was jointly interested with the other, was evidence against the other (*r*).

But an admission by one of several trustees, who are not personally liable, will not bind the rest (*s*).

By a wife. But, notwithstanding a community of interest, the declaration of the wife will not, in general, bind the husband. Even in an action by the husband and wife, in right of the wife as executrix, her declaration will not be evidence (*t*). So where wages had been earned by the wife, it was held that her admission of the receipt of 20*l.* was not evidence against the husband (*u*). So an admission by the wife, of a trespass, cannot bind the husband (*x*). So the answer of the wife in equity cannot be read against the husband (*y*); for the wife is not, in general, considered to be invested with power to act for her husband, and consequently to bind him by her declarations. But where the authority of the wife to act as agent to her husband can be presumed (*z*), her declarations are like those of any other agent; accordingly, the admission of the wife as to an agreement for suckling a child, was held, to be evidence (*a*) against him. So where an action was brought by the direction of the wife, in the name of her husband, to recover a sum of money which had been taken from her on suspicion that it was the produce of stolen property, it was held that what she had said (in the absence of the husband) respecting the money, when examined on a

(*q*) *Hill* v. *The Manchester and Salford Waterworks Comp.*, 5 B. & A. 866.

(*r*) *Vicary's Case*, Bac. Ab. Ev. 623. But an admission by one part-owner of a ship does not bind another part-owner. *Jaggers* v. *Binnings*, 1 Starkie's C. 64. And it has been held, in an action against two partners on a deed purporting to have been executed by one for *self and partner*, that an admission by the other that he had given authority to his partner to execute on his behalf, is not sufficient without producing the authority. *Steglitz* v. *Eggington*, Holt's C. 141.

(*s*) *Davis* v. *Kioge*, 3 Esp. C. by Lord Eldon. But in an action against a corporation, a declaration by a mere member not relating to any official situation is not admissible. *Mayor of London, &c.* v. *Long*, 1 Camp. 22.

(*t*) *Alban and others* v. *Pritchett*, 6 T. R. 680. In an action by the husband and wife for assaulting the wife, the defendant justified the turning the wife out to obtain possession of the plaintiff's house; it was held by Parke, B. that a declaration by the wife as to the terms of the agreement under which the husband held as tenant were inadmissible. *Newton* v. *Harland*, York Summer Ass. 1837. The joint answer of a husband and wife cannot be read in evidence against the wife. *Hodson* v. *Mercst*, 9 Price 556. In an action by the husband and wife to recover a loan by the wife, *dum sola*, a declaration by her during coverture was held to be inadmissible. *Kelly* v. *Small*, 2 Esp. C. 716. But in an action against the defendant as administrator of his wife, for money lent to her before marriage, her admission of the debt during coverture was held to be admissible. *Humphreys* v. *Boyce*, 1 Mo. & M. 240.

(*u*) *Hall* v. *Hill*, Str. 35; P. Will. 175. Bac. Ab. Ev 622

(*x*) 7 T. R. 112.

(*y*) 3 P. Wms. 238; Salk. 350; Vern. 60. 109, 110.

(*z*) Held that the jury might infer authority from two instances of her appearing to conduct his business relative to the transaction in question at his country house. *Palmer* v. *Sells*, 3 N. & M. 422.

(*a*) Str. 527. See also *Emerson* v. *Blonden*, 1 Esp. C. 141, and *infra* tit. AGENT; and *Anderson* v. *Sanderson*, 2 Starkie's C. 204, where the admission of the wife as to a sum due for articles supplied to the shop, of which she had the sole management, was received. S. P. *Clifford* v. *Burton*, 1 Bing. 199.

charge of being concerned in the robbery, was evidence for the defendant (*b*). So in an action against the husband for goods sold to his wife (*c*) during the time when he occasionally visited her, it was held, that a letter subsequently written by the wife, acknowledging the debt, was evidence.

By a conspirator.

The rule, that where there is a community of interest and design, the declaration of one of the parties is evidence against the rest, is not confined to cases of civil contract. It is indeed true, that in general the declaration or admission of one trespasser, or other wrong-doer, is not evidence to affect any other person, for it is merely *res inter alios acta*; but where it has once been established, that several persons have entered into the same criminal design, with a view to its accomplishment, the acts or declarations of any one of them in furtherance of the general object are no longer to be considered as *res inter alios* with respect to the rest; they are identified with each other in the prosecution of the scheme; they are partners for a bad purpose, and as much mutually responsible as to such purpose, as partners in trade are for more honest pursuits; they may be considered as mutual agents for each other. Where an unity of design and purpose has once been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one, with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all (*d*). And this seems to be the general rule, in case of trials for conspiracies, and other crimes of a like nature (*e*).

Against a representative.

An admission by the party represented is usually admissible in evidence against the representative (*f*).

An admission by the owner is sometimes evidence against one who claims title through him (*g*).

(*b*) *Carey* v. *Adkins*, 4 Camp. 92.

(*c*) *Palethorp* v. *Furnish*, 2 Esp. C. 211; 5 Esp. C. 145. *Gregory* v. *Parker*, 1 Camp. 594.

(*d*) See Lord Ellenborough's observations, 11 East, 584, *infra*, tit. TRESPASS.

(*e*) See tit. CONSPIRACY.—BANKRUPT.

(*f*) See EXECUTOR.—BANKRUPT.—An admission made by a bankrupt before his bankruptcy, is evidence to charge his estate with a debt. P. C. 5 T. R. 513. *Secus*, as to subsequent admissions. So admissions made by an insolvent subsequent to his insolvency, are not admissible against the trustees of his estate. *Smith* v. *Simmes*, 1 Esp. C. 330. In an action against trustees for creditors, a declaration of the debtor is evidence of the plaintiff's debt. *Robson* v. *Andrade*, 1 Starkie's C. 372. Note.—The declaration seems to have been made at the time the trust was created. So in an action against the sheriff for escapes, &c. See tit. SHERIFF. *Kempland* v. *Macauley*, Peake's C. 65; and see *Dyke* v. *Aldridge*, 7 T. R. 665; 11 East, 584, n. In an action against the sheriff for a false return of *nulla bona*, where the defence relied upon is an act of bankruptcy overreaching the levy, the plaintiff may give in evidence an admission made by one of the petitioning creditors as to any fact respecting his debt. *Young* v. *Smith*, 6 Esp. C. 121. To prove a bill of sale, fraudulent declarations made by the vendor *at the time of executing it*, are evidence, *Phillips* v. *Eamer*, 1 Esp. C. 357. *Secus*, of declarations made at any other time. Where the defence to an action against an acceptor is, that after the bill was due the amount was settled in account between himself and the then holder, under whose indorsement the plaintiff claims, the declarations of such holder are not evidence, as he might be called and examined. *Duckham* v. *Wallis*, 5 Esp. C. 251; and see tit. BILL OF EXCHANGE. *A.* indorsed a bill to *B.* as a security for a running account; *B.*, after the bill became due, indorsed to *C.*; an entry or declaration by *B.* respecting the state of his account with *A.* is not evidence for the latter unless made contemporaneously with the first indorsement. *Collenridge* v. *Farquharson*, 1 Starkie's C. 259; *Cutler* v. *Newlin*, cor. Holroyd, J., Winch. Spring Ass. 1819; Manning's Ind. Evidence, 253; and see *Bacon* v. *Chesney*, 1 Starkie's C. 192. An admission in an answer by a former owner of property, does not bind a subsequent owner. See tit. ANSWER IN EQUITY. *Gully* v. *Bishop of Exeter*, 5 Bingh. note (*u*). Appx. to St. Tr. 29, Hargrave's edit. and 6 St. Tr. 425.

(*g*) See *Ivatt* v. *Finch*, 1 Taunt. 141; also *supra* Vol. I. and Index, tit. HEARSAY EVIDENCE. An admission by a proprietor or an occupier possessing an in-

An admission by the debtor is evidence against the sheriff, in an action for a false return or escape (*h*); but this, it seems, is by reason of the sheriff's misconduct.

An admission by the principal is not evidence against his surety on a contract (*i*).

The whole is to be read.

It is a general rule with respect to admissions, as it is in all other cases, that where an entry or declaration is entire, and one part is capable of being explained and qualified by another, the whole is to be taken as evidence (*k*). What credit is to be given to the whole, or part, is a question for the consideration and discretion of the jury; and therefore where a party has admitted the claim made by another, but at the same time has made a counter-claim, his statement of a counter-claim is evidence to be left to the jury, as to the existence of such counter-claim (*l*).

Admission under rule of 2 Will. 4.

By the General Rules of Hilary Term 2 Will. 4, it is ordered that the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy,

terest, is frequently evidence as to the nature and extent of the interest, especially if it be connected with any act relating to the enjoyment. An admission by a former occupier of a tenement in respect of which common is claimed, is, it is said, evidence to negative the existence of the right, though the tenant be alive. *Walker* v. *Bradstock*, 1 Esp. C. 458; and see *Doe* d. *Human* v. *Pettet*, 5 B. & A. 223; *Baggaley* v. *Jones*, 1 Camp. 367. Vol. I. and *Woolway* v. *Rowe*, 1 Ad. & Ell. 114. But an admission made by one who takes a bankrupt's goods in execution, that he knew that an act of bankruptcy had been committed, is not evidence against one who takes the goods by assignment from the sheriff, the admission being subsequent to the assignment. *Deady* v. *Harrison*, 1 Starkie's C. 60. And as to a declaration by the holder of a negotiable security, vide *infra*, BILL OF EXCHANGE. *Competency*. To prove a forfeiture by underletting, declarations of persons found in possession were admitted in evidence against the lessee. *Doe* d. *Hindley* v. *Richarby*, 5 Esp. C. 4, *cor.* Lord Alvanley, *sed quære*.

(*h*) *Infra*, tit. SHERIFF. See tit. RES INTER ALIOS.

(*i*) *Infra*, tit. SURETY. *Hart* v. *Horn*, 2 Camp. 92. See *Perchard* v. *Tindall*, 1 Esp. C. 394. *Infra*, tit. REPLEVIN.

(*k*) *Randle* v. *Blackburn*, 5 Taunt. 245. *Smith* v. *Young*, 1 Camp. 439. *Jacob* v. *Lindsay*, 1 East, 462. *Barrymore* v. *Taylor*, 1 Esp. C. 325. *Green* v. *Dunn*, 3 Camp. 215. So in an answer in Chancery, if a party charge and discharge himself contemporaneously. *Smith* v. *Lumbe*, 7 Ves. 588. Where the only evidence against a party charged with murder, was his own confession, which admitted that he was present at the time, but took no part in the transaction; it was held that the whole was evidence for the prisoner, but that the jury might disbelieve any part. *R.* v. *Clewes*, 4 C. & P. 221. *Rose* v. *Savory*, 2 Bing. N. C. 145. A prosecutor gives in evidence the statement of the prisoner, which is exculpatory; it is not therefore to be taken as true, but it is for the jury to say if they think it consistent with the other evidence. *Rex* v. *Steptoe*, 4 C. & P. 397. The prosecutor offers evidence of what was said by the prisoner before the justice; it is evidence as well for as against him; it is for the jury to say under the circumstances whether they believe it or not. *Smith* v. *Blandy*, 1 Ry. & M. C. 275. *R.* v. *Higgins*, 3 C. & P. 609; *Cray* v. *Halls*, ib. Eq. C. Ab. 10; *Thomson* v. *Lumbe*, 7 Ves. 583; *Ridgway* v. *Dawson*, 7 Ves. 404. Giving credit *in a particular*, for a demand of the opposite party, is not an admission of the debt. *Miller* v. *Johnson*, 2 Esp. C. 602. Under a rule of the Court to admit a notarial copy of the condemnation of a vessel in evidence, such copy only establishes the fact of the condemnation, and is not evidence of the particular defects upon which the condemnation purports to be grounded. *Wright* v. *Barnard*, 2 Esp. C. 700. The plaintiff cannot give in evidence the examination of the defendant taken before Commissioners of Bankrupt on one day, without also reading those taken on another day, 5 Sim. 39. Nor can he give the cross-examination of a defendant in evidence, without reading his examination in chief, ib. It is otherwise where the answer of a witness in equity is put in to shew his incompetency, B. N. P. 238. And *see* 2 Vent. 171; Com. Dig. EVIDENCE, [B.] 5.

(*l*) *Randle* v. *Blackburn*, 5 Taunt. 245. *Thompson* v. *Austen*, 2 D. & R. 361, and see note (*k*) and Vol. I.

and unless such adverse party shall have refused or neglected to make such admission. Admission under rule of 2 Will. 4.

And it is further ordered, that the expense of a witness called only to prove the handwriting to or the execution of any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admission.

And by a General Rule of Hilary Term, 4 Will. 4, it is ordered that either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent (*m*), by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a Judge (*n*) why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause (*o*). 4 Will. 4.

Provided that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall

(*m*) In the notice of intention to produce documents in the form prescribed by the rule, one of them was described as a counterpart of a lease from *E. T.* to the defendant, date 26 December 1829. The order was, Take order by consent for admitting all but the three wills, &c. The plaintiff produced on the trial an instrument in the form of a lease from, and executed by *E. T.*, and also executed by the defendant, indorsed "counterpart," and having a 1*l.* 10*s.* stamp, which was sufficient for a counterpart but not for a lease, and it was held that the effect of the admission was, that a document had been executed of a character corresponding with that in the notice, and that the defendant could not object that the instrument was in effect a lease and not a counterpart; and it was held that proof was unnecessary of the identity of the document produced at the trial with that inspected at the Judge's chambers. *Doe* v. *Smith*, 8 Ad. & Ell. 255.

(*n*) The application must be made to a Judge at chambers; the Court have no authority under this rule. *Smith* v. *Bird*, 3 Dowl. 641; Jervis's New Rules, 111.

(*o*) Notice having been given, and admission refused, and a Judge's order having been made, certified by his indorsement, that the documents were produced to his satisfaction, the party is entitled to costs, although a new trial is granted, previously to which the documents are admitted. *Lewis* v. *Howell*, 6 Ad. & Ell. 769. The certificate in such case is to be granted by the Judge presiding at the first trial, *Ib.*

have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and in the absence of a special order the same shall be costs in the cause.

Confessions in criminal cases.

A confession, where it is voluntary, is one of the strongest proofs of guilt; for it cannot be supposed that a person really innocent would *voluntarily* subject himself to infamy and punishment. Many of the rules applicable to admissions in civil cases are applicable to those in criminal proceedings, but there are some which are peculiar to the latter (*p*).

Voluntary.

A confession can never be received in evidence, where the defendant has been influenced by *any* threat or promise (*q*). To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if *any* degree of influence has been exerted (*r*). And where a confession has once been induced by such means, all subsequent admissions of the same or of the like facts, must be rejected, if they have resulted from the same influence (*s*). It is, however, a question for the court, and not for the jury, to decide, whether under the particular circumstances the confession be admissible (*t*). The general principle on which the decisions on the subject seem to have proceeded, seems to be this, that if under the circumstances there be reasonable ground for *presuming* that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received (*u*).

(*p*) As to the effect of confessions in cases of treason, see TREASON.

(*q*) *Warrickshall's Case*, Leach's C.C.L. 3d edit. 298; Cowp. 334; 2 Haw. c. 46, s. 36. Two men were charged with the murder of one who (as it afterwards appeared) was still living, and yet one of them, upon a promise of pardon, confessed himself to be guilty of the crime. Note to *Warrickshall's Case*, Leach's C. C. L. 301, 3d edit. And an instance is mentioned in the State Trials, where not only the party himself, but his brother were executed on a supposed confession, although all the parties were innocent.

(*r*) A promise made by the surgeon who was called in upon a case of administering poison, after telling the prisoner that she was suspected and had better tell all she knew, was held to render the statement of the prisoner inadmissible. *R.* v. *Kingston*, 4 C. & P. 387. So after a threat by the captain of a ship to the prisoner, a mariner on board, upon the stolen property being found, that if he did not tell him who was his partner he would commit him to prison as soon as he got to *N.* *R.* v. *Parratt*, 5 C. & P. 570.

(*s*) By the Judges, in the case of *Sarah Nute*, Mich. T. 1800.

(*t*) Ib.

(*u*) Upon the trial of *Hall*, for burglary, proof was offered that the prisoner had desired *Last* to apply to the justice to admit him as a witness for the Crown; but the evidence of such request was rejected, on the ground that it had been made under the hope of being admitted king's evidence, and could not be considered as voluntary. By Adair, Serj. Leach's C. C. L. 636; this case goes to a very great length. Where hopes had been held out to a prisoner to confess, and when brought before a magistrate he refused to confess, except upon conditions, Buller, J. admitted the general rule, with some qualifications, observing, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account; and that it ought most clearly to appear that the prisoner understood such warning, before his subsequent confession could be given in evidence; East's P. C. 658. And in a similar case, before Bayley, J. where the prisoner had been told by the constable's assistant that it would be better for him to confess, but the magistrate cautioned him frequently to say nothing against himself, the confession was held to be admissible. *R.* v. *Lingate*, Derby Lent Ass. 1815, and afterwards before the Judges. Where the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, the confession was admitted. *R.* v. *Hardwicke, cor.* Wood, B., Nottingham Lent Assizes, 1811, and afterwards before the Judges. Where the prisoner was admonished by a *stranger*, in the presence of a constable, that he had better tell

Where a prisoner had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession, even although it had previously been *falsely* represented to him by a constable that his accomplices were in custody (*x*). Where a witness answers questions upon his examination upon a trial, tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes (*y*). Where a fact has been ascertained in consequence of an admission improperly obtained, it may still be proved, for *the fact* cannot have been affected by the influence used (*z*); therefore, upon an indictment for receiving stolen goods, where, in consequence of the confession, which had been unduly obtained, the stolen property had been

Voluntary.

the truth, his subsequent confession to the constable was admitted. *R.* v. *Row*, Append. to Burn's Just. tit. EVIDENCE, 23 edit. p. 102. Though the prosecutor, in the presence of a magistrate, desire the prisoner to speak the truth, and suggest that he had better speak out, yet if the magistrate or his clerk immediately check the prosecutor, desiring the prisoner not to regard him, the confession is still admissible. *R.* v. *Edwards*, E. T. 1802. And where the constable told the prisoner that he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, and the magistrate said he could not say that it would, on which the prisoner declined to confess, but on his way to prison he confessed to another constable, and confessed again in prison to another magistrate, the Judges held unanimously, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *R.* v. *Rosier*, on a case reserved for the Judges, East. Term. 1821.

So if the expressions be not calculated to raise any hope of some benefit or advantage of a mere temporal nature, it seems that they will not exclude a confession. Upon the trial of *Hodgson*, a girl at York, for arson, evidence was offered of declarations made by the prisoner to Mrs. Richardson, her mistress, after the latter had told her it would be better if she would confess if she were guilty, for she would never be easy in her mind till she had confessed. Holroyd, J. after consulting Bayley, J. was of opinion that the evidence was receivable, but it was afterwards excluded on other grounds. A police officer having a boy in his custody on a charge of arson, without a warrant, told him that after the prevarications he had made, there was no doubt of his guilt, and asked who was concerned with him. The prisoner had been apprehended about noon, and had no food till he made a confession, in answer to the officer's inquiries, between five and six in the afternoon; and seven of the Judges were of opinion that the evidence was receivable, no threat or promise having been used; but three were of the contrary opinion. *R.* v. *Thornton*, 1 R. & M. 27. Where the constable who had charge of the prisoner left the room, and shortly after the constable to whom the prisoner made the statement entered, the Judge refused to receive the statement without calling the other constable to negative any promise or threat, as otherwise it might lead to collusion by constables; but it appearing that the prisoner was not under charge at the time, but detained only as an unwilling witness, the Court received the statement without previously calling the other constable. *R.* v. *Swatkins*, 4 C. & P. 550. Where a promise or threat has been held out, it will usually exclude the statement made to the same person. *R.* v. *Dunn*, 4 C. & P. 543. But where the prisoner made a confession to a magistrate after the persuasions of a clergyman, but not with any view of temporal benefit, and after cautions that it would probably be given in evidence against him, it was held that such confession was properly admitted. *Gilham's Case*, 1 Ry. & M. C. 186. And where a justice had held out promises of interference to induce a confession, but afterwards had informed the prisoner that there was no hope of pardon, and the prisoner subsequently sent for the coroner, and made a full disclosure, notwithstanding he was cautioned that it would be used against him, held that it was admissible.

(*x*) *R.* v. *Burley*, *supra*, tit. ACCOMPLICE.

(*y*) *Supra*, 27; and see *Stockfleth* v. *De Tastet*, 4 Camp. 10. In the case of *R.* v. *Merceron*, *cor.* Abbott, J., 2 Starkie's C. 366, a statement by the defendant, upon examination before a committee of the House of Commons, was received in evidence, although it was objected that the defendant could not refuse to answer the question without incurring a contempt of the House.

(*z*) *R.* v. *Warrickshall*, Leach's C. C. L. 298, 3d edit. *Harvey's Case*, East's P.C. 658. *Mozey's Case*, Leach's C. C. L. 301. *Lockhart's Case*, Ibid. 430. *Butcher's Case*, Ibid.; 2 Haw. c. 46, s. 38.

found concealed between the sackings of the prisoner's bed, it was held by the twelve Judges, that the fact of finding the stolen property in the prisoner's custody was clearly evidence (*a*). But in such case nothing is to be left to the jury but the fact of the prisoner's having directed the witness where to find the goods, and his finding them, but not the acknowledgment (*b*). No evidence can be received of any act done by the prisoner in consequence towards discovering the property, unless the goods be actually discovered thereby (*c*).

Prisoner's examination.

Any voluntary admission or confession by a defendant is evidence against him at common law (*d*), whether it be made to a private person or to a magistrate (*e*). The statutes of Philip and Mary, which directed the prisoner's examination to be taken (*f*), made no difference as to the admissibility of evidence (*g*). The same observation is applicable to the stat. 7 Geo. 4, c. 64, s. 3. But no parol evidence of a confession can be given, where the confession has been taken down in writing, for the general rule applies, that it is not the best evidence (*h*). The statute directs that the examination of the prisoner shall be reduced to writing; the court will therefore presume that the magistrate has acted in conformity with the statute (*i*), consequently no parol evidence can be given of a prisoner's declaration before a magistrate, without previous proof that it was not taken down in writing (*k*). But a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced to writing (*l*).

The prisoner is not to be examined upon oath (*m*), for this would be a

(*a*) *Warrickshall's Case*, Leach's C. C. L. 298, 3d edit. So, if after a promise the prisoner bring money, and gives it up to the prosecutor *as part of that* which had been stolen from him. *R.* v. *Griffin*, 1 Russ. & Ry. 151. But where the prosecutor said he wanted his money, and that if the prisoner gave him that, he might go to the devil if he pleased, and the prisoner took money out of his pocket, and said it was all he had left, it was held that the confession ought not to have been received. *R.* v. *Jones*, 1 Russ. & Ry. 152.

(*b*) Per Le Blanc, J. *R.* v. *Grant and Craig*; *R.* v. *Marian Hodge*, Wells Summ. Ass. *cor.* Grose, J. East's P. C. 658.

(*c*) *R.* v. *Jenkins*, 1 Russ. & R. C. C. L. 492.

(*d*) 2 Haw. c. 46, s. 23; Dy. 214; 6 St. Tr. 58. *R.* v. *Tong*, Kel. 18, 19. *R.* v. *Wheeler*, Leach's C. C. L. 349, 3d edit. *R.* v. *Payne*, 5 Mod. 105.

(*e*) 2 Haw. c. 46, s. 33. *R.* v. *Dore*, And. 301. *Marshall's Case*, 2 St. Tr. 1002; Leach's C. C. L. 298, 3d edit.

(*f*) An examination of a prisoner, though elicited by the magistrate's questions, is admissible against him where no threat or promise was used by the magistrate. *R.* v. *Ellis*, 1 Ry. & M. C. 437. Where the prisoner's statement was reduced into writing before the witnesses against him had been examined, it was admitted by Garrow, B. with great doubts of its legality. *R.* v. *Fagg*, 4 C. & P. 566; but see *R.* v. *Bell*, 5 C. & P. 162.

(*g*) *R.* v. *Lamb*, Leach's C. C. L. 625, 3d edit. per Grose, J.

(*h*) 1 Hale, 284; Summ. 263.

(*i*) *R.* v. *Jacobs and others*, Leach's C. C. L. 349, 3d edit. *R.* v. *Hickman*, Ib. 349. *R.* v. *Fisher*, Ib. *R.* v. *Hall*, Ib. 240. *R.* v. *Fearshire*, Ib.; B. N. P. 298; 2 Haw. c. 46, s. 43.

(*k*) *R.* v. *Hall*, cited in *R.* v. *Lambe*, Leach's C. C. L. 635, by all the Judges, except Gould, J. *Phillips* v. *Winburn*, 4 C. & P. 273. *R* v. *Hollingshead*, Ib. 242.

(*l*) *R.* v. *M'Carty*, Sp. Comm. Dublin, 797. Macnally on Ev. 45. Action by bankers to recover money paid on a cheque purporting to be drawn by the defendant, but alleged to be a forgery, minutes of the defendant's examination on a charge made against a party as having forged the cheque, are receivable, although he afterwards signed a regular deposition. *Williams* v. *Woodward*, 4 C. & P. 346.

(*m*) B. N. P. 242; Kel. 2. It generally happens that a party who is examined upon oath before the magistrate, is examined as a *witness* against others, and under the expectation that he will not be prosecuted. It has been said that a prisoner ought not to be *questioned* by a magistrate; and in the case of *R.* v. *Wilson*, Holt's C. 597, *cor.* Richards, C. B., the prisoner's statement was, on this ground, rejected as inadmissible; but by the statute of Philip and Mary formerly, and now by the stat. 7 G. 4, c. 64, s. 3,

species of duress, and a violation of the maxim, that no one is bound to criminate himself. And where the examination purported on the face of the magistrate's return to have been taken upon oath, the Judge rejected parol evidence to show that no oath had in fact been taken (*n*).

In *Lambe's Case* (*o*) it was held, by a majority of the twelve Judges, that a confession made by the prisoner before a magistrate might be read in evidence, upon proof, that when it was read over to the prisoner he said it was *all true* enough, although he declined to sign it, and although it had not been signed by the magistrate; for even a parol confession was evidence at common law before the statutes of Philip & Mary (*p*). Proof of examination.

By the statute 7 Geo. 4, c. 64, s. 3, the examinations must be returned by the justices to the next general gaol delivery, to be held within the limits of their commission. The identity of the examination (*q*) is usually proved by the magistrate, coroner, or his clerk, who took it down (*r*), and it should be shown that it contains the *substance* of what the prisoner said (*s*). It should also appear that the confession was made freely (*t*); but it is not

the magistrate is to take the *examination* of the prisoner; and at the Carlisle Sp. Ass. 1824, Holroyd, J. admitted the prisoner's examination to be used as evidence against him, notwithstanding this objection. Where a statement by a defendant, made before a committee of the House of Commons, was objected to on the ground that the statement had been made under a compulsory process, the objection was overruled. *R.* v. *Merceron*, 2 Starkie's C. 366. Before a statement made by a prisoner to the magistrate he was sworn by mistake, but as soon as it was discovered, the deposition was destroyed, and the party cautioned; his subsequent statement is receivable. *R.* v. *Webb*, 4 C. & P. 564. A party is examined on oath upon a charge made against another, he not being himself charged or suspected of any offence; upon his being afterwards charged and indicted, his former deposition is admissible. *R.* v. *Haworth*, York Spring Assizes, 1830, Parke, J.

(*n*) *R.* v. *Smith and another*, *cor.* Le Blanc, J. 1 Starkie's C. 242. In the case of *R.* v. *Wilson*, 1 Holt, C. 597, *cor.* Richards, L. C. B. it was held, that an examination of a prisoner, which consisted in answers to questions put by the magistrate, could not be received in evidence, although no threats had been held out.

(*o*) Leach's C. C. L. 625; and see 2 Haw. c. 46, s. 31.

(*p*) In the case of *The King* v. *Telicote*, *cor.* Wood, Baron, York Summer Assizes, 1819, 2 Starkie's C. 483, where a prisoner after his examination had been read over, refused to sign it, and did not say (as in *Lamb's Case*) that it was true, the learned Judge rejected the evidence. But in the later case of *R.* v. *Dewhurst*, Lancaster Spring Assizes, 1825, where the magistrate himself had taken down the examination, which was read over to the prisoner, who made no objection to it, but did not sign it, Bayley, J. held that the magistrate might at all events refresh his memory by the writing, and give evidence of the statement; but ultimately the examination itself was read. Minutes of a prisoner's examination, which have not been signed by him, or read over to him, may be used as minutes to refresh the memory of the witness. *Layer's Case*, 24 Howell's St. Tr. 214; 6 Hargreave's St. Tr. 229. Where the examination of a prisoner taken in writing is inadmissible from some irregularity, parol evidence of what he said upon the examination is admissible, *R.* v. *Reed*, 1 Mood. & M. C. 403.

(*q*) It has been said that the examinations ought not to be taken before the grand jury, Gilb. Ev. by Loft, 216; but the rule seems to apply to depositions only; and, in practice, the examinations are frequently (by leave of the court,) taken before the grand jury.

(*r*) Parke, B. was of opinion, that it is sufficient to prove the magistrate's signature; but Lord Denman held, that this was not sufficient when the prisoner made his mark only, without writing his name.

(*s*) 1 Hale, 284. The safest course is to take down the very words. The statute requires the justices to take the examination, and to put the same, or so much thereof as is material, into writing. A prisoner said, "Give me a glass of gin, and I'll tell you all about it," and two glasses of gin were given by an officer to the prisoner, who then made a confession, and the officer afterwards wrote down from recollection what the prisoner had said, and the officer read over what had been so written before the committing magistrate, and the magistrate told the prisoner that a confession might do him harm, upon which the prisoner said that what had been read was the truth, and signed the paper. Best, J. refused to admit the evidence. *R.* v. *Sexton*, Norwich, Summ. Ass. 1822.

(*t*) 1 Hale's P. C. 284.

absolutely incumbent on the magistrate to warn the prisoner not to confess (*u*). The whole of the confession must be read (*x*).

Force and effect.

A prisoner may be convicted upon his own confession, without other evidence (*y*).

It is a general rule, founded upon principles already adverted to (*z*), that the admission or confession of one defendant is not evidence against any but himself (*a*); except, indeed, such a privity and community in the same original design be proved, as to render that which has been said or done by one, in furtherance of the common object, fair and reasonable evidence of the general design and project itself. It was ruled in *Tong's Case* (*b*), upon the soundest principles, that the confession of one shall not be evidence against another. Where several are tried at the same time, and the confession of one implicates another, the evidence cannot on that account be rejected; the usual course is for the court to inform the jury that the confession is evidence against that party only by whom it is made (*c*). In some instances, the confession of one, taken in the presence and hearing of another prisoner, may be very material evidence to explain the expressions and conduct of the latter upon that occasion; for any *declarations* of his, by which he assented to what was confessed by another, to his own prejudice, would be admissible evidence against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations (*d*).

ADMISSION TO A COPYHOLD. *See* COPYHOLD.—EJECTMENT.

ADULTERY. *See* CRIMINAL CONVERSATION.

AFFIDAVIT.

An affidavit sworn before a Judge is receivable in the court of which he is a Judge, though not entitled of that court, but not in any other court unless entitled of that court (*e*).

AFFIRMANCE OF CONTRACT. *See* Index, tit. WAVER.

AGENT (*f*).

IF *A.* authorize *B.* to do an act, it is in law the act of *A.*, and may be so alleged in pleading, except in cases of felony; for then, if *A.* be absent when the fact is committed, he is but an accessory before the fact (*g*). Ac-

(*u*) *R.* v. *Magill*, Macnally, 38.

(*x*) *R.* v. *Payne*, 5 Mod. 165; 2 Haw. c. 46, s. 42.

(*y*) *Stone's Case*, Dy. 214. *Francis's Case*, 6 St. Tr. 58. *Fisher's Case*, Leach's C. C. L. 3d edit. 349. *Wheeler's Case*, Ib. Even though there be no positive proof that the offence was committed. *R.* v. *Eldridge*, Russ. & R. C. C. L. 440. *R.* v. *Falkner*, Ib. 481. *R.* v. *White*, Ib. 508, *R.* v. *Tippett*, Ib. 509.

(*z*) Vol. I. See Index, tit. ADMISSIONS.

(*a*) 2 Haw. c. 46. The contrary was unjustly ruled in *Throgmorton's Case*, 1 St. Tr. 70. *Earl of Essex's Case*, Ib. 197; and *Sir Walter Raleigh's Case*, 1 Jac. 1.

(*b*) Kel. 18.

(*c*) *R.* v. *Hearne and others*, 4 C. & P. 215. See the observations of Wood, B. in *Bullen* v. *Mitchell*, 2 Price, 299. It is, however, morally impossible that the hearing of such a confession should not operate to the prejudice of the parties implicated; in some instances, the inconvenience might be obviated by separate trials.

(*d*) But a confession by one of several prisoners before a magistrate, which implicates all, cannot be read in evidence merely for the purpose of drawing an inference from their *silence* as to the parts which affect them. *R.* v. *Appleby and others*, 3 Starkie's C. 33, *cor.* Holroyd, J. who said that it had been so held by several of the Judges on a case from Chester, and that he was of that opinion.

(*e*) Reg. G., H. T. 2 W. 4. The addition of every person making an affidavit must be inserted therein, Ib. When sworn before the attorney on record or his agent, Ib.

(*f*) For other evidence on this head, see tit. ADMISSIONS.—ACCESSORIES.

(*g*) See ACCESSORY.

cordingly, on an allegation (in a civil action) that the master and servant drove ungovernable horses in Lincoln's-Inn-Fields, both were found guilty, although the servant alone was present (*h*). So an allegation that the defendant negligently drove his cart, is supported by proof that it was driven by his servant (*i*). Before the act of *B.* can be given in evidence as the act of *A.*, it must be proved that *B.* was the agent of *A.* This proof may either be,—1st, direct, or it may result, 2dly, from the relative situation of *A.* and *B.*; or 3dly, from their habit and course of dealing, or other special circumstances; or, 4thly, from *A.*'s recognition of *B.*'s act, or his acquiescence in it. 1st. May be *direct* (*k*). As where the agent is called as a witness and proves that he was authorized to do the act, or transact the particular business. The fact of agency may be proved by collateral evidence without calling the agent (*l*). If the authority was in writing, it must be produced, in order that it may be seen whether it has been pursued (*m*). If he acted under a power of attorney, the instrument must be produced and proved (*n*). And parol evidence of the authority is inadmissible, where the authority from its nature must have been in writing (*o*). This, however, does not appear to be necessary, where the authority can be clearly inferred from the course of dealing, or from the recognition of the agent's acts by the principal. And therefore in the case of *The King* v. *Bigg* (*p*), which was an indictment for a felonious erasure of an indorsement upon a bank-note, although it was contended, on behalf of the prisoner, that it was necessary to prove the appointment of *Adams* as the agent of the Bank of England, being a corporate body, under their seal (*q*), it was held to be sufficient to show that *Adams* had been used to sign bills and notes, which from time to time had been duly paid, and answered by the Bank. It was found by the special verdict that *Adams* had been intrusted and employed by the Governor

Direct evidence of agency.

(*h*) *Michael* v. *Allestree*, 2 Lev. 172.

(*i*) *Brucker* v. *Fromont*, 6 T. R. 659; and see *Tuberville* v. *Stamp*, Ld. Raym. 264.

(*k*) A letter authorizing an agent to draw to a certain amount, coupled with a power of attorney to enter into and *complete* contracts, make *purchases*, &c., is a sufficient authority to such agent to raise money for the purposes of his employers; and a party advancing monies to such agent is not bound to call for those instruments, and inquire what money has been already advanced on the letter. *Withington* v. *Herring*, 5 Bing. 442. See *Attwood* v. *Munnings*, 7 B. & C. 278. A direction to an agent to enter upon premises (in mortgage) and sell the stock, &c., which was declared to be for the benefit of the plaintiff, and amounting to an authority to pay over the amount to him, being in consideration of his postponing the sale of the estate, is an irrevocable authority, and the plaintiff may sue the agent for money had and received. *Metcalf* v. *Clough*, 2 M. & Ry. 178. The steward of a manor cannot appoint a deputy without special authority. *Barker* v. *Kett*, 3 Salk. 124. The office is grantable in reversion; Ib. Where the agent had in his own name always sold the goods and received the amount, held that having an authority to sell, he had an implied one to receive the price; and that the principals could not avow the act of their agent as to one part, and repudiate it as to the other. *Capel* v. *Thornton*, 3 C. & P. 353.

(*l*) *Owen* v. *Barrow*, 1 N. R. 101; *infra*, tit. USURY. Where goods were fraudulently obtained by *D.*, the agent of *W.*, the purchaser, and also of the defendants, without any intention of being paid for, and were immediately sold to the defendants; held, in trover, that the handwriting of *D.* to various contracts as the agent of *W.* might be proved, and as steps in proving the fraud, without calling him as a witness, although the jury found that the defendants were not privy to the fraud. *Irving* v. *Motley*, 7 Bing. 543.

(*m*) *Johnson* v. *Mason*, 1 Esp. C. 89. *Coore* v. *Calloway*, Ib. 115.

(*n*) Ibid.

(*o*) Ibid; but see 3 P. Wms. 427, *R.* v. *Bigg*.

(*p*) 3 P. Wms. 427.

(*q*) It was alleged in the indictment, that one *Joshua Adams* was intrusted and employed by the Governor and Company of the Bank of England to sign bank-notes for the said company; and it was found by the special verdict that he was so intrusted and employed by the Governor, &c. *but not under their common seal.*

and Company, but not by any instrument under their seal. A majority of the Judges were of opinion that the evidence was sufficient, and the prisoner was transported.

From the relative situation of the parties.

Secondly. From relative Situation.—Where the authority results from the relative situation of the parties, it is sufficient to prove such relative situation (*r*). Thus, to affect the sheriff with the act of the under-sheriff it is unnecessary to show more than that the latter is the under-sheriff (*s*). But a bailiff is not the general officer of the sheriff, and therefore the particular authority must be proved (*t*). Proof of the sale of a book by a servant in a bookseller's shop is *primâ facie* evidence of a sale by the master (*u*) The answer of a clerk at a banking-house, transacting the business of his principals, is evidence against the latter (*x*). Where the captain of a vessel orders goods for the use of the ship, the owners are responsible (*y*). So it is the common course upon trials at Nisi Prius, to read the admissions of the attorney on record of either of the parties; and a plaintiff is bound by the act, not only of his attorney, but of his agent in town (*z*), in the course of the cause.

A letter written to the plaintiffs, respecting the pulling down an adjoining house belonging to a corporation by their surveyor, and who had the management of their buildings, may be presumed to have been written by him in that capacity, and therefore is evidence against them (*a*).

From habit and course of dealing.

Thirdly. From habit, course of dealing, &c.—In mercantile transactions the fact of the usual and general employment of a particular agent in the transaction of business is the most usual evidence of authority (*b*). Thus,

(*r*) See 7 T. R. 113. The plaintiffs, correspondents in England of a foreign merchant, had in May 1827 a Bank of England note remitted in part-payment of the account due to them, which had been stolen in February 1826, and when presented at the Bank, was detained; it was held in trover, that the plaintiffs must be taken to be the agents of the foreign merchant, and could only recover upon his title, and therefore were bound to show that it had been received without any grounds of suspicion that the note had been improperly obtained. *De la Chaumette* v. *Bank of England*, 9 B. & C. 208. A deed signed by the chief clerk and solicitor of a company is binding on them, unless it be shown that he exceeded his authority; and it makes no difference whether the object of producing it were to enforce it or bind the company in any other way by its contents. *Doe* d. *Macleod* v. *East London Waterworks Company*, 1 Mood. & M. C. 149. Agents, authorized to draw bills for a company, drew them in their own names, and not as agents, although for the purposes of the company; held that the members of the company were not liable on the bills, but, *semble*, they were liable as partners for the money lent. *Ducarrey* v. *Gill*, 1 Mo. & M. 451, and 4 C. & P. 121.

(*s*) Ibid.

(*t*) Ibid.

(*u*) *R.* v. *Almon*, Burr. 2686. See tit. LIBEL.

(*x*) *Price* v. *Marsh*, 1 Carr. C. 60. The employment of a ship is evidence of an authority from the owner to the master, in respect of every lawful contract made by him relative to such employment of the ship. Abbott's L. S. 112. 122; 1 Vent. 190. 238. An assignment of a lease under a *fi. fa.* by *A. B.* as under-sheriff, is evidence that he is under-sheriff. *Doe* d. *James* v. *Brown*, 5 B. & A. 243. The drawing of bills by the consignor of goods on the consignee or factor, against the consignment, does not authorize the latter to pledge the goods. *Gill* v. *Kymer*, 5 Moore, 518. *Duclos* v. *Ryland*, cited Ib. See *Guichard* v. *Morgan*, 4 Moore, 36; *Paterson* v. *Gandesequi*, 15 East, 62; *Daubigny* v. *Duval*, 5 T. R. 604; *Fielding* v. *Kymer*, 2 B. & B. 639. By the stat. 4 G. 4, c. 83, a person may take a deposit or pledge of goods to the extent of the consignee's interest.

(*y*) 1 T. R. 108; and so is the captain also; *aliter*, if they be ordered before his appointment, although not delivered till after. *Farmer* v. *Davis*, Ibid. And see the last note.

(*z*) *Griffiths* v. *Williams*, 1 T. R. 710, 711. See *Hays* v. *Perkins*, 3 East, 508.

(*a*) *Peyton* v. *Governors of St. Thomas's Hospital*, 3 C. & P. 363. The answer of a clerk at a banking-house, transacting the business of his principals, is evidence against them. *Price* v. *Marsh*, 1 Carr. C. 60.

(*b*) See *R.* v. *Biggs*, 3 P. Wms. 427, and *supra*, note (*x*).

the general authority of brokers to sell, so as to bind their principals in respect of the purchase, is to be collected from their general dealings, and not merely from their private instructions as to the particular parcel of goods; and if a general authority can be inferred from the usual course and habit of dealing, the principal will be bound by the contract, although it be contrary to the particular instructions (*c*). Where an agent had been employed for a length of time to pay for work of a particular description, and workmen were always referred to him, his acknowledgment of a debt was held to be binding upon his principal (*d*). A master, who in a single instance authorizes his servant to take up goods on credit, is afterwards liable (*e*). So where the defendant's wife usually gave orders for goods, her acknowledgment of a debt being due within six years, was held to be evidence against her husband (*f*). So where the wife had taken lodgings for herself and her husband, and afterwards gave notice of quitting, upon an action brought for use and occupation, it was held that the acknowledgment of the wife was evidence against her husband; and Lord Kenyon said, that where a wife acts for her husband in any business or department by his authority, and with his assent, he thereby adopts her acts, and must be bound by any acknowledgment, or any admission made by her respecting that business in which she has acted for him (*g*). In such respects, the wife does not differ from any other agent. So an admission by a clerk usually employed in corresponding on business, is evidence (*h*). From habit and course of dealing.

An authority to receive payment on bonds, bills, &c. is usually evidenced by the custody of the instruments themselves (*i*). And it was held, that a payment to one who usually received money for an obligee of a bond, was not sufficient, unless he had the custody of the bond (*k*).

Fourthly.—A recognition by the principal of the agency in the particular instance, or in similar instances, is evidence of the authority to the latter. As, where one subscribes policies in the name of another, and, upon a loss happening, the latter pays the amount; this would be evidence of a general authority to subscribe policies (*l*). So where the defendant's son had, in three or four instances, signed bills of exchange by the direction of his father, it was held to be sufficient evidence for presuming an authority from the father to the son to sign a guarantee (*m*). Recognition.

(*c*) *Whitehead* v. *Tuckett*, 15 East, 400.

(*d*) *Burt* v. *Palmer*, 5 Esp. C. 145. The plaintiff, after repeated applications for payment to the defendant, receiving no answer, applied to an attorney, supposed to act for the defendant, for payment, who answered the letter, and paid part, and to a subsequent letter replied, promising payment of the remainder; held, that as it appeared that he was the agent at one time, this was evidence to go to the jury that he continued to be so. *Roberts* v. *Gresley*, 3 C. & P. 380.

(*e*) The defendant sent a waterman to the plaintiff for iron, on trust, and paid for it afterwards; he sent the same waterman a second time with ready money, who received the goods, but did not pay for them. The C. J. ruled that the sending him on trust the first time, and paying the money, gave him credit, so as to charge the defendant on the second contract. *Hazard* v. *Tradwell*, Str. 506; and see *Rusby* v. *Scarlett*, 5 Esp. C. 76; 1 Show, 95. See tit. GOODS SOLD AND DELIVERED.

(*f*) *Palethorp* v. *Furnish*, 2 Esp. Cas. 211. See tit. ADMISSIONS, 29, 30.

(*g*) *Emerson* v. *Blonden*, 1 Esp. C. 142; and see *Anderson* v. *Sanderson*, 2 Starkie's C. 104. So where the wife kept a shop in the absence of the husband, and admitted a debt for goods sold and delivered. *Peto* v. *Hague*, 5 Esp. C. 134. *Clifford* v. *Burton*, 1 Bing. 199.

(*h*) *Harding* v. *Carter*, Park on Ins. 4; vide *supra*, p. 42.

(*i*) 1 Chan. Cas. 193. *Owen* v. *Barrow*, 1 N. R. 101; 12 Mod. 564. See tit. PAYMENT.

(*k*) *Gerard* v. *Baker*, 1 Ch. Ca. 94. *Duke of Cleveland* v. *Dashwood*, 2 Eq. Cas. Ab. 709.

(*l*) *Courteen* v. *Touse*, 1 Camp. 43, n. (*a*). *Neal* v. *Irving*, 1 Esp. C. 61. *Haughton* v. *Ewbank*, 4 Camp. 88; although the agent acted under the power of attorney.

(*m*) *Watkins* v. *Vince*, 2 Starkie's C. 308.

Mere evidence, however, that the agent has done acts in the name of a principal, will not bind the latter without some evidence of recognition on his part; and therefore, where a policy had been signed by one *Butler*, and it was proved that *Butler* had signed other policies in the name of the defendant, but no evidence was adduced of any authority given in the particular case, or of the defendant's having ever paid a loss on such policies, the evidence was held to be insufficient (*n*). If an agent has authority to subscribe a policy, he has also authority to adjust it (*o*).

Recognition of authority.

Where the defendant in an action on a policy of insurance had used an affidavit made by a third person, for the purpose of putting off the trial, it was held, that the statement in the affidavit, that the deponent had subscribed the policy on the behalf of the defendant, was admissible to prove the fact (*p*).

If a master send a servant to receive money, and the servant instead of money receives a bill, the master may, as soon as he knows it, dissent, and will not be bound by the payment; but acquiescence, or a small matter, it was said, in the case of *Ward* v. *Evans* (*q*), will be proof of the master's assent, and that will make the act of the servant the act of the master. In *Thorold* v. *Smith* (*r*), the servant having been sent for money received a cheque, which he kept in his own hands, without the knowledge of his master, and upon the banker's failure the servant sent back the bill; and Holt, Chief Justice, and Powell, J. seem to have been of opinion, that it was a question of fact for the jury, whether the servant, under the circumstances of the case, had authority from his master to receive bills instead of money; and a new trial was granted, for the purpose of ascertaining the fact (*s*).

Where the defendants' agent abroad received by their orders money on their account, and communicated the fact to them, which they acknowledged, and directed the disposal of it; it was held that the agent's letters were admissible as against the defendants to charge them with the receipt of the money, they having adopted and acted upon the assertions of their agent (*t*). A duty arising out of particular relations or circumstances, is properly alleged as an implied promise (*u*).

Acts and declarations of an agent.

Such presumptions and implications of authority are in general applicable to civil cases only. Evidence of a wilful trespass by the servant will not show that the master is a trespasser, without express evidence that the act was done by his direction; for an authority to commit a trespass cannot be implied (*x*). But fraud will vitiate a contract, although the principal take

(*n*) *Courteen* v. *Touse*, 1 Camp. 43, n. (*a*).

(*o*) *Richardson* v. *Anderson*, 1 Camp. 43. n. (*a*).

(*p*) *Johnson v. Ward*, 6 Esp. C. 48. See also 2 T. R. 189, in not.; 2 Ld. Raym. 930; 11 Mod. 88.

(*q*) Salk. 442. *Watkins* v. *Vince*, 2 Starkie's C. 368.

(*r*) 11 Mod. 87.

(*s*) But Holt. C. J. intimated his opinion that a jury at Guildhall would find payment by a bill to be a good payment, according to the common practice of the city; and Powell, J. said he *supposed* that the servant had many times received bills for his master, which was an authority for the purpose; but that that was matter of evidence, being according to the common practice of the world.

(*t*) *Coates* v. *Bainbridge*, 5 Bing. 58; 1 M. & P. 142.

(*u*) *Callender* v. *Delriche*, 5 Bing. N. C. 58.

(*x*) *Macmanus* v. *Crickett*, 1 East, 106; 2 H. B. 443. See also *Harding* v. *Greening*, Holt's C. 531; and *R.* v. *Johnston*, 7 East, 65, *infra*, tit. LIBEL. The tort of a servant or deputy does not affect the master. Mo. 777. 787; Com. Dig. OFFICER, [K.] 3. Although an information for penalties is a criminal proceeding, yet it is also in the nature of a civil process to recover the Crown's debt; a party therefore carrying on trade by his servants,

no part in it, for he is civilly responsible for the acts of his agent (*z*). It is a general rule, that an agent cannot bind his principal by any act beyond the scope of the authority delegated to him (*a*). Where the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal (*b*), whose mere instrument he is; and then, whatever the agent says, within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal (*c*) himself; and it makes no difference whether the declaration be true or false, for they are just as binding upon the principal as if they had been actually made by him. But where the agent makes any declaration or representation of his own, and not as the instrument of his master, that declaration will not be evidence, but the agent himself must be called (*d*) to prove any fact within his knowledge; consequently, a letter written by

Acts and declarations of an agent.

and deriving profits from their acts, is responsible for penalties incurred by their violation of the revenue laws. *Attorney General* v. *Siddon*, 1 Cr. & J 220; 1 Tyrw. 41; and see *R.* v. *Dixon*, 3 M. & S. 11; and *R.* v. *Gutch*, 1 Mood. & M. C. 433. In the case of an illegal distress, as damage feasant, by a servant, an authority to make the illegal distress cannot be inferred from lawful authority given in other instances. *Lyons* v. *Martin*, 3 N. & P. 509.

(*z*) *Doe* v. *Martin*, 4 T. R. 39. A principal is bound by the fraud or misrepresentation of an agent in making a contract for him. *Fitzherbert* v. *Mather*, 1 T. R. 12, Park. Ins. 321. 326. See further, App. 45.

(*a*) *Fenn* v. *Harrison*, 3 T. R. 357. A factor cannot pledge the goods of his principal by indorsement of the bill of lading, or even by delivery of the goods themselves. *Newsom* v. *Thornton*, 6 East, 17. *Daubigny* v. *Duval*, 5 T. R. 604. *Paterson* v. *Tash*, 2 Str. 1178. *Martini* v. *Coles*, 1 M. & S. 140. Even although he has accepted bills on the faith of such consignments. *Graham* v. *Dyster*, 2 Starkie's C. 21. *Fielding* v. *Kymer*, 2 B. & B. 639; 5 Moore, *supra*, 42, note (*x*). But the rule does not apply to a banker who pledges an indorsed negotiable security deposited in his hands. 1 Bos. & Pull. 648. 651. The plaintiffs previously to a sale issued catalogues, and by one of the conditions of sale, payment was to be made on delivery by good bills on London, at four months from the date of the sale; one of the catalogues being sent to the defendants by their broker, they directed him to purchase certain lots, which he accordingly did, in his own name, and immediately drew on the defendants at four months, which they accepted, and paid when due. It appeared that at the sale the terms of payment were varied to known purchasers to "payment two and two months," by which the brokers were allowed to have the goods without giving bills at the time, and they subsequently became bankrupts. In an action against the defendants as the real purchasers, it was held that the defendants not having authorized any contract different from that mentioned in the condition, viz. a payment on delivery by good bills, and on the faith of which they might properly accept the bills, they were not bound by the contract varied at the sale, and that the plaintiffs therefore were not entitled to recover. *Horsfall* v. *Fauntleroy*, 10 B. & C. 755.

(*b*) The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyar* v. *Hawke*, 5 Esp. C. 72; and see *Irving* v. *Motley*, 7 Bing. 543. *Garth* v. *Howard*, 8 Bing. 451. *Schuman* v. *Locke*, 10 Moore, 39. And see note (*l*).

(*c*) As to payments to an agent, see tit. PAYMENT, and *Stewart* v. *Aberdeen*, 4 M. & W. 211.

(*d*) See *Kahl* v. *Jansen*, 4 Taunt. 565, and *Langhorn* v. *Allnutt*, 4 Taunt. 511. In the first of these cases the Chief J. observed, "when it is proved that *A.* is the agent of *B.*, whatever *A.* does or says, or writes, in the making of a contract, as agent of *B.*, is admissible in evidence, because it is part of the contract which he makes for *B.*, and which therefore binds him, but it is not admissible as the agent's account of what passes." See also *Mestaers* v. *Abraham*, (1 Esp. C. 375); the question was, whether the defendant, the purchaser of goods, had agreed to find bags for the carriage of them: according to the report of the case, the plaintiff offered in evidence the letter of the broker who sold the goods, (being the plaintiff's own agent,) written to the plaintiff, saying that the bags would be ready by a certain day; the broker was then in the box, and Lord Kenyon said, that he would admit evidence of what he had done on account of the defendant, but that it should be learned from himself, and not from his letter. See *Ashford* v *Price*, 3 Starkie's C. 185, *infra*, note (*g*).

an agent to his principal of what he has done, being the representation of the agent to his principal of what he has done, is not admissible in evidence against the principal to prove the truth of the representation (*e*); for he is no longer the authorized instrument of the principal to bind him by such declarations.

So where the question was, whether the agent of the defendant had delivered to him a bond, alleged to have been made by the defendant to the plaintiff, it was held by the Master of the Rolls, that the declaration by the agent, that he had delivered the bond to the defendant, was not admissible evidence to prove the fact (*f*). But it is otherwise where the principal refers himself to his agent's declaration on a particular subject, or constitutes a party his general agent for conducting his business, for then a declaration or acknowledgment by the latter falls within the scope of his authority (*g*).

Defence by an agent.

An agent may generally repel an action against himself by proof that he acted on the footing of an agent, and was understood so to act (*h*), unless he execute an instrument in his own name (*i*). A public officer, trading on behalf of the public, is not liable on contracts made by him in that capacity (*k*). One who contracts on behalf of Government is not liable, although the contract be by deed (*l*). But if a person represent himself to be an agent for one who resides abroad, it seems that he is personally liable (*m*).

So where a captain contracts for goods for the use of the ship (*n*).

(*e*) 4 Taunt. 511, Ib. 565. 663. As to admissions by an attorney, see tit. ATTORNEY.

(*f*) *Fairlie* v. *Hastings*, 10 Ves. jun. 128.

(*g*) Vide *supra*, p. 29. A declaration by the clerk of an attorney, in taxing costs, that he would not charge extra costs, is evidence against the principal. *Ashford* v. *Price*, 3 Starkie's C. 185; 1 D. & R. 48.

(*h*) See VENDOR and VENDEE. The office of clerk to a body of trustees being executed by a deputy, the clerk is not responsible for losses occasioned by the negligence of such deputy induced by the negligence of the trustees, nor for monies which came into his hands through their irregular acts; but he is for sums received at his office by such deputy without his authority, but which he had ground for believing would be paid there. *Whitmore* v. *Wilks*, 1 Mood. & M. 214. Notice that third parties are interested in a particular adventure, imposes upon an agent the duty of accounting with the latter, in respect of their proportion; but it is otherwise if from subsequent transactions it be shown that they are content to rest upon the responsibity of the other partners, and that the agents should account solely to them. *Killock* v. *Grey*, 4 Russ. 285. See further as to the defence that the party is but an agent, *Foster* v. *Blakelock*, 5 B. & C. 328; and tit. WORK AND LABOUR. As to the liability of parishioners directing parish work to be done by the churchwardens, see *Lanchester* v. *Tucker*, 1 Bingh. 200. See tit. ABATEMENT—CHURCHWARDEN.

(*i*) *Appleton* v. *Binks*, 5 East, 148. But if an agent covenant in his own name, he will be personally bound, although he be described in the deed as covenanting on the part of another. *Appleton* v. *Binks*, 5 East, 147. *Wilks* v. *Backs*, 2 East, 142. *White* v. *Cuyler*, 6 T. R. 176. And if he draw a bill in his own name, he will be personally liable, although the plaintiff knew that he was merely an agent. *Leadbitter* v. *Farrow*, 5 M. & S. 345. *Thomas* v. *Bishop*, Str. 955. So where a solicitor undertakes in writing to pay rent on withdrawing a distress. *Burrell* v. *Jones*, 3 B. & A. 47. A party describing himself as agent or consignee of a vessel chartered for a specific purpose, signs an agreement in his own name, witnessing "that the said parties agree," &c., and acting as principal throughout the voyage, is personally liable. *Kennerly* v. *Gravina*, 3 D. & R. 503.

(*k*) *Macbeath* v. *Haldimand*, 1 T. R. 172.

(*l*) *Unwin* v. *Wolseley*, 1 T. R. 674.

(*m*) *De Gaillon* v. *L'Aigle*, 1 B. &. P. 368; 3 B. & A. 47. *Burrell* v. *Jones*. *Appleton* v. *Binks*, 5 East, 148. *A.* appoints by power of attorney three persons to act in the management of his estates in Jamaica, as his attornies, one of whom residing there, enters into an agreement with *R.* to undertake the factorage of the estates, together with others, on certain terms; *R.* cannot call upon *A.* for supplies furnished, but must look to the attorney with whom he contracted. *Pennant* v. *Simpson*, 1 Knapp, P. C. 399.

(*n*) *Farmer* v. *Davis*, 1 T. R. 108.

It is a settled rule of law (*o*), that an agent shall not be allowed to dispute the title of his principal.

One who agrees to be responsible as agent for the plaintiff in respect of a sale with the auctioneers, is liable, although the plaintiff appoint the auctioneer (*p*).

It is also a general rule, that an agent shall not be allowed to take an undue advantage of his principal through the medium of such agency, by standing in a double capacity (*q*).

AMENDMENT.

See Tit. VARIANCE; *and see* Append. Vol. II. 47.

APOTHECARIES.

An apothecary, by the stat. 55 Geo. 3, c. 194, s. 21, must, in an action for business done, prove either that he *practised* (*r*) as an apothecary prior to or on the *first* day of August 1815, or that he has duly obtained his certificate (*s*) from the master, wardens, and society of Apothecaries, unless he be a surgeon or assistant-surgeon within the stat. 6 Geo. 4, c. 133 (*t*). A diploma from a Scotch university does not exempt in England (*u*). In an action to recover penalties under the same Act, sec. 20 (*v*), where the question was,

(*o*) And therefore, where an agent has received money on behalf of his principal, he cannot afterwards be allowed to say that he received it for some other person. *Dixon* v. *Hammond*, 2 B. & A. 310. The defendant in that case having effected an insurance for both Flowerden and Davidson, and having received the amount of a loss, it was held that he was bound to pay it over to the partnership, and could not pay it to Flowerden alone. In *Farrington* v. *Clarke*, 2 Chitty's C.T. M. 429, an agent had taken out letters of administration in India for his principal, who had obtained administration of the intestate's effects; and it was held that the agent could not refuse to pay over the assets to his principal, on the ground that others had obtained administration. *Ib.* See also *Roberts* v. *Ogilby*, 9 Price, 269. *Gosling* v. *Birnie*, 7 Bingh. 339; 5 M. & P. 160. *Hawes* v. *Watson*, 2 B. & C. 541. *Stonard* v. *Dunkin*, 2 Camp. 334. But see *Saxby* v. *Wynne*, and *Ogle* v. *Atkinson*, Vol. II. TROVER BY VENDEE.

(*p*) *Cholmondely* v. *Payne*, 8 C. & P. 482. And the plaintiffs receiving part of the proceeds from the auctioneer does not discharge the agent. *Ib.*

(*q*) *A.*, being in this country, applied to *B.* to advise him as to dealing in foreign funds, and by his advice transferred foreign securities from one to another. It appearing that the funds purchased were *B.*'s own, and the transfers merely dealing with his own stock, it was held that the transaction could not be supported, the dealer standing in a situation of advantage which an agent is not permitted to be in dealing with his principal. *Brookman* v. *Rothschild*, 3 Sim. 153; and affirmed in Dom. Pr. 1 Dow. & C. 188. A party employed to purchase an estate, becoming the purchaser himself, is held in equity to be a trustee for his employer. *Lees* v. *Nuttall* 1 Russ. & M. 53. Where the defendant, having been employed by the plaintiff as broker, undertook (as he was bound to do under 6 Ann. c. 16, s. 4) to charge him only the cost price of the goods purchased, having violated his duty in every instance, the plaintiff is entitled to recover damages for such overcharges paid by him. *Proctor* v. *Brain*, 2 M. & P. 284.

(*r*) *Wogan* v. *Somerville*, 7 Taunt. 401. It was there held that the house-apothecary of an infirmary, who officiates in making up medicines for the patients, is a person practising within the statute.

(*s*) *Sherwin* v. *Smith*, 1 Bingh. 204. It was there held that a certificate from the Court of Examiners was conclusive to show that the party had served an apprenticeship. It is sufficient to prove the signature of one of the examiners of the Apothecaries' Company, which the certificate purports to bear, with evidence that it was issued by the Court of Examiners. *Walmesley* v. *Abbott*, 3 B. & C. 218. By the 6 Geo. 4, c. 133, s. 7, the seal of the Apothecaries' Company is evidence of the certificate and qualification; but the seal must be proved. *Chadwick* v. *Bunning*, 2 C. & P. 106; 1 Ry. & M. 306.

(*t*) See the Appendix.

(*u*) *Apothecaries' Company* v. *Collins*, 4 B. & Ad. 604.

(*v*) *Apothecaries' Co.* v. *Roby*, 5 B. & A. 940. It was there held, that upon an information against the defendant to recover penalties for practising against the statute, it was necessary to show in defence that the defendant was in practice on the first day of August 1815, and that it was not sufficient to show that he was in practice on a previous day.

whether the defendant had *practised as an apothecary* previous to the 1st of August 1815, it was held, that the incapacity, proved on the defendant, to make up the prescriptions of physicians before that time, was cogent evidence to prove the negative (*v*); since the 5th section of the act describes it to be the duty of an apothecary to make up prescriptions for physicians. It has been held, that an apothecary who charges for attendance is not entitled to charge for the medicines which he finds, and *vice versâ* (*w*). In a later case, a surgeon and apothecary was allowed to recover reasonable charges for attendance, besides his charges for medicines (*x*).

APPLICATION OF PAYMENT. *See* PAYMENT.

APPORTIONMENT.

THERE can be no extinguishment, suspension or apportionment of rent contrary to the contract and agreement of the parties, but where the lessor enters wrongfully (*y*). But if the lessor take a part, then there shall be an apportionment (*z*); and the apportionment may be made by a jury (*a*) So if the lessee be evicted of part, and continue to hold the remainder (*b*).

APPROPRIATION. *See* PAYMENT.

THE brokers of *B.* sell goods in their possession to *C.*, taking in payment a bill accepted by *D.* and retain the goods on *C.*'s account, with instructions to sell, if at a profit. Before the bill becomes due, *D.* becomes bankrupt; the brokers, of their own accord, apply to *C.* for security, who authorises them to sell the goods, and apply the proceeds in payment of the bill. Before they are sold, *C.* also becomes bankrupt; *C.*'s assignees cannot maintain trover against the brokers, or against *B.*, for the goods which, after the order from *C.* to the brokers to sell and apply the proceeds, remained in the hands of the latter subject to that charge, although the brokers, in requiring such security, acted without instructions from *B.*, he having by his conduct subsequently ratified their acts, and the brokers being entitled to act for their employers' benefit (*c*).

(*v*) *The Apothecaries' Company* v. *Warburton*, 3 B. & A. 40. It is not sufficient to show that he professed to cure, and practised in local complaints only; to entitle himself to sue he must have compounded medicines, and practised the general duties of an apothecary. *Thompson* v. *Lewis*, 1 M. & M. 255. A practising in the service of another is not sufficient. *Brown* v. *Robinson*, 1 C. & P. 264. *A.* bound himself apprentice to an apothecary, who resided eight miles from *H.* The apothecary then took a house at *H.*, in which *A.* resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients; held that this was a practising by *A.* as an apothecary within the meaning of 55 Geo. 3, c. 194, s. 20. *The Master, &c. of the Company of Apothecaries* v. *Greenwood*, 2 B. & Ad. 708. If a person compounds medicines, &c. he is liable to penalties, although he cannot make up a physician's prescription. *Apothecaries' Company* v. *Allen*, 4 B. & Ad. 625.

(*w*) *Towne* v. *Gresley*, 3 C. & P. 581.

(*x*) *Handey* v. *Henson*, 4 C. & P. 110. See further BILL OF EXCHANGE —SURGEON.

(*y*) *Hodgson* v. *Thornborough*, 2 Lev. 143. If *A.* lease to *B.*, reserving 20*l.* rent, and *B.* underlet *part* to *C.* without rent, and *C.* assign to *A.*, yet *A.* shall have the whole 20*l.* without apportionment.

(*z*) Per Popham, in *Smith* v. *Malings*, Cro. Jac. 160; Litt. s. 222; Co. Litt. 148 (*a*). So if the lessor grant or devise part of the reversion to another. Co. Litt. 148 (*a*).

(*a*) On *nil debet* pleaded in debt for rent. 1 Vent. 276; Com. Dig. SUSPENSION [E.]; Cro. Eliz. 771; Cro. Jac. 160.

(*b*) *Smith* v. *Malings*, Cro. Jac. 160. *Smith* v. *Raleigh*, 3 Camp. 513. *Stokes* v. *Cooper*, Ib. 514, n. *Dalston* v. *Reeve*, Ld. Ray, 77. *Clun's Case*, 10 Rep. 128. *Burn* v. *Phelps*, 1 Starkie's C. 94. *Tomlinson* v. *Day*, 3 B. & B. 680. But the lessee may at his election, on eviction from part, abandon the whole.

(*c*) *Bailey* v. *Culverwell*, 8 B. & C. 449 (and see Appendix). Here the act of the agent, ratified by the principal, had the effect of an order given by the

APPROPRIATION OF PAYMENT. *See* PAYMENT.

APPURTENANT (*d*). *See* TRESPASS

ARBITRATOR. *See* AWARD.

ARREST.

It must be proved that the arrest was by authority of the bailiff; but it is not necessary to show that he was actually present, or in sight, or within any precise distance (*e*). *See* tit. SHERIFF.—TRESPASS.

ARSON.

To establish this offence it is essential to prove, *first.* the act of setting fire to and burning; *secondly*, the house, &c.; *thirdly*, of the owner specified in the indictment; *fourthly*, with a felonious intent (*f*).

First. The act of setting fire to and burning.—To constitute arson at common law, there must be an actual burning of the house, or of some part of it (*g*). And the statutable description "set fire to," does not enlarge the common law offence in this respect (*h*). It is necessary to prove that some part of the house was burnt. Upon an indictment under the statute 9 G. 1, c. 22, for burning an out-house called a paper-mill, proof that a large quantity of paper drying in a loft of the mill had been set on fire, no part of the mill itself having been set on fire, was held to be insufficient (*i*). But it is not necessary to show that the whole was consumed (*j*). The act may consist in the prisoner's burning his own house, if he do it with intent to burn the house of another, which is in consequence burnt, or even with a felonious intent to defraud an insurer (*k*). Act of setting fire to.

Secondly. The house, &c.—Arson at common law is an offence against the habitation, and therefore the house must be proved to be a dwelling-house (*l*). The offence at common law extends to the burning not only of the dwelling-house, but also of all out-houses which are parcel of the dwel- House.

principal, and accepted by the brokers. See *Carvalho* v. *Burn.* As to the appropriation of a cargo in the hands of an agent as a security for advances by a third person, see *Fisher* v. *Miller*, 1 Bingh. 150. *A.* directs *B.*, his debtor, to pay *C.* his creditor, *B.* assents, and pledges himself to pay *C.*, *A.* cannot revoke the order. *Hodgson* v. *Anderson*, 3 B & C. 842. Before payment *A.* becomes a bankrupt. His assignees cannot recover, for *C.* is entitled in equity to an assignment of debt. *Crowfoot* v. *Gurney*, 9 Bing. 372.

(*d*) Land cannot be appurtenant to land. *Buzzard* v. *Capel*, 8 B. & C. 141.

(*e*) *Blatch* v. *Archer*, Cowp. 65. As to arrest within a privileged jurisdiction, see *Spinks* v. *Spinks*, 7 Taunt. 311. If a sheriff arrest a defendant on one writ, he is arrested as to all writs then in the sheriff's office. Per Bayley, J., *Short* v. *Vansittart*, York, 1821. See tit. TRESPASS.

(*f*) See the allegations, Criminal Pleadings, 417.

(*g*) 3 Inst. 66; 1 Hale, P. C. 568; East's P. C. 1020; 1 Haw. c. 39, s. 4; 2 Bl. Comm. 222.

(*h*) This was so held under the stat. 9 Geo. 1, c. 22 (now repealed). East's P. C. 1020. *R.* v. *Spalding*. *R.* v. *Reeve*. *R.* v. *Taylor*, Leach C. C. L. 58. The late stat. 7 & 8 Geo. 4, c. 30, s. 2, uses the same words, and makes it capital, unlawfully and maliciously to set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same be then in the possession of the offender, or of any other person, with intent thereby to injure or defraud any person.

(*i*) *R.* v. *Taylor*, Leach's C. C. L. 58.

(*j*) 3 Inst. 66; 1 Hale, 568; 1 Haw. c. 39, s. 4.

(*k*) *R.* v. *Probert*, East's P. C. 1030; 6 St. Tr. 222. And see the stat. *supra*, note (*h*).

(*l*) See Criminal Pleadings, note (*h*). And see the late stat. *supra*, note (*h*).

ling-house, although not adjoining to it, or under the same roof (*m*). In what cases an out-house is to be considered as part of the dwelling-house will be more fully considered in treating of the evidence in case of burglary. The burning of a barn, containing corn and hay, was felony at common law (*n*). A common gaol was held to be a house, under the stat. 9 Geo. 1, c. 22 (*o*). An indictment under that statute for burning an *out-house*, was sustained by proof of burning an out-house, although it was part of a dwelling-house (*p*); for it is still an out-house, and the statute did not alter the nature of the crime, but only excluded the principal more clearly from clergy (*q*).

Ownership. *Thirdly. Ownership and possession.*—The house is described either as the house of a particular person specified in the indictment, or under the stat. 7 & 8 Geo. 4, c. 30, is described to be in the possession of the prisoner, or of some other person. If it be described generally as the house of another, then, since arson is an offence immediately against the possession, the house must be proved to be in the possession of that person, *suo jure* (*r*). Hence if the house be alleged to be the house of another, and it appear that the prisoner was in possession of the house under a lease for years, it is not felony (*s*). So an indictment against a prisoner for burning his own house was bad (*t*) before the stat. 43 Geo. 3, c. 58 (*u*); but it is no defence that the prisoner resided in the house by sufferance, as a pauper, by permission of the overseers, without any interest of his own; for the possession in such case is in the overseers, by the occupation of the pauper (*x*). Where a widow, who was entitled to dower out of a house in the possession of a tenant, which had been mortgaged, her son, being entitled to the equity of redemption, procured another to burn the house, it was held that she was guilty as an accessory before the fact, since the possession was in the tenant on behalf of her son; and her title to dower, supposing the tenant's interest to be out of the case, did not give her even a right of entry (*y*). And it seems, that even if the prisoner had been entitled to the inheritance, and the tenant had been in possession, she would have been guilty of felony (*z*). As the offence is against the possession, it is essential to prove that person to be in possession who is alleged in the indictment to be the owner (*a*). In *Glandfield's Case* (*b*), the premises (which were out-houses) were alleged to be the mother's. It appeared in evidence that they were the property of *Blanche Silk*, widow, the mother, but that one part was occupied jointly by the mother and son, and the rest by the son alone, and the variance was held to be fatal. On an

(*m*) 1 Hale, P. C: 567, 570; Summ. 86; 3 Inst. 67. 69; 1 Haw. c. 39, s. 1, 2; 4 Bl. Comm. 221.

(*n*) East's P. C. 1020; and so (*semble*) was the burning of a barn simply.

(*o*) *R.* v. *Donnovan*, Leach's C. C. L. 81. Repealed by the stat. 7 & 8 Geo. 4, c. 30.

(*p*) *R.* v. *North*, East's P. C. 1021.

(*q*) *R.* v. *Breeme*, East's P. C. 1021.

(*r*) East's P. C. 1022. 1033. See East's P. C. tit. BURGLARY.

(*s*) *R.* v. *Holmes*, Cro. Car. 376, W. Jones, 351; 1 Hale, P. C. 568; 3 Inst. 66. The authority of this case was questioned by Mr. J. Foster, who thought that the house might with propriety be considered the house of the landlord; and in *R.* v. *Breeme*, East's P. C. 1026, Ld. Mansfield said, that if *Holme's Case* had come again in question he should have been of a different opinion.

(*t*) *R.* v. *Spalding*, East's P. C. 1025; 4 Bl. Comm. 222-3. *Poulter's Case*, 11 Co. 29. *R.* v. *Scofield*, Cald. 397. East's P. C. 1028.

(*u*) Now repealed, and the stat. 7 & 8 G. 4, c. 30, is substituted; vide *supra*, 49.

(*x*) *R.* v. *Gower*, East's P. C. 1027. *Qu.* whether in such a case the pauper could have committed a burglary in the house!

(*y*) *R.* v. *Ann Course*, Foster, 113.

(*z*) Ibid.

(*a*) *R.* v. *Breeme*, Leach's C. C. L. 261. *R.* v. *Spalding*, 1b. 258; 11 Co. 29. *R.* v. *Holmes*, Cro. Car. 376. *Rickman's Case*, East's P. C. 1034.

(*b*) East's P. C. 1034.

indictment against the prisoner for burning his own house, with intent to burn the house of *A. B.* in one count, and of *C. D.* in another count, it appeared that *A. B.*, the owner of the latter house, had let it to *C. D.* for ninety-nine years, who had let it to *E. F.* for one year, who had let it to *G. H.* for three months, and the variance was held to be fatal (*c*).

Felonious intent.

Fourthly. With a felonious intent, &c.—An indictment at common law alleges that the prisoner did the act *feloniously, wilfully, and maliciously* (*d*). And although the words maliciously and wilfully were no part of the description of the offence under the stat. 9 Geo. 1, c. 22 (*e*), yet, in order to oust the offender of his clergy under that statute, it was held that it must appear that the act was wilful and malicious (*f*). If *A.* set fire to his own house, with intent to defraud the insurer, and the house of *B.*, his neighbour, be burnt in consequence, and it was likely that this circumstance would happen, *A.* is guilty of arson, since the common law connects the primary felonious intention with the immediate consequence (*g*). So if *A.*, intending to burn the house of *B.*, set fire to the house of *C.*, and burn it, this, for the same reason, would be evidence of a felonious intent to burn the house of *C.* (*h*), although the house of *B.* escaped by some accident. So if *A.* procure *B.* to burn the house of *C.* and he does it, and the fire extends to the house of *D.* and burns it, *A.* is accessory to burning the house of *D.* (*i*). But if it appear that the house of the prosecutor was burnt by the negligence of the prisoner, however gross, or by accident, or even by his committing an unlawful act, which does not amount to a felony, the burning will not amount to arson. As, where an unqualified person, shooting at game, sets fire to the thatch of a house; or where a person is committing a trespass, by shooting at the poultry of another (*k*), provided he did not mean to steal them. Where the intent is laid to defraud the insurer, the books of the insurance company are not evidence without notice to produce the policy (*l*). Where the prisoner's goods, in a particular house, had been insured, and a memorandum had been indorsed on the policy, stating that the insured goods had been removed to another house, and the policy had been properly stamped,

(*c*) *R.* v. *Pedley*, Cald. 218; Leach's C. C. L. 277; 1 Hale's P. C. 568; East's P. C. 1026.

(*d*) See Criminal Plead. 417.

(*e*) Now repealed; the words of the stat. 7 & 8 G. 4, c. 30, are, unlawfully and maliciously, and with intent to injure or defraud any person.

(*f*) 1 Hale's P. C. 567. 569; 3 Inst. 67. *Minton's Case*, East's P. C. 1021. Ib. 1033. Criminal Pl. 419, n (*o*).

(*g*) *R.* v. *Isaac*, East's P. C. 1031. The prisoner was indicted for a misdemeanor in setting fire to his own house, whereby the neighbouring and contiguous dwelling-houses of other persons were endangered; and upon its appearing, from the statement by counsel, that the act was done with intent to defraud the insurers, and that the adjoining houses were actually burnt, Buller, J. was of opinion that the misdemeanor was merged in the felony, and directed an acquittal. Note, that at that time the burning a man's own house with intent to defraud an insurer was but a misdemeanor; there was therefore no primary felonious intent. The offence was made felony by the express provisions of the stat. 43 G. 3, c. 58, s. 1, and by the subsequent stat. 7 & 8 G. 4, c. 30, the former act being repealed. And in *Probert's Case*, East's P. C. 1030, where the prisoner was indicted and convicted of a misdemeanor for having set fire to his own house, and thereby endangering contiguous houses, Grose, J. said, on passing sentence, that if any of the contiguous houses had been actually burnt in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to have been done in order to cheat the insurance-office,) it would clearly have amounted to a capital felony.

(*h*) 1 Hale, 569; 3 Inst. 67; 1 Haw. c. 93, s. 5; East's P. C. 1019.

(*i*) Plowden, 475; East's P. C. 1019.

(*k*) 1 Hale, 569; 3 Inst. 67; 1 Haw. c. 39, s. 5; East's P. C. 1019.

(*l*) *R.* v. *Doran, cor.* Kenyon, C. J. 1 Esp. C. 127.

but the memorandum had no new stamp; on the trial of the prisoner for setting the latter house on fire, it was objected that the memorandum could not legally be received in evidence for want of a stamp. The case was argued before the twelve Judges, and the prisoner was afterwards discharged (*m*). Where the indictment was framed under the stat. 43 Geo. 3, c. 58, s. 1 (*n*), it was held that the act of wilfully burning the property carried within itself sufficient evidence of an intention to injure the owner, without proof of any other act which indicated malice (*o*); although the principal object of the statute was to comprize the case of a person burning a house of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud the insurers (*p*).

General evidence.

General Evidence.—In *Rickman's Case* (*q*), evidence was adduced that a bed and blankets, which had been taken from the house at the time of the fire, had been in the possession of the prisoners, and had been concealed by them from that time. Buller, J. doubted at first whether such evidence of another felony could be admitted in support of this charge; but, as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, the evidence was admitted. The evidence to prove this offence, as in other cases, resolves itself into the probable motives of the prisoner, his opportunity and means of committing the offence, and his conduct. Where the prisoner is charged with setting fire to his own house, with intent to defraud the insurer, the value of the property as compared with the amount insured, obviously becomes a question of great importance, in order to establish or repel the inference of motive.

Variance.

A *variance* from the ownership, as laid in the indictment, is fatal (*r*). Upon a charge of burning an out-house the prisoner may be convicted, although it appear that the out-house was part of a dwelling-house (*s*). An allegation that the offence was committed in the night-time need not be proved (*t*).

ASSAULT AND BATTERY.

For the evidence in an action for an assault and battery, see TRESPASS.

Evidence upon an indictment.

An *indictment* for an *assault* is supported by evidence of an attempt, with force and violence, to do a corporal hurt to another (*u*). An indictment for a *battery* is sustained by evidence of the smallest injury done to the person of a man, in an angry, rude, revengeful or violent manner (*x*). A previous assault upon the defendant by the prosecutor is evidence in justification (*y*) under the plea of not guilty. But in order to make this a good justification,

(*m*) *R.* v. *Gillson*, 2 Leach, 1007, 4th edit.; 1 Taunt. 95. Phillips on Evidence, 457.

(*n*) Now repealed; but the language of the stat. 7 & 8 G. 4, c. 30, is nearly similar, *supra*, 49, note (*i*).

(*o*) *Farrington's Case*, Russel, 1674. The fact of the prisoner having set his master's mill on fire was clearly proved by his own confession; but it appeared that he was in other respects a harmless inoffensive man, and that he had never had any quarrel with his masters. After conviction, sentence was respited to take the opinion of the Judges upon this clause of the statute; and they held the conviction to be proper, since the burning of the mill must, under the circumstances, have been done with an intention to injure.

(*p*) Ibid.

(*q*) East's P. C. 1035.

(*r*) See above, p. 50; and *Rickman's Case*, East's P. C. 1034; *Glandfield's Case*, Ib.

(*s*) *North's Case*, East's P. C. 1021.

(*t*) *Minton's Case*, Ib.

(*u*) 1 Haw. b. c. 62. The riding after a plaintiff, and threatening to horsewhip him, so as to compel him to run into a place of shelter, is an assault in law. *Martin* v. *Shepper*, 3 C. & P. 373.

(*x*) 1 Haw. b. c. 62. As by spitting upon him. *R.* v. *Cotesworth*, 6 Mod. 172.

(*y*) Per Holt, C. J., 6 Mod. 172.

it seems that it ought to appear that the striking by the defendant was in his own defence, and was in proportion to the attack made; and that if *A.* give *B.* a slight blow, it will not justify *B.* in maiming *A.*, or in beating him violently and outrageously, and without a view to his own defence (*z*).

Where the defendant is indicted for an assault, with intent to murder, and it appears that if death had ensued it would have amounted to manslaughter only, the defendant should be acquitted on the first count (*a*).

Assault with intent to rob.

Assault with intent to rob.—In *Parfait's Case* (*b*), the indictment charged an assault with a pistol, with intent to rob. It appeared in evidence that the prisoner did not make any demand or motion, or offer to demand the prosecutor's money, but only held a pistol in his hand towards the prosecutor, who was on the coach-box, and bade him stop; and L. C. J. Willes and Chappell, Justices, are said to have held, that the case was not within the act, because no demand was proved; but the words of the act are in the *disjunctive*; and where the indictment is framed upon the first branch of it, a demand is unnecessary, and it is for the jury to decide with what intent the assault was made (*c*).

In *Thomas's Case* (*d*) it appeared that the prosecutor, *Lowe*, was in a chaise, and that the prisoner, after following it for some time, presented a pistol, to *Dring*, the postboy, bidding him stop, with many violent oaths, but making no demand of money: the carriage stopped, and the prisoner rode up to the chaise, but perceiving that he was pursued, immediately rode away. Upon an indictment for an assault on *Lowe* with intent to rob him, the prisoner was acquitted, because there was no evidence of an assault upon *Lowe*. And he was acquitted upon an indictment for an assault on *Dring*, the postboy, with intent to rob him, because it appeared that there was no intent to rob him; for when he stopped, the prisoner made no demand upon him, but went up to the person in the chaise (*e*).

And in the case of *Trusty* and *Howard* (*f*), where the prisoners were indicted

(*z*) *Cockcroft* v. *Smith*, 2 Salk. 642. In an action for assault, battery and mayhem, the plea of *son assault demesne* was held to be a good plea, because it might be such an assault as endangered the party's life; but upon the question what assault was sufficient to maintain such a plea in mayhem, Holt, C. J. said that Wadham and Wyndham, Justices, would not allow it if it was an unequal return, but that the practice had been otherwise, and was fit to be settled; that for every assault he did not think it reasonable that a man should be banged with a cudgel; and that the meaning of the plea was, that he struck in his own defence. That if *A.* strike *B.*, and *B.* strike again, and they close immediately, and in the scuffle *B.* maims *A.*, that is *son assault*; but, if, upon a little blow given by *A.* to *B.*, *B.* give him a blow that maims him, that is not *son assault demesne*. See 11 Mod. 43, S. C.

(*a*) Per Ld. Kenyon, *R.* v. *Mytton*, East's P. C. 411. *Bacon's Case*, 1 Lev. 146; 1 Sid. 230; Stanndf. 17. But if there be but one count, *semble* the defendant may be found guilty of the assault simply. See Crim. Pl. 388; and *R.* v. *Dawson*, *cor.* Holroyd, J., York Summer Ass. 1821, *infra*, tit. VARIANCE. The same point was also ruled by Hullock, B., York Summ. Ass. 1827; vide *infra*, tit. VARIANCE. The defendant, a soldier, marching in file along the Strand, wantonly jostled the prosecutor off the pavement, who thereupon struck him with a small stick which he had in his hand, on which the defendant aimed a blow at the prosecutor with his bayonet fixed on his musket, and thrust him under the ear; and Ld. Kenyon, being of opinion that if death had ensued, it would have been manslaughter only, directed an acquittal on the first count. *R.* v. *Mytton*, East's P. C. 411.

(*b*) East's P. C. 406. Under the stat. 7 G. 2, c. 20. This is now repealed; but the stat. 7 & 8 G. 4, c. 29, s. 6, makes it felony, punishable with transportation for life, &c. to assault with intent to rob, or with menaces, or by force to demand property, with intent to steal, &c.

(*c*) See East's P. C. 417.

(*d*) East's P. C. 417; Leach, C. C. L. 372.

(*e*) East's P. C. 417; Leach, C. C. L. 372.

(*f*) Sess. Pap. 735; Crim. Pl. 404.

for a felonious assault, with an offensive weapon, with intent to rob, it appeared that one of them, presenting a pistol to the prosecutor, bade him stop, which he did, but called out for assistance; on this the prisoners threatened to blow his brains out if he called out any more, which he nevertheless continued to do, and the men were taken; and, although no demand of money was made, they were convicted and transported. Under this branch of the act it must be proved that the assault was made upon the person whom the prisoner intended to rob. And if the assault be made on *A. B.*, and it appear in evidence that the intent was to rob *C. D.*, the prisoner cannot be convicted.

In *Sharwin's Case*(*g*), it was held, that an allegation that the assault was made with an offensive weapon called a wooden staff, was satisfied by evidence of an assault made with a stone (*h*).

Assault with intent to spoil clothes.

Assault with intent to spoil clothes, &c., 6 Geo. 1, c. 23, s. 66 (*i*).—In *Renwicke Williams's Case* (*k*), a majority of the Judges appear to have been of opinion that a prisoner ought not to be convicted where it appeared in evidence that his primary intention was to injure the person, and not the clothes. But Buller, Justice, was of a different opinion, relying on the authority of *Coke* and *Woodburn's Case.* He considered that the intent of the prisoner was to wound the party, by means of cutting through her clothes; and the jury, whose sole province it was to find the intent, had found that fact. The case was ultimately decided on a different point, and therefore cannot be considered as a direct authority upon this point. On the other hand, the case of *Coke* and *Woodburn* is a most strong and express authority on the other side, and seems to rest upon a very plain and substantial principle of justice, frequently recognized by one of the most enlightened Judges that have presided in our courts; namely, that every man shall be presumed to contemplate that which is the natural and immediate consequence of his act.

Assault on account of money won at play.

Under an indictment for an assault, on account of money won at play (*l*), it is necessary to adduce proof to show that the assault was made or challenge given on account of the money won at play, which is question of fact for the jury; and this may be proved, although the assault was not committed at the time of playing, and although it was not committed till the day after (*m*). The prosecutor having lost his money to the defendants, they proposed to depart; the prosecutor objected, and complained that they would not give him an opportunity of recovering his loss: Buller, Justice, directed an acquittal, being of opinion that since the game was over before the assault began, it could not be said to have arisen out of the game, but out of what had been said to the defendants; and that to bring the case within the statute, it was necessary that the assault should arise out of the play, and during the time of the game (*n*). But in the subsequent case of *The King* v. *Darley* (*o*), it was held that the act was not confined to an assault during the time of play (*p*); and it was considered to be a question for the

(*g*) East's P. C. 421.

(*h*) See Crim. Pl. 85. 405.

(*i*) See the averments, Crim. Pleadings.

(*k*) Leach's C. C. L. 597; East's P. C. 424.

(*l*) Under the stat. 9 Ann. c. 14. See Crim. Pleadings, 407, and the stat. there cited.

(*m*) *R.* v. *Darley*, 4 East, 174.

(*n*) *R.* v. *Randall and others*, East's P. C. 423.

(*o*) 4 East, 174.

(*p*) Ld. Ellenborough observed, that it more frequently happened that such disputes did not arise till after the play was over.

jury, whether a subsequent assault was made on account of the money previously won (*q*).

ASSETS.

Assets.

THE principle of distributing assets is, that where there are two funds, and one party may claim under either, but another is confined to one, the former party will primarily be excluded from the latter fund (*r*).

ASSIGNEE.

FOR the evidence in an action by the assignee of a bankrupt, see tit. BANKRUPT.

For the evidence in an action by an assignee of a reversion or term, see COVENANT.

Where a plaintiff brings an action as assignee, and the assignment is put in issue by the pleadings, he must give regular evidence of the different steps, by the production and proof of the requisite deeds, will, or probate, (if the subject-matter be of a chattel interest), according to the circumstances of the case. Where a defendant is sued as the assignee of a term, it is sufficient *primâ facie* evidence, on the part of the plaintiff, to prove the payment of rent by the defendant, or even to show that he is in possession of the premises (*s*); for he is not privy to the defendant's title. But if the defendant show that he is but the under-tenant under the original lessee, that will defeat the action, although a reversion of one day only be left in the original lessee (*t*).

An admission by a lessee that he has assigned the premises to another, is evidence of the fact against himself, although it could not have been effected without an instrument in writing (*u*).

ASSUMPSIT (*x*).

THE essentials to this action (*y*), to the proof of which the plaintiff may be put by proper pleas, are a *promise* by the defendant, as stated in the declaration, founded upon a sufficient *consideration* (*z*), and in some instances the *performance of conditions precedent* by himself and a *breach* of that promise by the defendant. The declaration is either upon a *special contract*, or upon a general *indebitatus assumpsit*.

Proof of the promise.

A special promise may be proved; 1st. By a written agreement. 2dly. In some instances by oral evidence. Or, 3dly. It results from the special circumstances of the case.

(*q*) Heath, J., who tried the question, left it to the jury to say whether the assault was committed on account of the abusive language used at the time, or on account of the money won the day before.

(*r*) 2 Powell on Dev. by Jarman, 30.

(*s*) *Doe* v. *Parker*, *cor.* Ld. Kenyon, Stafford Summ. Ass. 1788, Peake's Ev. 304. *Holford* v. *Hatch*, Doug. 133. *Hare* v. *Cator*, Cowp. 766.

(*t*) Ibid.

(*u*) *Doe* v. *Watson*, 2 Starkie's C. 230.

(*x*) For proofs in actions of special assumpsit on bills of exchange, guaranties, &c., see the titles respectively.

(*y*) Assumpsit is the proper form of action in all cases of injury from a breach of contract not under seal.

(*z*) A consideration may consist in any act or omission either beneficial to the defendant, or prejudicial to the plaintiff. See *Bunn* v. *Guy*, 4 East's R. 194; *March* v. *Culpepper*, Cro. Car. 70; *Sturlyn* v. *Albany*, Cro. Eliz. 67; 4 Taunt. 611. It is sufficient if the benefit accrue to a third person at the defendant's request; and it seems that any benefit of *value* will be sufficient to support a promise. But the consideration must be of some value. A promise in consideration that the plaintiff

Written agreement.

First. By a written agreement.—In order to establish a written contract, the plaintiff, if he have it in his possession, must produce it, and prove it by evidence of the defendant's signature (*a*); or by the evidence of the attesting witness, if the instrument be so attested. It may then be read in evidence, provided a proper stamp has been affixed to it (*b*).

Proof of written contract.

If the written contract has been lost or destroyed, after due proof of its former existence and subsequent loss or destruction, parol evidence may be given of its execution by the defendant, and of its contents; such secondary evidence is also admissible where the plaintiff has proved that the instrument is in the possession of the defendant, and that he has had notice to produce it. If parol evidence be given of an agreement proved to have been lost, it should also be proved that it bore a proper stamp (*c*). But against a party who refused to produce it, a proper stamp would be presumed (*d*).

Parol evidence cannot be received where the instrument was not, when in existence, duly stamped, even although it has been destroyed by the party objecting to the want of a stamp (*e*).

would make an estate at will to the defendant was held to be insufficient, for the plaintiff might immediately revoke it. 1 Roll. Ab. 23, pl. 29. So the mere performance of an act which the plaintiff was otherwise bound to perform, is not a sufficient consideration. *Harris* v. *Watson*, Peake's C. 72. *Stilk* v. *Mcyrick*, 2 Camp. 317. The allowing the defendant to weigh the plaintiff's boilers will support a promise to return them. *Bainbridge* v. *Firmeston*, 1 P. & D. 1.

Natural affection, though sufficient to raise an use, will not support a promise. *Brett* v. *J. S. & Wife*, Cro. Eliz. 755; and it is very doubtful whether a mere moral consideration is sufficient. See note to *Wennall* v. *Adney*, 3 B. & P. 249; and see the case of *Wennall* v. *Adney*, and *infra*, 69. But the release of a merely equitable right is a good consideration in law. *Wells* v. *Wells*, 1 Lev. 273. *Thorpe* v. *Thorpe*, Ld. Raym. 663. Contrà, *Preston* v. *Christmas*, 2 Wils. 87. So the consideration may consist in some loss or damage to the plaintiff himself. As if he forbear a legal suit to the debtor, 1 Roll. Ab. 29, pl. 40. *Bond* v. *Payne*, Cro. J. 273. *King* v. *Wills*, Str. 873; Cro. J. 47. But the forbearance must either be for some certain or definite, (*Mapes* v. *Sidney*, Cro. J. 683. *Fisher* v. *Richardson*, Cro. J. 47.; 1 Roll. Ab. 23, pl. 25, 26), or at least a reasonable time. *Johnson* v. *Whitcott*, 1 Roll. Abr. 24, pl. 33. See also *Scott* v. *Stephens*, Sid. 89; Lev. 71; Roll. R. 27. *Keech* v. *Kennegall*, 1 Ves. 125. Where the plaintiff was about to enforce a debt of 57 *l.* and costs 65 *l.*, by an execution against the goods of *A.*, the defendant, in consideration the plaintiff would forbear to execute the writ, promised to pay him 107 *l.* in seven days, it was held to be a sufficient consideration to support the promise, and that the action was maintainable. *Smith* v. *Algar*, 1 B. & Ad. 603. In *assumpsit* for breach of an agreement "to remain with the plaintiff two years, for the purpose of learning the business of," &c., held, that there being no stipulation to instruct, and no consideration for the defendant's undertaking, it was not binding on the latter to serve. *Lees* v. *Whitcomb*, 5 Bing. 34; 2 M. & P. 80; and 3 C. & P. 289. Again, the consideration must move from the plaintiff. *Bourne* v. *Mason*, 1 Vent. 6. *Crow* v. *Rogers*, Str. 592; *Dutton et ux* v. *Pool*, 2 Lev. 210; 1 Vent. 318. 334. For the very notion of a contract *implies* mutuality of intention and privity between the parties. *A.* agrees to pay the rent of tolls hired from the commissioners of a road to the treasurer; the treasurer cannot recover. *Pigott* v. *Thompson*, 3 B. & P. 147, *infra*. *A.* having made a contract with *B.* to supply him with a carriage for three years, transfers his interest to *C.*, a secret partner; *A.* and *C.* cannot jointly sue *B.*, who refuses to continue the contract with *C.* *Robson* v. *Drummond*, 2 B. & Ad. 300. Lastly, the consideration must be legal, vide *infra*; for it would be against legal policy to sanction in any way an illegal agreement.

(*a*) The signature of the party would not conclude him without acceptance by the other party; see *Payne* v. *Ives*, 3 D. & R. 664; but the very delivery of an absolute undertaking, signed by the defendant, would be evidence of a mutual agreement, till the contrary was shown.

(*b*) Vide *infra*, tit. STAMP.—AGREEMENT.

(*c*) *Supra*, Vol. I. Index, tit. STAMP. *Goodier* v. *Lake*, 1 Atk. 246. *R.* v. *Sir T. Culpepper*, Skinn. 677.

(*d*) *Crisp* v. *Anderson*, 1 Starkie's C. 35.

(*e*) *Rippiner* v. *Wright*, 2 B. & A. 478. *Non constat* that the commissioners would have stamped it on payment of the penalty.

Secondly. By oral evidence.—An oral contract, agreeing with that stated in the declaration, may be proved by any witness who was present at the time, or who heard the defendant admit the existence of such a contract. In two classes of cases, however, parol evidence is inadmissible: *first*, where the parties have condescended upon a written contract, for that is the best and only evidence of the intention of the parties, so long as it exists, that can be produced; and when it is lost, or in the hands of the defendant, who refuses to produce it after notice, secondary evidence is to be given of its contents: *secondly*, where written evidence of the contract is expressly required by the Statute of Frauds (*f*). Proof of the contract by oral testimony.

Where a party proposes to prove that which has been agreed on in writing, it is necessary to produce the writing as being the best evidence (*g*). In an action for use and occupation, it appeared upon cross-examination that there was an agreement in writing, which had not been stamped, and the plaintiff was nonsuited (*h*). The rule does not apply where a mere memorandum has been made in writing, preparatory to an agreement, but which has not been signed as an agreement (*i*). Upon the letting of premises to a tenant, a memorandum of an agreement was drawn up, the terms of which were read over, and assented to by him; and it was agreed that he should, on a future day, bring a surety, and sign the agreement, which he never did: it was held that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms might be proved by parol evidence (*i*). So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but the memorandum is not signed by the vendor, it need not

(*f*) *Infra.* FRAUDS, STATUTE OF.

(*g*) See Vol. I. and Index, tit. BEST EVIDENCE, and *infra*, tit. PAROL EVIDENCE. In an action for work and labour in building, &c., it appeared that there was an agreement in writing, relating to the claim, and it was held that the plaintiff could not proceed without producing it, nor recover for items as *extras* proceeded on even after an admission by the defendant that they were such, and which the written instrument might furnish a means of ascertaining the amount to be paid for: the course would be highly inconvenient if the Judge were to be called upon to look into it, to ascertain whether items alleged to be *extras* were or were not included in it. *Vincent* v. *Cole*, 1 Mo. & M. 257, and 3 C. & P. 481. Where, after the plaintiff had made out and closed his case, it appeared from the defendant's evidence that there existed a written contract, but which, for want of being properly stamped, he was unable legally to produce; it was held that the plaintiff could not be nonsuited for its non-production, upon the mere assertion of the defendant, since the written instrument, if produced, might have turned out not to apply to the contract in question. *Fielder* v. *Ray*, 6 Bing. 332, and 4 C. & P. 61. Where, in an action for work and labour in printing, the case was opened on the *quantum meruit*, without stating that there was a special contract; after which, the defendant having proved that the plaintiff had agreed to do the work at a certain sum, the plaintiff proposed to show the special contract, which was different from that set up by the defendant; it was held that he could not be permitted to abandon the cause of action first relied on, and resort to that which he ought to have set up in the outset, nor be allowed to impeach that proved by the defendant. *Soulby* v. *Pickford*, 2 Moore & P. 545. Where one of the parties to an agreement, after its execution, and within the twenty-one days allowed for stamping it, obtained possession of it, and swore it was lost, the Court ordered him to produce a copy in his possession to be taken to the Stamp-office, and that if the plaintiff should produce the same on the trial, stamped, the defendant should not be permitted to produce the original agreement. *Bousfield* v. *Godfrey*, 5 Bing. 418. Where a written agreement refers specifically to a plan, if there be clear and satisfactory parol evidence to identify it, it is admissible for that purpose; where however it was not satisfactorily shown to the Court that the parties had agreed upon either of two suggested, the Court held that it was properly refused. *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

(*h*) *Brewer* v *Palmer*, 3 Esp. 213, *cor.* Ld. Eldon; and see *Jeffery* v. *Walton*, 1 Starkie's C. 267.

(*i*) *Doe* v. *Cartwright*, 3 B. & A. 323.

be produced (*h*). The plaintiff in ejectment having made out a *primâ facie* case, by proof of a payment of rent, and notice to quit, it appeared, upon cross-examination of his witness, that an agreement relative to the same land had been given in evidence on a former trial between the same parties, and had been seen the same morning in the hands of the plaintiff's attorney, the contents of which the witness did not know; no notice having been given by the defendant to produce that paper, it was held that the plaintiff was not bound to produce it; for although it was an agreement relative to the land it might not at all affect the question between the parties (*l*).

From special circumstances.

Thirdly. Where the promise results from the special circumstances of the case, those circumstances must be proved; as, where the plaintiff declares upon a contract by the defendant, as his tenant, to use the farm in a husbandlike manner, according to the customary course of good husbandry in that part of the country, the plaintiff must prove that the defendant occupied the lands in question as his tenant, and the promise results as an inference of law from the premises (*m*).

(*h*) *Dalison* v. *Stark*, 4 Esp. C. 163. See *Doe* v. *Morris*, 12 East, 236; 3 B. & A. 326.

(*l*) *Doe* dem. *Wood* v. *Morris*, 12 East, 237. See also *Doe* v. *Pearson*, Ibid. 238, where in a similar case it appeared, on cross-examination of the plaintiff's witness, that an agreement as to the time of quitting did exist, and the objection that the plaintiff was bound to produce it was overruled by Chambre, J. And where the plaintiff, in an action for work and labour, proved his case, and the defendant's witness proved that a written agreement had been entered into, but had not been stamped, and the defendant had given no notice to produce it, it was held that the plaintiff's case was not disturbed. *Stevens* v. *Pinney*, 2 Moore, 439. *Sed quære*, the general rule seems to be, that where the subject-matter of proof is vouched by a written contract, it ought to be produced and proved by the party who relies on the contract. Where the master had undertaken, by the bill of lading, to deliver goods to the consignee on payment of freight, it was held that he could not maintain an action for not unloading in a reasonable time, on an implied contract. *Evans* v. *Forster*, 1 B. & Ad. 118. And see *Brouncker* v. *Scott*, 4 Taunt. 1. Where a party engaged to perform works under a written contract, during which a separate order was given for other work, it was held that it was not necessary to produce the written contract. *Reid* v. *Batte*, 1 Mood. & M. C. 413. In an action for not delivering goods, manufactured by the defendant in pursuance of an order signed by the plaintiff only, the precise terms of the contract, and the defendant's accession to it, may be proved by parol. *Ingram* v. *Lea*, 2 Camp. C. 521. An assignee of a lease, who has been compelled by distress to pay rent due before, the lessee having granted the lease by deed of assignment with the usual covenant for quiet enjoyment, cannot recover on an implied promise. *Baber* v. *Hamil*, P. & D. 360.

(*m*) *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154. So in special actions against carriers, &c. where the alleged promise is a legal duty resulting from the nature of the particular service which the defendant has undertaken to perform, it is sufficient to prove the original undertaking. *Nelson* v. *Aldridge*, 2 Starkie's C. 435. Although (as it seems) the declaration allege a specific promise to do or omit that, which in performance of the general duty, the defendant was bound to do or omit. *Ibid.* And therefore, where the declaration alleged an undertaking on the part of an auctioneer, employed to sell goods, not to rescind a contract made by him as such auctioneer, &c., it was held, that general evidence of employment was sufficient. *Ibid.* In *Witherington* v. *Buckland*, Cas. Temp. Hardw. 309, Lord Hardwicke is reported to have said, that where the plaintiff does not declare on any general custom, but on a special contract, the contract must be proved as laid. But in that case, where the plaintiff had declared on an undertaking to repair and enlarge a house, and particularly a certain room in the house called the club-room, it appeared that the defendant had been employed not by the plaintiff, but by an insurance company, except as to some alterations in the club-room, and therefore the plaintiff was nonsuited. Promises in law exist in those cases only where there is no special agreement between the parties. Per Buller, J. *Toussaint* v. *Martinnant*, 2 T. R. 100. An agreement to grant a lease contains no implied engagement for general warranty, nor for delivery of an abstract of the lessor's title. *Gwillim* v. *Stone*, 3 Taunt. 433. *Temple* v. *Brown*, 6 Taunt. 60; vide *infra*, VENDOR AND VENDEE. A party agreeing *to let*, virtually undertakes to give possession, and not a mere right of

Variance.

The plaintiff must establish his right of action, and contract, in evidence, as set forth in the declaration; and a variance in any circumstance that is essential to the contract will be fatal (*n*).

Parties.

It is now perfectly well established, that a misjoinder of plaintiffs is a ground of nonsuit, as also is a joinder of too many defendants; but that the omission of any party who jointly promised, must be pleaded in abatement (*o*). Where the action is brought by several, or against several, it must appear either that the promise was so expressly made, or that the plaintiffs in the one case, or the defendants in the other, were partners, and that the contract was made in behalf of all: this is a consequence which usually follows, from proof of the partnership itself (*p*). In order to establish the fact of partnership, it is sufficient even for the plaintiffs to prove that they have carried on business as partners, without proving the partnership deeds.

The allegation of a contract between the plaintiff and defendant, is proved by evidence of a contract made between their agents on their behalves (*q*).

A contract alleged as between the plaintiff and defendant, is not proved by evidence of a contract between the plaintiff and a deceased partner with the defendant; but it is sufficient to prove that the defendant and a deceased partner made the contract with the plaintiff (*r*).

Where the plaintiffs sue in a particular capacity, as where they sue as assignees of a bankrupt upon promises to the bankrupt, they must, under the general issue, prove their title to sue as assignees (*s*).

Promise.

The contract consists of the promise itself, and the consideration on which it is founded. A promise alleged absolutely is not supported by proof of a promise in the *alternative* (*t*). The allegation of a promise to deliver forty bags of wheat immediately, and the remainder of one hundred bags on the next market-day, is not supported by proof of a promise to deliver forty *or* fifty bags immediately, and the residue on the next market-day (*u*). So an absolute promise varies from a conditional promise (*x*).

action; where therefore the premises were held over by a preceding occupier, it was held that the plaintiff was not driven to his ejectment, but might support an action for breach of agreement. *Coe* v. *Clay*, 5 Bing. 440.

(*n*) 1 T. R. 140; Gilb. Law. Ev. 229. *Shute* v. *Hornsey*, Doug. 643. *Bristow* v. *Wright*, Doug. 640. *Grant* v. *Astle*, Doug. 695; 3 T. R. 646.

(*o*) B. N. P. 152; 2 M. & S. 23; 2 Str. 820. *Wilsford* v. *Wood*, 1 Esp. 183. A joint contractor must be sued, although he be a certificated bankrupt. *Bevil* v. *Wood*, 2 M. & S. 23.

(*p*) See tit. PARTNERS.

(*q*) See tit. AGENT.—PARTNERS.—SET-OFF.—VENDOR AND VENDEE. In general an action may be brought either in the name of the person with whom the contract was made, or in the name of the party really interested (*Skinner* v. *Stocks*, 4 B. & A. 437); and therefore joint-owners of a vessel employed in the whale-fishery may sue a purchaser of whale-oil, although the contract of sale was made by one of the part-owners, and the purchaser did not know any other person in the transaction. The statutes of set-off do not prevent the action from being maintainable in the names of all the parties interested. *Ibid.* So in case of policies of insurance. *Ibid.* See *Lloyd* v. *Archbowle*, 3 Taunt. 324. *Mawman* v. *Gillett*, Ib. 325.

(*r*) *Richards* v. *Heather*, 1 B. &. A. 29. *Hyat* v. *Hare*, Comb. 383. *Smith* v. *Barrow*, 2 T. R. 479. *Slipper* v. *Stidstone*, 5 T. R. 493. Contrà, *Spalding* v. *Mure*, 6 T. R. 363. See *Rice* v. *Shute*, 5 Burr. 2663. *Whelpdale's Case*, 5 Rep. 109.

(*s*) See tit. BANKRUPT.

(*t*) 8 East, 8; 2 B. & P. 116. In assumpsit on the warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63 *l.*, but the consideration as proved was, that the plaintiff would pay that sum, and if the horse was lucky, would give the defendant 5 *l.* more, or the buying of another horse; held no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting in point of law to a promise. *Guthing* v. *Lynn*, 2 B. & Ad. 232.

(*u*) *Penny* v. *Porter*, 2 East, 2; 8 East, 8. *White* v. *Wilson*, 2 B. & P. 116. *Shipham* v. *Sanders*, 2 East, 4.

(*x*) *Churchill* v. *Wilkins*, 1 T. R. 447. *Layton* v. *Pearce*, Doug. 14.

Variance.—Promise. The allegation of a promise to pay the amount of a promissory note on the death of *J. S.*, is not supported by proof of a promise to pay the amount on the death of *J. S.*, *provided* he left the party sufficient, *or* he was able to pay it (*y*).

So if the plaintiff allege a promise by the defendant to sell his tallow to the plaintiff at four shillings per stone, and prove an agreement by the defendant to sell his tallow to the plaintiff at four shillings per stone, but that if the plaintiff gave more to any other person, he should give the same to the defendant (*z*).

An agreement to pay 20 *l.* if a given number should be drawn on a given day, varies from an agreement to deliver an undrawn ticket, *or* pay 20 *l.* (*a*). One of two pleas of usury stated the forbearance to be until September 1st, 1785; the second until January 1st, 1786. The evidence was an agreement of forbearance till *either* of those days; and it was held that the evidence did not support either of the pleas (*b*).

Subject-matter. So a variance as to the *subject-matter* contracted for will be fatal. A declaration on a promise to deliver good merchantable wheat, is not supported by evidence of an agreement to deliver good second-sort of wheat (*c*). A contract to deliver *soil* or *breeze*, varies from a contract to deliver *soil* (*d*). A contract to carry goods, and deliver them to *A. B.*, the plaintiff, varies from a contract to carry goods and deliver them to *J. S.* (*e*). A contract to deliver so many bushels of corn varies from a contract to deliver so many bushels, according to a particular measure, which is greater than the Winchester measure, since by the bushel generally, the Winchester bushel must be understood (*f*).

It is no variance that the defendant promised some other distinct matter in addition to that alleged, since the proof supports the declaration as far as is requisite (*g*). It is true that the defendant did promise that which is alleged, although he further promised some other thing in addition; therefore a declaration on a contract to pay 52 *l.* 10 *s.* for rum-money, is supported by proof of a note, by which the defendant undertook to pay the plaintiff 52 *l.* 10 *s.*, *together* with a pint of rum per day (*h*) So a promise to deliver a horse which should be worth 80 *l.*, and be a young horse, is supported by proof of a promise to deliver a horse which should be worth 80 *l.*, and be a young horse, with a warranty that it had never been in harness (*i*).

It is no variance that a part of the contract has not been alleged which merely regards some *collateral* engagement as to the subject-matter of the contract. The declaration alleged that the defendant bought of the plaintiff a quantity of East India rice, according to the conditions of sale of the East India Company, at a specified price, to be put up at the next Company's sale, if required; and it appeared in evidence, that, in addition to those conditions, the rice was to be sold *per sample*; it was held that this was no variance, for it was not a description of the commodity, but a collateral engagement that it should be of a particular quality (*k*).

(*y*) *Roberts* v. *Peake*, 1 Burr. 325. The Court were of this opinion, but the case was not decided upon this point.

(*z*) *Churchill* v. *Wilkins*, 1 T. R. 447.

(*a*) *Layton* v. *Pearce*, Doug. 14.

(*b*) By Lord Kenyon, and Buller and Grose, Js., *Tate* v. *Willing*, 5 T. R. 531.

(*c*) Ld. Ray. 735.

(*d*) *Cook* v. *Munstone*, 1 N. R. 351.

(*e*) *Leery* v. *Goodson*, 4 T. R. 687.

(*f*) *Hockin* v. *Cooke*, 4 T. R. 314. See the stat. 12 Hen. 7, c. 5; 22 Car. 2, c. 8.

(*g*) *Cotterell* v. *Cuff*, 4 Taunt. 285. *Tempest* v. *Rawling*, 13 East, 630. For other instances, see tit. VARIANCE.

(*h*) *Baptiste* v. *Cobbold*, 1 B. & P. 7.

(*i*) *Miles* v. *Sheward*, 8 East, 7.

(*k*) *Parker* v. *Palmer*, 4 B. & A. 387. The goods did not correspond with the samples, but after seeing the samples the

Consideration.

In assumpsit, the *consideration* is of so entire a nature, that not only must it be proved to the extent alleged, but an omission to allege any part is fatal; for if any part be omitted, then the basis of the promise is misdescribed. It is not true, as stated, that the defendant's promise was founded upon the consideration alleged, when it was in fact founded upon that and something else, which is also essential to its support (*l*). An averment that stock was to be transferred *on request*, is not proved by evidence that it was to be transferred on a particular day (*m*).

An allegation of an *executory* consideration is not proved by evidence of an *executed* consideration, though it is otherwise where an *executed* consideration is alleged, and the law implies the promise (*n*). An averment that a note was given in repayment of monies paid, is not satisfied by proof of a note given to secure money to be paid (*o*). So if the moral obligation on which the action is founded is misdescribed (*p*).

So where the declaration alleged an agreement to sell goods expected by the Fanny Almira, and the agreement proved was for the goods expected by the Fanny *and* Almira (*q*). So an agreement alleged to be for the delivery of all merchandisable skins, varies from the proof of a contract to deliver all merchandisable calf-skins (*r*).

In an action against a carrier, if the contract be alleged to be to carry from *A.* to *B.*, the *termini* are material, and must be proved as laid (*s*).

defendant had taken upon himself the disposition of the goods, and had put them up to sale at a limited price, and bought them in again, and the Court held that after this he could not repudiate the contract; and the jury found that he had not repudiated the contract within a reasonable time; therefore the sale was in effect complete. So where the plaintiff declared that the defendant had agreed to buy of the plaintiff a large quantity of head-matter and sperm-oil, in the possession of the plaintiff, and the contract proved was for the purchase of all the head-matter and sperm-oil per the Wildman, it was held that there was no variance, for the allegations were proved as far as they went, and the additional matter proved (that it was oil by the Wildman) was immaterial; it did not qualify or annex any condition to what was stated. *Wildman* v. *Glossop*, 1 B. & A. 9. So if part of the contract has not been alleged, which merely regards the liquidation of damages after a right has accrued by a breach of the contract; for it is matter of evidence only in reduction of damages. *Clarke* v *Gray*, 6 East, 564. In an action against a carrier it is not necessary to allege the limitation of his responsibility by notice. *Ibid.* See 1 Starkie's C. 207. In an action of assumpsit for breach of an agreement for the assignment of a lease, alleging that the defendant had no title to assign, held that it was no variance that the declaration did not set out a clause in the agreement restraining the plaintiff from carrying on a certain trade in general terms, that not forming any part of the consideration. *M'Allen* v. *Churchill*, 11 Moore, 483.

(*l*) *Swallow* v. *Beaumont*, 2 B. & A. 265.

(*m*) *Bordenave* v. *Gregory*, 5 East, 111.

(*n*) 3 Lev. 98. Com. Dig. ACTION ON THE CASE.—ASSUMPSIT [F.] 6.

(*o*) *Amory* v. *Merreyweather*, 2 B. & C. 539.

(*p*) The declaration alleged that the plaintiff had supplied goods to *Elizabeth S.* to the amount of 16*l.*, and that in consideration of the premises and of the said sum being unpaid, the said *E. S.* afterwards promised to pay as soon as it was in her power; averment, that though it was afterwards in her power, she refused. The proof was, that the goods were supplied to her when she was a feme covert, living apart from her husband, and that she after his death promised to pay. Held, that as the price of the goods originally constituted a debt from the husband and not from the defendant, the ground of the supposed moral obligation, on which the assumpsit proceeded, was not properly set out in the declaration, and therefore the plaintiff could not recover. *Semble*, that a moral obligation is not in every case a sufficient consideration for a promise. *Littlefield, Executrix*, v. *Shee*, 2 B. & Ad. 811.

(*q*) *Boyd* v. *Siffkin*, 2 Camp. 326.

(*r*) B. N. P. 145.

(*s*) *Tucker* v. *Cracklin*, 2 Starkie's C. 385. So where a sailor declared for wages, and the average price of a negro slave, due to him in consideration of service during a certain voyage, to wit, "A voyage from London to the Coast of Africa, and from thence to the West Indies," and in the articles it was described as "A voyage from London to the Coast

Variance.—Substance and legal effect.

It is in all cases sufficient to prove the promise alleged according to the *substance* and *legal effect* of the allegation. Where the declaration alleged an agreement to purchase eight tons of hemp under a *videlicet*, and the contract proved was for the purchase of *about* eight tons; and it also appeared that after the contract the hemp had been weighed, and amounted to eight tons, it was held that the variance was not material, for when the weight had been ascertained, the contract was in effect for eight tons (*t*).

Time, place, magnitude, &c.

A variance as to the time and place of the contract is not material, unless they be made part of the description of a written instrument (*u*). But where a particular sum, magnitude or quantity, is part of the contract, and the allegation is material, it must be proved as laid, though it be averred under a *videlicet*. Thus, where the defendant averred that the plaintiff held certain lands of him as his tenant, at a certain rent, to wit, at 110*l.* rent, payable half-yearly; upon *non-tenet* pleaded, it appeared that the land had been let by a written contract, at 15*s.* per acre, and that the whole amounted to 111*l.*; the variance was held to be material (*x*).

of Africa, from thence to the West Indies or America, and afterwards to London in Great Britain, or to some delivering port in Europe," the variance was held to be fatal, notwithstanding the *scilicet*. *White* v. *Wilson*, 2 B. & P. 116. So a declaration which alleges a retainer to cause the plaintiff's ship to proceed to Gottenburgh, in order that she might afterwards proceed to Petersburgh, is not proved by evidence of a retainer to cause the ship to proceed to Gottenburgh, and afterwards, under certain conditions, to Petersburgh. *Lopez* v. *De Tastet*, 1 B. & B. 538. In the case of *Frith* v. *Gray*, 4 T. R. 501, n., in an action for not building the plaintiff a booth at a horse-race to be run on Barnet Common, in the county of Middlesex, it was proved that the whole of Barnet Common was in the county of Hertford. But Lord Mansfield and the rest of the Court, on a motion for a new trial on the ground of variance, held that as it was perfectly immaterial whether Barnet Common was in Middlesex or not, those words might be rejected as surplusage: *tam. qu.* A warranty to buy a horse at a certain price, *scil.* 86*l.* 5*s.*, is not supported by evidence of a warranty upon the purchase of two horses jointly for the sum of 60 guineas. *Hart* v. *Davis*, N. P. Dec. 1796.

(*t*) *Gladstone* v. *Neale*, 13 East, 409. So where the alleged promise was to deliver stock on the 27th of February, but the contract proved was to deliver stock on the *settling day*, which at the time was fixed for and understood by the parties to mean the 27th of February, it was held that the proof was sufficient, the contract proved being in substance the same with that alleged. *Wilks* v. *Gordon*, 2 B. & A. 335. So an allegation of a contract for the delivery of gum-senegal is supported by evidence of a contract for the delivery of rough gum-senegal, coupled with evidence that all gum-senegal on its arrival in this country is called rough. *Silver* v. *Heseltine*, 1 Chitty's R. 39; vide *infra*, 63, note (*z*).

(*u*) Where the promise was laid on the 24th of March, and to a plea of tender, the plaintiff replied a bill filed on the 12th of February; upon the objection being taken, the Court held that the day was alleged merely for form, and that the plaintiff would not have been confined to it in evidence; but, that if it had been the case of a note it would have been different, since then the day would have been an essential part of the agreement (*Matthews* v. *Spicer*, Str. 806); and *semble*, not even then, unless it had amounted to a misdescription of the instrument, by alleging that it bore date on such a day. Where an action was brought on a note dated 1704, and the replication alleged a bill filed in 1713, and that the cause of action arose within six years, it was held to be a departure, because the day was material, and judgment was arrested. *Stafford* v. *Farrer*, cited Stra. 22.

(*x*) *Brown* v. *Sayer*, 4 Taunt. 320. Mansfield, C. J. observed, that the record would certainly be evidence as to the amount of the rent between the same parties in another action. So where the plaintiff alleged that he had agreed to sell, and that the defendant had agreed to buy, certain goods and merchandises, to wit, 328 chests and 30 half-chests of oranges and lemons, at and for a certain price, to wit, the price of 623*l.* 3*s.*, and the contract proved was for 308 chests and 30 half-chests of China oranges, and 20 chests of lemons; it was held to be a fatal variance. *Crispin* v. *Williamson*, 1 Moore, 547. In an action for not retaining the plaintiff as a servant at a yearly salary, the declaration averred the agreement to be to pay 250*l.* per annum for the service; it was held to be necessary to prove the specific sum as alleged, though it was laid under a *videlicet*. *Preston* v. *Butcher*,

Variance.

And even where it is unnecessary to allege the precise sum, quantity or magnitude, yet if it be alleged without a *videlicit*, precise proof will, it seems, be necessary. Thus where the declaration in an action on a warranty of soundness on the sale of sheep, alleged the consideration for the purchase to be 54*l.* 11*s.* 6*d.*, and it turned out to be 54*l.* 19*s.* 6*d.*, the variance was held to be fatal (*y*).

So where the consideration was alleged to be the forbearance of 21*l.* 6*s.* without a *videlicet*, and the proof was of a forbearance of 20*l.* 18*s.*, the variance was held to be fatal (*z*).

But where the declaration alleged that *S. F.*, the father of the defendant, was indebted to the plaintiff in a certain sum, to wit, the sum of 26*l.* 13*s.* 6*d.*, being the unpaid balance of a larger sum, and that in consideration of the plaintiff's forbearance to sue for the recovery of the balance of 26*l.* 13*s.* 6*d.*, the defendant undertook to accept a bill for the amount of 26*l.* 13*s.* 6*d.*, and the balance really due was 26*l.*, it was held to be no variance; the payment of the balance being the consideration for the promise, the statement of a particular sum was unnecessary (*a*).

Legality.

It is essential that the agreement should be such as the law will sanction; if it be illegal or contrary to justice and sound policy, no action can be founded upon it (*b*).

Where the illegality is set forth upon the record, the objection may be taken either by demurrer or in arrest of judgment. Where it does not appear on the record, the defendant may show that the claim is in reality founded upon an illegal and noxious agreement. In some instances, however, the plaintiff's claim is even founded upon the illegality of the agreement; as, where he seeks to rescind an illegal contract, whilst it is executory, and recover the money which he has advanced under it (*c*).

1 Starkie's C. 3. So, in general, where the sum, quantity or magnitude, is material and traversable, the averment under a *scilicet* will not render it immaterial, so as to protect from a traverse, or to render precise proof unnecessary. See the observations of Lawrence, J., in *Grimwood* v. *Barrett*, 6 T. R. 463. *Johnson* v. *Pickett*, which was an action on the Statute of Usury, cited Ibid. S. P. *Pope* v. *Foster*, 4 T. R. 590, cited also by Lawrence, J. Also, *Symmons* v. *Knox*, 3 T. R. 65; 2 Will. Saund. 207.

(*y*) *Durstan* v. *Tatham*, cited in *Symmons* v. *Knox*, 3 T. R. 67; cited by Dampier, J., in *Arnfield* v. *Bate*, 3 M. & S. 175.

(*z*) *Arnfield* v. *Bate*, 3 M. & S. 175. In the case of *Laing* v. *Fidgeon*, 6 Taunt. 108, it was held that an allegation of a contract to deliver saddles to the plaintiff at a reasonable price, was supported by proof of an agreement to deliver saddles at 24*s.* and 26*s.*; and it seems, that if the declaration state the consideration to be certain reasonable reward, proof that a specific sum was agreed on, will not be material as to variance. *Bayley* v. *Trecker*, 2 N. R. 458.

(*a*) *Bray* v. *Freeman*, 2 Moore, 114.

(*b*) In conformity with the rule of civil law, *ex turpi causâ non oritur actio*, no action can be maintained if any part of the entire consideration (Cro. J. 103), or any branch or part of the matters promised, be so. T. Jones, 24.

(*c*) In general, where the demand arises out of any agreement which is illegal or immoral, or contrary to sound policy, the Courts will not lend their aid to enforce it. See *Jordaine* v. *Lashbrook*, 7 T. R. 601; *Cockshott* v. *Bennett*, 2 T. R. 763; and the cases cited; tit. MONEY HAD AND RECEIVED; MONEY PAID; *Aubert* v. *Maze*, 2 B. & P. 371. *Booth* v. *Hodgson*, 6 T. R. 405; *Mitchell* v. *Cockburne*, 2 H. B. 379. As where the consideration is a simoniacal presentation to a living (Cro. Car. 337. 353. 361), or the escape of a prisoner in execution. *Martin* v. *Blithman*, Yelv. 197, 1 Roll. R. 313. Where money has been advanced in furtherance of a joint illegal agreement, or received upon an executed illegal agreement (*see the cases under the count for money had and received*). So where the consideration is any act inconsistent with the party's duty as a sheriff or other public officer. *Morris* v. *Chapman*, T. Jones, 24. *Martin* v. *Blithman*, Gil. 197. So if the consideration be the sale of spirituous liquors, unless to the amount of 20*s.* at one time; 24 G. 2, c. 40; and the statute applies though the spirits be sold in a state mixed with other ingredients; as where grog is sold. *Gil-*

Condition precedent.

Where the promise is merely conditional, upon some precedent act to be performed by the plaintiff, the promise must be so alleged in the declaration,

pin v. *Kendle*, Devonshire Lent Ass. 1809; Sel. N. P. 61. It has been held, that this statute does not extend to a security given in payment for small quantities of spirituous liquors. *Spencer* v. *Smith*, 3 Camp. 9; *contrà Scott* v. *Gilmore*, 3 Taunt. 226. The statute is not confined to sales to the consumer. *Bennyatt* v. *Hutchinson*, 5 B. & A. 241; overruling, as it seems, *Jackson* v. *Attrill*. Peake's C. 40. So, in general, agreements against the principles of sound policy are void. As, for instance, all agreements for the sale of public offices; or that one person shall hold an office of trust for another. *Parsons* v. *Thomson*, 1 H. B. 322. *Blackford et al.* v. *Preston*, 8 T. R. 89. *Layng* v. *Payne*, Willes, 571; 3 T. R. 19; 2 Wills. 133. *Garforth* v. *Fearon*, 1 H. B. 327; and see the stat. 12 R. 2, c. 2; 5 & 6 Ed. 6, c. 15. So, all agreements are illegal and void which tend to the obstruction or hindrance of public justice: as to prevent the due examination of a bankrupt by the commissioners. *Perot* v. *Wallace*, 3 T. R. 17. To omit to call the defendant up to receive judgment for a misdemeanor. *Pool* v. *Bousfield*, 1 Camp. C. 55. So, all agreements in restraint of trade are illegal; but an agreement not to use a trade in a particular place is legal. Cro. J. 596. *Bunn* v. *Guy*, 4 East, 190. So is a general agreement among those who use a particular trade to establish a general lien. *Hickman* v. *Shawcross*, 6 T. R. 14. It is also a general rule that fraud will vitiate a contract: for illustrations of this position, see tit. BILLS OF EXCHANGE.—FRAUD.—MONEY HAD AND RECEIVED.

Thus, any secret agreement or stipulation, or compositions with insolvents, by means of which one creditor seeks to obtain an unfair advantage, are void. *Cockshott* v. *Bennett*, 2 T. R. 763. *Leicester* v. *Rose*, 4 East, 372. *Stocke* v. *Madder*, 1 B. & P. 286. *Thomas* v. *Courtnay*, 1 B. & A. 1; or by which any unfair advantage may be obtained over a third person (*Jackson* v. *Duchaire*, 3 T. R. 551. *Pidcock* v. *Bishop*, 3 B. & C. 605), is void. So also no action will lie in furtherance of any agreement whatsoever of a vicious or immoral tendency. As if lodgings be let for an illegal purpose. *Crisp* v. *Churchill*, 1 B. & P. 340, 1, n. *Girardy* v. *Richardson*, Ib. As prostitution, Ib. Or where the plaintiff lodges unfortunate women and partakes of the profits. *Howard* v. *Hodges*, *cor.* Ld. Kenyon, C. J. Dec. 2, 1796. Nor for the price of immoral, libellous, or indecent prints, per Lawrence, J., 4 Esp. C. 97. It seems, however, that though clothes or lodgings are supplied to a prostitute, the mere knowledge on the part of the plaintiff of her situation and circumstances will not exclude his right of action, unless they were directly supplied for that purpose; or under an agreement or expectation, at least, that he should be paid out of the illegal profits. *Bowry* v. *Bennett*, 1 Camp. 348. It was held that a washerwoman might recover for the washing of expensive clothes and dresses, though it was obvious that the plaintiff must have known that they were to be used for improper purposes. Buller, J. observed, "This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used for an improper purpose, and which were not." *Lloyd* v. *Johnson*, 1 B. & P. 341; and see tit. MONEY HAD AND RECEIVED.

Some of the decisions upon this head have conflicted, not so much in consequence of any doubt upon general principles, as of the difficulty in applying them. The general principle and foundation of them all is this, that the law will not lend its aid in furtherance of an illegal or immoral transaction, or of any contract which is in general inconsistent with sound policy; but that, on the contrary, it will interfere for the purpose of preventing the execution of an illegal agreement, and of furthering the enactments of any prohibitory or remedial statute. The application of this principle is strongly exemplified in the case of the action for money had and received, where the law prohibits or enforces the recovery of the money, just as the prohibition or enforcement will further the object of the legislature. If the money has been paid upon an illegal agreement which remains *executory* between the parties, the law enforces the recovery of the money, because it thereby prevents a violation of the law by carrying the illegal agreement into effect; it affords the party a *locus pœnitentiæ*, and encourages him to recede from the illegal contract before it is too late. Where the money has been paid by one who was the object of the law's protection, and who is not equally culpable with the defendant who has received the money, the Courts allow it to be recovered, although the agreement has been carried into effect, since the object of the statute was to protect the plaintiff. But where both parties are equally implicated in guilt, and the illegal contract has been carried into effect, the law denies its aid, for both parties are equally guilty, and equally undeserving of the aid of the law, and the best policy is to favour neither. (See *Lacaussade* v. *White*, 7 T. R. 535, *contrà*; but this case has often been denied.) The principal difficulty has arisen where a claim has been made by one partner in an illegal transaction against another. It

or the variance would be fatal. Where the promise depends upon the per- Condition precedent.

has been allowed on all hands, that where one partner has paid money for another in an illegal transaction, no action can be maintained, without evidence of an express request made by the defendant to the plaintiff to pay the money, since no implied assumpsit to pay the money can arise out of an illegal transaction; where such request has been made, many learned Judges have been of opinion that the partner or agent in the illegal transaction who paid the money, might rely on the express assumpsit, and that he had no more concern with the illegal transaction itself in the course of which the money was paid, than if a mere stranger had paid it at the defendant's request; and that therefore where the illegal object was merely *malum prohibitum*, the plaintiff was entitled to recover. In other and later instances very learned Judges have held, that a partner in such an illegal transaction, who had paid money even at the express request of his co-partner, could not recover, since his claim is mixed up and contaminated with the illegal agreement itself, and cannot be separated from it; that the distinction founded on an express request is untenable, because in every case of such a partnership the jury would be warranted in finding an assent to the payment; and lastly, that the distinction between *malum prohibitum* and *malum in se* is not a sound one. It is indeed a distinction very difficult to be supported; every act which is immoral, must, it should seem, be *malum in se*, and it can scarcely be denied that the wilful violation of any positive law is not more or less immoral. A man may in fact be more guilty in a moral point of view in doing that which is usually termed a mere *malum prohibitum*, than in committing that which is *malum in se*. The destruction of the current coin of the realm to the prejudice of the whole community is merely *malum prohibitum*, if there be any virtue in the distinction; yet surely any act tending to this prejudice is more mischievous and more immoral than the telling a lie, which is *malum in se*. In reality, an act is immoral, independently of any prohibitory law, in proportion to the evil which is likely to result from it; in a moral point of view, every act from which evil is likely to flow is *malum in se*, and the abstract immorality does not depend on any positive prohibition. The broad, general, and intelligible test for the decision of these cases, seems to depend upon the question, whether the sustaining such actions would encourage and support illegal or immoral contracts, or whether the immorality be not so far out of the question that no rule or principle of sound policy is violated in enforcing a contract which in conscience ought to be performed? If money be advanced in order to effectuate a criminal purpose, and be applied in furtherance of that object, a Court, in lending its aid to the recovery of that money, would be sanctioning and consummating a contract founded in criminality; the affording legal protection to the lender would encourage the affording of aid and supplies for such purposes in future, and in consequence encourage the committing of the offence itself.

A party who lends his aid to the commission of an offence is himself criminal in point of law as well as morals. If a man were to advance money to another to purchase a weapon for the committing of treason or murder, would he not at least be guilty of a misprision of treason or felony? In such cases, and where the money is so applied, the plaintiff's claim is tainted with criminality, and he seeks to recover through the medium of an illegal transaction. It can make no difference in principle whether the money was advanced by a partner, or by a stranger, provided the criminal object was known and intended, or whether the contract was express or implied. Upon the same principle of policy, the law, in many instances, permits money supplied for an illegal purpose to be recovered before the object has been executed; for it is the policy of the law to assist and encourage parties in receding from illegal projects. Where money has been paid in execution of an illegal contract to the agent, whose principal is a *particeps criminis*, the principal, it seems, ought to recover it; the party who paid it to the agent is not entitled to it, since it has been paid in consummation of an executed illegal contract, and it would be against conscience that the agent should be allowed to retain it; it is the money of the principal, and the case seems to be the same in effect as if the principal had received the money with his own hands, and then delivered it to the agent. He does not claim as from the agent, through the medium of an illegal contract: his title arises immediately from the act of the agent in receiving the money to his use; and therefore the case differs widely from that of money knowingly lent for an unlawful purpose, where the illegal object is immediately connected with the lending, which is the consideration for the promise.

The case of *Cannan* v. *Bryce*, 3 B. & A. 179, seems to remove the doubts formerly entertained upon questions of this nature, vid. *infra*, 77–93.

For further illustration of the principles above adverted to, it may be proper to refer to the following decisions. Where the plaintiff received into his employment the defendant, a person of competent but inferior skill in the plaintiff's profession, upon a stipulation that he might discharge him upon three months' notice, and the

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formance of a condition precedent, the plaintiff either alleges perform-

defendant covenanted in case of dismissal not to practise within 100 miles, it was held that the contract was one which contained a restraint on the defendant in respect of his trade far larger than was necessary for the protection of the plaintiff in the enjoyment of his, and could not therefore form the subject of an action. *Horner* v. *Graves*, 7 Bing. 735. So where the consideration of an agreement, by which a party undertook to work exclusively for another, was wholly without adequate consideration, and placed him entirely at the mercy of the latter; and a promissory note, given by the former for breaches of the agreement on his part, cannot be set off against his claim for work performed by him before he became bankrupt, in an action by his assignees, such note being void for want of consideration. *Young* v. *Timmins*, 1 Cr. & J. 330, and 1 Tyrw. 226. Where three persons carrying on a similar trade, and vending their manufactures about the country, entered into an agreement for their mutual benefit, to confine themselves to certain districts, and that neither should purchase certain articles at or beyond a certain price, and that if any other persons should set up the same trade, and oppose them, that then they would meet together, and enter into such mutual agreement as should be beneficial to their mutual interests, it being their intention not to do any acts prejudicial, but to aid and assist each other in the said trade to the utmost of their power; held that such agreement not operating as a general restraint of trade, was valid, and that there was on the face of it a sufficient consideration for the partial restraint it contemplated. *Wickens* v. *Evans*, 3 Y. & J. 318; and see *Davies* v. *Mant*, 5 East, 120. An agreement, reciting that the plaintiff was possessed of the means of furnishing evidence enabling the defendant to recover certain sums, of which it was alleged that he had been defrauded, and stipulating that he should use his utmost means and influence for procuring evidence to substantiate the defendant's claims, and that he should receive a certain proportion of the amount recovered by his means; was held to be illegal. *Stanley* v. *Jones*, 7 Bing. 369, and 5 M. & P. 193. An agreement between two sons to convey and assign, the one to the other, a moiety of all such real or personal estate as they should respectively derive under their father's will, so that each should take an equal moiety, and that in such division all sums, &c. received in his life-time as advancement should be taken into account, was held to be valid. *Wethered* v. *Wethered*, 2 Sim. 183. So was an agreement between two parties having expectancies from a third party, to divide equally what he might leave them respectively. *Harwood* v. *Tooke*, 2 Sim. 192. Where the plaintiff had purchased the certificates or obligations of a revolted colony of a foreign State, assuming to be an independent State, but not recognised by the Government of this country, the defendants representing that they had entered into a contract for the loan, and expected it would bear a premium; held, that independently of any question of fraud, the purchase being founded on a contract which the Court upon grounds of public policy could not sanction, it could not relieve the plaintiff as to the instalments he had paid; held also, that as it did not appear that the payments of the interest on such instruments were to be paid in this country, the stipulation for six per cent. interest was not usurious. *Thompson* v. *Powles*, 2 Sim. 195. A publican cannot recover for beer, &c. furnished to third persons, by order of a party who has been allowed to become previously intoxicated; the permitting persons to become so in his house being illegal, he cannot take advantage of an offence which he has been instrumental to. *Brandon* v. *Old*, 3 C. & P. 440. Where, pending an action, a party undertook to pay the plaintiff's attorney his costs, in consideration of the plaintiff's, with his attorney's consent, giving an authority to the defendant to pay over the debt sued for to a creditor of the plaintiff; it was held, that the action could not be supported. *Taylor* v. *Watson*, 4 M. & Ry. 259. Where the plaintiff, a creditor, having seized goods in execution, afterwards at a meeting of creditors declared he would not come into a composition nor withdraw the execution, without security for a certain part of his debt, to which a third party consented, and gave a guarantee, and he thereupon signed the deed; held that such security was *fraudulent* as against the rest of the creditors, and void. *Colman* v. *Waller*, 3 Y. & J. 212. Upon a previous agreement with a third person for a benefit by supplying coals to a stated amount, if the plaintiff would sign an agreement for a composition with his debtor for 10*s.* in the pound, and for which the defendant afterwards signed a joint and several note, although the coals were supplied, and no other creditor was acquainted with or influenced by the transaction, it was held that the plaintiff could not recover on the note. *Knight* v. *Hunt*, 5 Bing. 432. Where the insolvent having been opposed by a creditor was remanded to a future day, and in the meantime his attorney undertook, in consideration of the creditor's withdrawing his opposition, that he should be appointed sole assignee, and receive a certain sum within a fixed time, held that such agreement being contrary to the policy of the Insolvent Acts, no action could be maintained thereon. *Murray* v. *Reeves*, 8 B. & C. 421. Where a party elected died before taking his seat, held that the representation having become

ance, or alleges some matter in excuse for the non-performance (*d*); and the proof varies accordingly. And where the agreement contains mutual conditions or covenants to be performed at the same time, the plaintiff must either aver performance, or a readiness to perform his part of the contract (*e*). Condition precedent.

vacant on his death, the plaintiff, a publican, could not recover for beer, &c. supplied to voters on a canvass by a third party on behalf of a candidate at the following election, although the latter neither ordered nor was shown to have knowledge of the treating; held also that the Treating Act was not confined merely to successful candidates. *Ward* v. *Nanney*, 3 C. & P. 399. Where a contract for the purchase of a heifer was made on a Sunday, but the defendant retained possession, and subsequently promised payment, held that the plaintiff was entitled to recover for the value on a *quantum meruit*, though not for the price agreed on upon the bargain completed on Sunday. *Williams* v. *Paul*, 6 Bing. 653. Where the lessee of premises covenanted that he would indemnify the parish against all costs whatsoever, for or by reason of his taking an apprentice or servant, who should thereby gain a settlement, or become chargeable to the parish; the agreement was held on demurrer to be valid. *Walsh* v. *Fussell*, 6 Bing. 163. The forbearing to petition against the return of a sitting Member on the ground of bribery, is an illegal consideration for a promise to pay money. *Coppocke* v. *Bower*, 4 M. & W. 361. The agreement, although unstamped, was admitted in evidence. In assumpsit on an agreement to pay a sum in consideration of the plaintiff using his influence, and securing an appointment to the defendant; plea (*inter alia*) that the plaintiff had procured the appointment through fraudulent representation; it was held that the issue was whether the representation was false to the knowledge of the plaintiff at the time. *Neely* v. *Locke*, 8 C. & P. 527.

(*d*) *Ughtred's Case*, 7 Rep. 10, *a*. 1 T. R. 638. Doug. 600. Com. Dig. PLEADER, c. 51. Chitty on Pleading, 309. An allegation of the actual performance of a condition precedent, or of readiness to perform a condition conusant, is not satisfied by evidence of a discharge, or excuse for non-performance by the act or omission of the defendant. Ib. And see the observations of the Court in *Heard* v. *Wadham*, 1 East, 619. *Jones* v. *Berkeley*, Doug. 659. *Kingston* v. *Preston*, cited Ib. *Rawson* v. *Johnson*, 1 East, 203. P. C. *Berry* v. *Deighton*, K. B. Mich. 1827. Where, in an action on a breach of a contract to convey on board of plaintiff's ship, a *boat* not exceeding certain dimensions, which when tendered proved to be a *decked boat* within that size, which the plaintiff refused to receive unless the defendant would consent to remove the deck, as obstructing the navigation of the ship; held that evidence of its being always usual to take off the deck of such boats in stowing them, was properly admitted, and that the plaintiff having declined to permit it, could not recover for breach of the contract. *Haynes* v. *Holliday*, 7 Bing. 587.

(*e*) See 1 East, 203. The question, what will constitute a condition precedent, is purely a consideration of law, arising upon the inspection and construction of the agreement itself. (See 1 Will. Saund. 320, *a*.) Since, however, the omission to aver the performance of a condition precedent is a ground of nonsuit at the trial, when it appears that the defendant has not undertaken or covenanted absolutely, but only upon the performance of some condition by the plaintiff, the performance of which he has not alleged, it may be proper to observe, in the first place, that covenants and agreements are to be construed according to the intention and meaning of the parties, to be collected from the whole instrument. *Porter* v. *Sheppard*, 6 T. R. 668. *Hotham* v. *East India Company*, 1 T. R. 645. *Campbell* v. *Jones*, 6 T. R. 571. *Morton* v. *Lamb*, 7 T. R. 130. And see above, note (*d*).

If a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen before the thing which is the consideration for the payment of the money, or the doing of any other thing, an action may be brought for the breach before performance, since it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. 1 Will. Saund. 320, *a*. And so it is where no time is fixed for the performance of that which is the consideration for the payment of the money or other act. Ibid.; and see *Campbell* v. *Jones*, 6 T. R. 572; *Thorpe* v. *Thorpe*, 1 Salk. 171; 1 Ld. Raym. 665; 1 Lut. 250; 12 Mod. 461; 1 Vent. 177; *Peters* v. *Opie*, 1 Salk. 113; 2 H. B. 389. But where the consideration is to precede the act covenanted for, it is a condition precedent. Ibid.; and *Boon* v. *Eyre*, 1 H. B. 273; 1 Salk. 171; 1 Ld. Raym. 665; 12 Mod. 462; 1 Lutw. 251; Dyer, 76, *a*. Where a covenant goes to part only of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of such covenant, without averring performance. *Boon* v. *Eyre*, 1 H. B. 273,

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To satisfy an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, which he refused, the plaintiff must prove an actual tender and refusal; or that he waited at the Bank on the day appointed for the tranfer, until the close of the transfer books, the latest moment when the transfer could have been effected (*f*).

Where the plaintiff alleged, in an action for not completing the purchase of certain shares, that he was *lawfully entitled* to so many shares, and it appeared from the act of parliament which created the shares that no legal

n. *a*. *Campbell* v. *Jones*, 6 T. R. 570; 1 Will. Saund. 310, *b*. But where the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, and performance must be averred. *Duke of St. Albans* v. *Shore*, 1 H. B. 270. *Large* v. *Cheshire*, 1 Vent. 147. Where the two acts are to be done at the *same time*, they are also mutual conditions; as, where *A*. covenants to convey an estate to *B*. on the day specified, and in consideration thereof *B*. covenants to pay *A*. a sum of money on the same day. 1 Salk. 112, 113. 171. *Thorpe* v. *Thorpe*, 2 Salk. 623; 1 Will. Saund. 320, *c*. and the cases there cited. Where upon an arrangement of cross actions it was agreed, *inter alia*, that the defendant, the attorney of one party, should give his note for —— *l*. as a collateral security for the amount to be paid to the other, and that the latter should give up all the effects which he had of the former into the defendant's hands; which note was given immediately after the signing of the agreement; it was held that the delivery of the goods was not a condition precedent to the right to recover on the note. *Irving* v. *King*, 4 C. & P. 409. Where upon a building contract, the defendant covenanted to pay a further sum, provided the pavement were laid and other work completed before a certain day, held that the non-completion of the pavement by that time, although occasioned by bad weather, defeated the right to such further sum. *Maryon* v. *Carter*, 4 C. & P. 205. By an agreement with a foreign mining company the plaintiff was engaged as superintendent for three years, at a salary increasing yearly, with a proviso for a twelvemonth's notice of dismissal, or a twelvemonth's salary, and the reasonable expenses of his return; and if he stayed the three years, he should also be entitled to all reasonable expenses of the return to his family; the defendant dismissed him before the expiration of the second year, without notice, or paying the year's salary or expenses; held that he could only recover such damages as he would have received if notice had been given, and not for the salary which would subsequently have accrued, or the expenses of the return to his family. *French* v. *Brookes*, 6 Bing. 354. Where the defendant subscribed and paid a deposit for a "New History of Scotland, by," &c., and the work when delivered appeared to be only a translation of Buchanan's work, with notes and continuation by *J. H.*, which the defendant had insisted upon the plaintiff's taking back; held that the latter could not recover the price. *Paton* v. *Duncan*, 3 C. & P. 336. The plaintiff consented to a composition with other creditors, but the trustees afterwards refused to allow him to sign the deed, alleging that his claim was usurious; held that he was remitted to his original legal rights. *Garrard* v. *Woolner*, 4 C. & P. 471. *R*. agreed to supply *W*. with straw, to be delivered at *W*.'s premises at the rate of three loads in a fortnight, during a specified time, and *W*. agreed "to pay *R*. 33 *s*. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time, *W*. refused to pay for the last load delivered, and insisted on always keeping one load in arrear; held, that according to the true effect of the agreement, each load was to be paid for on delivery; and that on *W*.'s refusal to pay for them, *R*. was not bound to send any more. *Withers* v. *Reynolds*, 2 B. & Ad. 882. Upon a stipulation in a charter-party, that if the ship did not arrive at the port of loading on or before ——, unless prevented by stress of weather or other unavoidable impediment, the freighter should not be obliged to ship a cargo; held, that the captain was only bound to use ordinary diligence, and that if the arrival of the vessel had been delayed by impediments not to be overcome without unusual exertion, the defendant was liable for a breach of the covenant to ship a cargo. *Granger* v. *Dent*, 1 Mood. & M. C. 475. Where the terms of the contract of the charter-party (dated June 30) were, that the vessel should be ready "forthwith," and not being so on the 4th of July, the plaintiffs renounced the contract, and sued the defendants for the default; held, that having regard to the state of the vessel, which was known to both parties, the question was, whether the vessel could, with reasonable and proper diligence, have been got ready; and if the jury thought that it could not have been reasonably expected to be so, that the defendants were entitled to the verdict. *Simpson* v. *Henderson*, 1 Mood. & M. C. 300.

(*f*) *Bordenave* v. *Gregory*, 5 East, 107.

title had been vested in him, it was held to be a ground of nonsuit (*g*). Where a mere duty is to be paid on request, the bringing of the action is a sufficient request; but if the defendant promise to pay a collateral sum on request, an actual request must be alleged and proved. As where the defendant undertakes to pay 10*l.* on request if he does not perform an award (*h*).

Indebitatus assumpsit.

The general count of *indebitatus assumpsit* is founded upon an implied promise to pay a certain debt or duty, upon a consideration, executed at the instance and request of the defendant, or upon a legal obligation arising from the particular circumstances of the case (*i*). The plaintiff must prove, 1st, a consideration executed; 2dly, at the *request* of the defendant. The necessity of proving a request, or that which is equivalent to it, or is evidence from which a request may be inferred, follows from the principle of law, that no one can constitute another person his debtor without his permission; and consequently it is not sufficient that the plaintiff should have rendered services to the defendant (*k*), without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. In order to show this it is essential, in every declaration in *assumpsit*, which is founded upon a past consideration, to allege it to have been done at the special instance and request of the defendant (*l*); and, in evidence, it is necessary in some instances to prove an express request by the defendant, and in others, to prove circumstances from which a previous request may be inferred (*m*) either in fact or in law.

Proof of actual request.

If the service be not for the benefit of the defendant himself, evidence of an express previous request is essential, and a subsequent promise is not sufficient. *A.*'s servant being arrested, *B.*, the friend of *A.*, bailed him, and *A.* afterwards undertook to indemnify *B.*; and it was held that this promise was not binding, because the consideration was past; but that it would have been otherwise had *A.* previously requested *B.* to bail his servant (*n*).

But if the defendant voluntarily derive benefit from the service, that will be *evidence* of a previous request: as, where the plaintiff has paid a sum of money for the defendant, or bought goods for him without his knowledge or consent, and he afterwards assents to the payment or uses the goods (*o*).

Request when presumed.

Where the defendant was under a legal obligation to procure the service to be done, a subsequent promise to pay will be evidence of a previous request. And therefore, where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden to be bind-

From legal obligation.

(*g*) *Latham* v. *Barber*, 6 T. R. 67.

(*h*) B. N. P. 151; 1 Saund. 33; 1 Str. 68.

(*i*) See B. N. P. 129; *Bell* v. *Burrows*, 5 Geo. 3, cited Ibid. *Indebitatus assumpsit* will not lie in any case where debt would not lie; *Hurd's Case*, Salk. 23. But it will not lie in all cases where debt would lie; it is not maintainable on a specialty. But it will lie on a foreign judgment. *Plaistow Van-Uxem*, Doug. 5, n, and on *an Irish* judgment. *Vaughan* v. *Plunkett*, 3 Taunt. 85, n. *Harris* v. *Saunders*, 4 B. & C. 411. *Crawford* v. *Whittal*, Doug. 4 n.

(*k*) See *Birks* v. *Trippett*, Saund., as to the distinction between a duty and a collateral undertaking. *Back* v. *Owen*, 5 T. R.

(*l*) *Lamplugh* v. *Braithwaite*, 1 Roll. Ab. 11. *Bosden* v. *Thin*, Cro. J. 18; 1 Will. Saund 264. n. (1); Dyer, 272; Hob. 106. *Hayes* v. *Warren*, Str. 933.

(*m*) *A.* requests *B.* to endeavour to procure a pardon for *A.*; if, after endeavour made, *A.* in consideration thereof, promises to pay *B.* a certain sum, it is a good consideration. 1 Roll. Ab. 11, pl. 6.

(*n*) Dyer, 272, *a.*; 1 Roll. Ab. 11, pl. 2, 3.

(*o*) Assumpsit lies by the owner of a market for stallage, without showing any contract with the occupier. *Mayor, &c. of Newport* v. *Saunders*, 3 B. & Ad. 411.

Request.—Legal obligation.

ing (*p*). But a mere moral obligation is insufficient without a previous request (*q*), or a subsequent express promise (*r*), in respect of a debt due in point of natural justice, but which, for technical reasons, cannot otherwise be enforced. A master is not liable on an implied *assumpsit* to pay for medical attendance on his servant (*s*). And the overseers of a parish to which a pauper belongs are not liable, without an express promise, to reimburse the overseers of another parish, for medicines supplied to the pauper during his casual residence there (*t*). Where the obligation is a *legal one*, the parties who ought to discharge it are liable, though there be no previous request or subsequent promise. Thus the overseers of a parish are liable, not only in respect of necessary medical attendance on a casual pauper accidentally disabled within the parish, but even for such attendance in the pauper's own parish, to which they have improperly removed the pauper (*u*).

(*p*) *Watson* v. *Turner*, B. N. P. 129. 147. 281. See also *Wing* v. *Mill*, 1 B. & A. 105. And where a casual pauper accidentally fractured his leg, and was attended by a surgeon who attended the parish poor, with the knowledge of the overseer of the poor, who visited the pauper there, it was held that a request by the overseer might be presumed. *Lamb* v. *Bunce*, 4 M. & S. 275. An accident having happened to one of the defendant's children, who were residing at a distant place under the care of servants, the latter called in the plaintiff, an apothecary, to attend; held, that the father was liable, although he never knew of the plaintiff's attendance, and the accident was owing to the servant's negligence; held also, that he was liable for attendance on one of his servants, in illness brought on in consequence of the service, but not for illness occasioned by the servant's own imprudence, unless the master had been informed of it, and acquiesced. *Cooper* v. *Phillips*, 4 C. & P. 581. An executor having assets is liable, upon an implied contract, to pay suitable funeral expenses, although ordered by a third party, it not appearing that they were furnished upon his credit. *Rogers* v. *Price*, 3 Y. & J. 28. And see *Tugwell* v. *Hayman*, 3 Camp. C. 298.

(*q*) See the note 3 B. & P. 249, and the cases there collected.

(*r*) A feme covert having an estate settled to her separate use, gave a bond for repayment, by her executors, of money advanced at her request, on security of that bond, to her son-in-law; after her husband's death, she wrote, promising that her executors should settle the bond; and it was held that the executors were bound. *Lee* v. *Muggeridge*, 5 Taunt. 36. This, with many other cases, falls within a very general principle, that wherever a debt in point of natural justice is due, but cannot be legally claimed by reason of the intervention of some positive law, the consideration will support an express promise: for a party may always waive a provision for his own benefit. The principle, therefore, applies not only in the above case, where the legal claim was impeded by coverture, but also where it is prevented by the Statute of Usury (*Barnes* v. *Heady*, 2 Taunt. 184); or of Limitations (*Hyeling* v. *Hastings*, Ld. Raym. 589; see tit. LIMITATIONS); or by the defendant's infancy (*Southerton* v. *Whitlock*, 2 Str. 690, & *infra*, tit. INFANCY); or by an insolvent act (*Mucklow* v. *St. George*, 4 Taunt. 613); or by the Statute of Bankruptcy (*Fleming* v. *Haynes*, 1 Starkie's C. 370; *Linbuy* v. *Weightman*, 5 Esp. C. 188); or where the holder of a bill of exchange omits to give due notice of the dishonour to the drawee. (*Lundie* v. *Robertson*, 7 East, 231. *Roper* v. *Alder*, 6 East, 10, n.) In such cases, however, it is a general essential that the promise should be distinct and unequivocal. Per Lord Ellenborough, in *Fleming* v. *Haynes*, 1 Starkie's C. 370. A promise made to pay an old debt discharged by an insolvent act, by instalments, without specifying the amount or time of payment, was held to be insufficient. *Mucklow* v. *St. George*, 4 Taunt. 613. And if the subsequent promise be conditional, it is incumbent on the plaintiff to show performance. *Besford* v. *Saunders*, 2 H. R. 116. By the stat. 6 Geo. 4, c. 16, s. 131, a certificated bankrupt is not liable on a subsequent promise, unless it be in writing. A subsequent promise will not revive a *void* security. *Cockshott* v. *Bennett*, 2 T. R. 763.

(*s*) *Wennall* v. *Adney*, 3 B. & P. 247. But see *Newby* v. *Wiltshire*, 2 Esp. C. 739; *Scarman* v. *Castel*, 1 Esp. C. 270.

(*t*) In *Atkins* v. *Banwell*, 1 East, 505, a pauper residing in the parish *A.* was relieved there, and supplied with medicines by the parish officers, and it was held that the officers of the parish *B.*, to which the pauper belonged, were not bound to repay the money so expended. And see *Tomlinson* v. *Bentall*, 5 B. & C. 738. *Gent* v. *Tompkins*, 5 B. & C. 746.

(*u*) *Tomlinson* v. *Bentall*, 5 B. & C. 738. Note, that after the removal, one of the defendants sent for the surgeon, who resided in the pauper's own parish, in order

Request.—Legal obligation.

Where goods are supplied to a feme covert living apart from her husband, without any fault of her own, suitable to her rank in life (*x*); or where the plaintiff, to save himself, pays money for the defendant, which the latter was in law bound to pay (*y*), no evidence of a previous request or subsequent promise is necessary (*z*). So in many instances, where the defendant has committed a *tort* with respect to the property of the plaintiff, the latter may *waive the tort*, and bring his action for goods sold and delivered, or for use and occupation, according to the circumstances of the case (*a*). In these cases no evidence, either of a previous request or subsequent promise, is necessary; for as soon as, in point of law, a debt certain is due from the defendant to the plaintiff, the law infers a promise on his part to pay it; whereas, in the other cases, either a previous request, or subsequent promise, or some evidence of assent, is essential to constitute a perfect legal duty.

Proof by special agreement.

When the terms of a special agreement have been performed so as to leave a mere simple debt or duty between the parties, the plaintiff may give the circumstances in evidence, and recover under a general count of *indebitatus assumpsit* (*b*). But in such case, if it appear that the work has been done under a written agreement, the plaintiff must produce and prove it, or he will be nonsuited; so if he produce it and it cannot be received in evidence for want of a proper stamp (*c*).

If goods are to be paid for at a specified time, an *indebitatus assumpsit* will lie when the time has expired (*d*). If goods are to be paid for by a bill at two months, although the acceptance of the bill be refused, the action of *indebitatus assumpsit* cannot be brought until the expiration of the time of credit, and then the action will lie (*f*). If a bill be given in payment for goods, and there be no agreement as to time, and the bill turn out to be worthless, an action may be commenced immediately (*g*). And it is suf-

that he might attend the pauper; but the Court seem to have decided the case wholly on the ground of legal obligation. See *R.* v. *Inhab. of St. James, Bury St. Edmunds*, 10 East, 25. In the case of *Gent* v. *Tompkins*, 5 B. & C. 746, the pauper being settled in *N.*, met with an accident in *W.*, and was attended by a surgeon of *W.*: the defendant, who was the overseer of *N.*, after a fortnight's attendance, called and desired of the surgeon (the plaintiff) that the pauper might continue to receive every attention, saying that he (the defendant) would see the plaintiff paid. The Court were of opinion that the overseers of *W.*, where the pauper met with the accident, and not those of *N.*, to which the pauper belonged, were liable in the first instance, but expressed a doubt whether the defendant might not be liable if, in consequence of his promise, the plaintiff continued to attend, and thought that this point ought to have been left to the jury; and on that ground granted a new trial.

(*x*) *Jenkins* v. *Tucker*, 1 H. B. 90. So for the funeral expenses of the wife. Ibid. *Secus*, where she leaves the house of her husband without necessity. *Horwood* v. *Heffer*, 3 Taunt. 421.

(*y*) Vide *infra*, 58.

(*z*) *Qu.* Whether in the former case the wife, and in the latter the plaintiff, may not be considered to be the agents of the defendant?

(*a*) Vide *infra*, 83.

(*b*) *Gordon* v. *Martin*, Fitzg. 303. B. N. P. 139; Gilb. Law of Evid. 191; Tri. per Pais, 399; Style, 461. But an *indebitatus assumpsit* does not lie on a collateral undertaking. *Mines* v. *Sculthorp*, Camp. C. 215, such as in guarantee.

(*c*) See *Brewer* v. *Palmer*, 3 Esp. C. 213, *cor.* Ld. Eldon. *Jeffery* v. *Walton*, 1 Starkie's C. 267; *supra*, 56.

(*d*) *Mussen* v. *Price*, 4 East, 147. Where the time of delivery is specified, the plaintiff having delivered part of the goods before the time, cannot recover the price of such part before the expiration of the time; for the contract is entire, and cannot be split. *Waddington* v. *Oliver*, 2 N. R. 61.

(*e*) *Dutton* v. *Solomonson*, 3 B. & P. 582.

(*f*) *Mussen* v. *Price*, 4 East, 75. 147. *Brooke* v. *White*, 1 N. R. 330. Lord Alvanley's *dictum*, 3 B. & P. 582, *contra*. See tit. GOODS SOLD AND DELIVERED.

(*g*) *Stedman* v. *Gooch*, 1 Esp. 5. *Puckford* v. *Maxwell*, 6 T. R. 52. *Owenson* v. *Morse*, 7 T. R. 64. A debtor is not dis-

Indebitatus assumpsit. —Special agreement.

ficient, if, from the memorandum, it appear that the bill was filed after the time when the credit expired (*h*).

If the plaintiff declare upon a special contract, as well as upon the general count, and fail in his proof upon the special count, but yet establish a special contract, the terms of which have been performed, he will still be entitled to recover on the general count, provided he would have been entitled to recover on that count if no special agreement had been laid in the declaration (*i*). If he declare upon a special agreement, and prove a special agreement which varies from that laid, and which still remains in force, the special performance or rescinding of the agreement not having raised a simple debt or duty, he cannot recover; for he cannot recover on the special count, on account of the variance; nor on the general count, since the terms of the special agreement have not been rescinded, or reduced by performance to a mere duty. In *Cooke* v. *Munstone* (*k*), the plaintiff declared for not delivering thirty-five chaldrons of *soil* or *breeze*, according to a special contract. It was proved that the contract was for the delivery of thirty-five chaldrons of *soil* (only), and that the plaintiff had paid 2*l.* 5*s.*, as earnest, and that it had not been delivered on account of a dispute between the parties as to the wharf from whence the soil should be loaded; and it was held that the plaintiff could not recover on the special count, on account of the variance, *soil* and *breeze* being distinct things; nor upon the count for money had and received, since the contract had never been rescinded (*l*).

Indebitatus assumpsit: effect of special contract.

Where the plaintiff proves a special agreement and work done, but not pursuant to such agreement, it is said that he shall recover upon the *quantum meruit*; for otherwise he would not be able to recover at all (*m*). As if, on a *quantum meruit* for work and labour, the plaintiff should prove that he had built a house for the defendant, though the defendant should prove that there was a special agreement about the building of it, *viz.* that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover on the *quantum meruit*, although such proof on the part of the defendant might be proper to lessen the quantum of damages (*n*).

charged by giving an unproductive cheque, though he has previously tendered cash. *Everett* v. *Collins*, 2 Camp. C. 505. Though the cheque was given by an agent of the buyer, who was at the time indebted to his principal in a larger amount. Ib.

(*h*) *Swancott* v. *Westgarth*, 4 East, 75. Vid. *infra*, tit. TIME.

(*i*) B. C. P. 139. *Harris* v. *Oke*, Winch. Summ. Ass. 1759. In Buller's C. P. 139, it is laid down, that if a man declare upon a special agreement, and likewise upon a *quantum meruit*, and upon the trial prove a special agreement, but different from what is laid, he cannot recover on either count; not on the first, because of the variance; nor on the second, because there was a special agreement; but in a subsequent part of the same paragraph it is intimated that the plaintiff ought to have been suffered to recover on the *indebitatus assumpsit* count, provided the terms of the special agreement had been performed.

(*k*) 1 N. R. 351.

(*l*) See tit. MONEY HAD AND RECEIVED, for the different cases in which a contract is to be considered as rescinded. See also *Towers* v. *Barret*, 1 T. R. 133. *Weston* v. *Downes*, Doug. 23. *Power* v. *Wells*, Cowp. 818. *Giles* v. *Edwards*, 7 T. R. 181. *Hunt* v. *Silk*, 5 East, 449. *Payne* v. *Bacomb*, Doug. 628.

(*m*) B. N. P. 139. Mr. *Keck's Case* at Oxon. 1744. But in such case it should be shown that the defendant has *voluntarily* derived some benefit from the work, for otherwise he would be made to pay for work which he never contracted for, and against his assent. See *Ellis* v. *Hamlin*, 3 Taunt. 55.

(*n*) It seems, however, to be clear, that the plaintiff is not entitled to recover on the *quantum meruit* or *quantum valebant*, where a specific sum or price has been agreed on. 2 Will. Saund. 122, *n.* 2. And as he may recover on the general *indebitatus assumpsit* as much as the work is worth, &c. the *quantum meruit* and *valebunt* counts are unnecessary.

Indebitatus assumpsit: effect of special contract.

Where the plaintiff, under a special agreement, has executed the work improperly, since he has not done that which he engaged to do, and which is the consideration of the plaintiff's promise to pay, it seems to be now settled (*o*) that the plaintiff must recover, if at all, upon the *quantum meruit*, and that he cannot recover more than the value of the work and materials to the defendant (*p*). And where the plaintiff has executed his work so ill that the defendant has derived no benefit from it, or none which exceeds in value the sum which he has paid, the plaintiff is not entitled to recover at all (*q*), even for the labour and materials.

Where a builder undertook a work of specified dimensions, and deviated from the specification, it was held that he could not recover on a *quantum meruit* for work and labour and materials (*r*). Where a special contract has been entered into for the performance of a work, according to a specification, and deviations are made by mutual consent, the plaintiff is entitled to recover according to the terms of the contract and specification, as far as they are applicable, and upon a *quantum meruit* as to the rest (*s*). A lessor contracted to pay his tenant, at a valuation, for certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months; no plan was agreed upon, and the lessée proceeded, after condition broken, with the assent of the lessor; and it was held, that the lessee might recover, as for work and labour, upon an implied promise, arising out of so many of the facts as were applicable to the new agreement (*t*). Upon an *indebitatus assumpsit* for board, schooling, and clothes, with a count on a *quantum meruit*, stating that, in consideration that the plaintiff had taken *J. W.* as a scholar into an academy kept by him, and that he had left it without giving due notice, the defendant promised to pay so much as the plaintiff reasonably deserved to have, it was held that the plaintiff was entitled to recover for one quarter beyond the time when *J. W.* left; a quarter's notice not having been given, according to the original terms of the contract (*u*).

Variance.

The plaintiff, in this form of action, may recover in respect of any number of different claims included in the same count, provided it be applicable to them. Thus, under a count alleging that the defendant was indebted to the plaintiff in the sum of 1,000*l.* for work and labour, goods sold and delivered, money had and received, &c., the plaintiff may recover in respect of any number of demands proved within the different descriptions (*x*). Under the same count he may recover money due from the defendant solely, and money due from him as surviving partner (*y*).

(*o*) *Basten* v. *Butter*, 7 East, 479. It had before been held that the remedy of the defendant was by a cross-action, and had been so ruled by Buller, J. in *Brown* v. *Davis*, Taunton Lent Ass. 1794, where the plaintiff had built a booth for the defendant on a race-course so ill that it fell down, and the defendant had paid part of the sum agreed for.

(*p*) But where this defence is intended to be set up, the defendant ought to give the plaintiff notice to that effect. *Basten* v. *Butter*, 17 East, 479.

(*q*) *Basten* v. *Butter*, 7 East, 473. *Ellis* v. *Hamlin*, 3 Taunt. 52; vid. *infra*, WORK AND LABOUR.

(*r*) *Ellis* v. *Hamlin*, 3 Taunt. 52.

(*s*) *Robson* v. *Godfrey*, 1 Starkie's C. 275. *Pepper* v. *Burland*, Peake's C. 103.

(*t*) *Burn* v. *Miller*, 4 Taunt. 745.

(*u*) *Eardley* v. *Price*, 2 N. R. 333. And see *Gandall* v. *Pontigny*, 1 Starkie's C. 198. *The African Company* v. *Langdon*, 15 Vin. Ab. tit. Master and Servant, G. Pl. 5, Ch. Pr. 221. And *Miles* v. *Solebay*, 2 Mod. 242.

(*x*) *Webber* v. *Tivil*, 2 Saund. 121.

(*y*) Ib. and *Richards* v. *Heather*, 1 B. & A. 29.

Money paid.

In order to sustain the count for *money paid*, laid out and expended for the use of another, the plaintiff must prove,

First. The payment of the money.

Secondly. At the request of the defendant, either express or implied (*z*).

Payment of the money.

The plaintiff must show an actual payment of money, or its equivalent, the mere giving a *security* for the payment is not sufficient. A surety for the defendant, who had been discharged under an insolvent debtors' Act, was obliged to give a bond and warrant of attorney as a new security for the debt; and it was held that he could not hold the defendant to bail as for money paid to his use (*a*).

So, where one of several joint makers of a bill gave the holder a bond, and then sued the rest for contribution, in an action for money paid, it was held that the action was not maintainable, no money having in fact been paid (*b*). And it has been held that the receipt of stock cannot be considered as the receipt of money, either upon an agreement to pay a per-centage on the receipt of money (*c*), or in an action for money had and received (*d*).

(*z*) Vide *supra*, 69. Where the plaintiff, a sheriff's officer, had been obliged to pay the debt and costs on an attachment against the sheriff for not putting in bail above, and the defendant, both before and after the sheriff had been fixed, had repeatedly promised to indemnify the plaintiff, and repay him the money expended; held, that to the extent of the debt it was money paid to the defendant's use. *White* v. *Leroux*, 1 M. & M. 347. The defendant received from *H.*, as a security for goods sold, a bill accepted without consideration by the plaintiff; *H.* afterwards paid for the goods, and required the bill to be delivered back, which the defendant refused to do, and afterwards indorsed it over to a third person, who sued and recovered the amount from the plaintiff; held, that the plaintiff was entitled to recover the amount from the defendant as for so much money paid for his benefit, but not for the costs of the action, which he ought not to have defended. *Bleaden* v. *Charles*, 7 Bing. 246. After an agreement by the inhabitants in vestry to prosecute a party for encroachments, a committee had been formed, who retained an attorney, and a judgment was obtained; the attorney having recovered the amount of his bill, and with costs of the action, against the plaintiff, one of the committee, it was held that he might recover contribution from the others as for money paid. *Holmes* v. *Williamson*, 6 M. & S. 158. Goods were consigned from India to London, the bill of lading expressed the freight to have been paid, the consignee indorsed the bill of lading for value, after which it was found that, through the default of the shipper, the freight had not been paid; held, that the shipowners could not detain the goods until payment of the freight from the assignees of the bill of lading, and that the brokers of the latter, paying the freight in order to obtain the goods, after instructions from their employers not to pay the freight, it having been paid in India, as they supposed, paid it in their own wrong, and could not recover it as money paid for their principals. *Howard* v. *Tucker*, 1 B. & Ad. 712. One who has been obliged to pay a joint debt, cannot recover a proportion from the rest of the share of one jointly liable who has become insolvent. *Brown* v. *Lee*, 6 B. & C. 689.

(*a*) *Taylor* v. *Higgins*, 3 East, 169.

(*b*) *Maxwell* v. *Jameson*, 2 B. & A. 51.

(*c*) *Jones* v. *Brindley*, 1 East, 1.

(*d*) *Nightingale* v. *Devismes*, 5 Burr. 2589. The cases of *Taylor* v. *Higgins*, and *Maxwell* v. *Jameson*, seem to over-rule that of *Barclay* v. *Gooch*, 2 Esp. C. 271; where the plaintiffs having become sureties for the defendant, and having been called upon after his bankruptcy to pay the money, gave their promissory note for the amount; and Lord Kenyon held, that as the club had consented to take the note as money in payment, it was to be so considered for the purpose of the action, and the plaintiff had a verdict, and a new trial was refused. In *Israel* v. *Douglas*, 1 H. B. 239, the defendants being indebted to Delvalée, who was indebted to the plaintiff, Delvalée gave an order to the plaintiff, on the defendant's requiring them to pay what was due to him to the plaintiff, and they accepted the order, but on Delvalée's becoming bankrupt, refused to pay the amount; and the Court of Common Pleas (Wilson, J. *dissentiente*) held that the defendants were to be considered as having received so much money as they owed Delvalée to the use of the plaintiff. Lawrence, J. in the case of *Taylor* v. *Higgins*, said, that the case of *Israel* v. *Douglas* had been afterwards disapproved of upon that point, and that he had a note of the case, which differed materially from

Payment of the money.

The damages to be recovered are measured by the sum which the plaintiff has actually at the express or the implied request of the defendant. Where the payment has been compulsory, the plaintiff cannot recover more than he was under the necessity of paying; and therefore although bail above may recover from their principal any sum which they have fairly expended in endeavouring to take him, they cannot recover the costs which have been occasioned by unadvisedly resisting the payment of those expenses (*e*).

Request.

Secondly. *At the defendant's request.*—Where there is no *request*, either express or implied, the action cannot be maintained (*f*), and therefore it cannot be maintained where the money has been paid against the express direction of the party for whose use it is supposed to have been paid. Where two parishes had long been united, and paid a joint sexton, and afterwards one claimed a right of electing a separate sexton, it was held that the other parish could not, after notice, recover a moiety of the sum paid as the sexton's salary, as money paid to the use of the seceding parish (*g*). So where the holder of stock authorized his broker to contract for the transfer of it, upon the opening of the stock which was then shut, and the broker sold without disclosing the name of his principal, and the stock rising in value, the principal refused to transfer, alleging that the broker had sold the stock at a lower rate than he was authorized to do, and the broker paid the deficiency to the purchaser; it was held that since he had paid the money without the consent of the principal, and could not be considered as a guarantee for his principal, he could not recover for money paid to the use of the principal (*h*).

The request may be implied from the special circumstances. The action lies against a shipowner for money supplied to the captain, either in a foreign or English port, for necessary repairs, provided it be expressly borrowed for that purpose (*i*) and be so applied. A request is never implied when a party is compelled to pay money through his own neglect, or breach of duty (*k*).

Assent implied; surety.

The defendant's assent is implied (*l*) in all cases where the plaintiff is compelled to pay the debt of another through his default (*m*); as where a surety is compelled to pay money on the default of his principal. The plaintiff in such case must prove the execution of the bond, or other instrument, by which he became the surety for the defendant, and that he became so at the request of the defendant, or that he assented to it; and that he was called upon to pay the money, and gave the defendant notice to pay it.

that cited. Wilson, J. although he differed from the rest of the court in their opinion, that this was money had and received, was of opinion that this was evidence under the count, upon an *account stated*. And see *Wade* v. *Wilson*, 1 East, 195; *Surtees* v. *Hubbard*, 4 Esp. C. 203; and *infra*, 79.

(*e*) *Fisher* v. *Fallows*, 5 Esp. 171.

(*f*) *Alexander* v. *Vane*, 1 M. & W. 711.

(*g*) *Stokes* v. *Lewis*, 1 T. R. 20.

(*h*) *Child* v. *Morley*, 8 T. R. 610. So if the vendor of stock to be transferred on a certain day make default, the vendee purchasing the amount with his own money cannot recover the price as money paid. *Lightfoot* v. *Creed*, 8 Taunt. 268.

(*i*) *Thacker* v. *Moates*, 1 Mo. & R. 70. *Robinson* v. *Lyall*, 7 Price, 392. *Rocher* v. *Busher*, 1 Starkie's C. 27. *Palmer* v. *Gooch*, 2 Starkie's C. 428.

(*k*) *Pitcher* v. *Bailey*, 8 East, 171. *Copp* v. *Topham*, 6 East, 392.

(*l*) The defendant is not liable in this form of action, unless he be primarily liable or the liability be incurred at his express request. An agreement with the plaintiff to pay money to a third party is not sufficient. *Spencer* v. *Parry*, 3 Ad. & Ell. 331. *Lubbock* v. *Tribe*, 3 M. & W. 607.

(*m*) *Exall* v. *Partridge*, 8 T.R. 310; *Dawson* v. *Linton*, 5 B. & Ad. 521. The plaintiff need not declare specially. *Vanderheyden* v. *Paiba*, 3 Wils. 528. Bail may recover such sums as they have been neces-

Notice to the party for whom the indemnity is given is not necessary previously to defending an action on a guarantee; but if he refuse after notice to defend the action, he is estopped from saying that the plaintiff was not bound to pay the money (*n*).

Where there are two sureties, each of whom has been obliged to pay part of the debt, separate actions should be brought (*o*), unless the payment has been made out of a joint fund (*p*). Where several are sureties for another, and one of them is compelled to pay the whole debt, he may by separate actions compel the others to contribute their proportions towards his loss (*q*).

The defendant as principal, and the plaintiff as his surety, made a joint and several promissory note; the holder gave time to the defendant, *L.*, a stranger, subscribing his name by way of additional security; the plaintiff having paid the money, is entitled to recover the amount as money paid; the payment was not voluntary and the subscription did not annul his original liability (*r*).

Where one who has been bail sues another who was bail with him, he must prove the judgment as well as the execution (*s*).

Money paid by compulsion.

Where a verdict has been obtained against several in an action of assumpsit, and the damages have been levied upon one, he may maintain actions against the rest for money paid to their use (*t*), and the record will

sarily and fairly obliged to expend; as in sending after and securing their principal after he has absconded, in order to surrender him. *Fisher* v. *Fullows*, 5 Esp. C. 571. In the case of *Exall* v. *Partridge*, above referred to, *A. B. C.* being joint lessees of premises, and *B.* and *C.* having assigned their interest to *A.*, the plaintiff, with notice of the facts, placed his carriage on the premises where *A.* carried on business as a coach builder, to be repaired; the carriage was seized as a distress for rent, and the plaintiff having paid rent in the name of the three to redeem his goods, it was held that all three were liable on an implied promise. Note, that if the carriage had been sold, and the money paid over to the landlord, the plaintiff could not have maintained his form of action, for then this money would not have been paid by him. *Moore* v. *Pycke*, 11 East, 52. The law will not sanction a promise of repayment where the necessity for payment has been occasioned by the default or failure of the party who has so paid it; as where an auctioneer, for want of taking proper precautions in putting up an estate for sale, has been compelled to pay the auction-duty. *Copp* v. *Topham*, 6 East, 392. But a bailiff who seizes and sells the goods of a bankrupt after an act of bankruptcy has been committed, may after a recovery against himself and the execution creditor, in an action of trover by the assignees, recover from the creditor the amount as paid under mistake, though he cannot sue him upon an implied engagement to indemnify him. 2 Camp. 452. So there is no implied *assumpsit* on the part of a sheriff to indemnify an auctioneer employed by the *sheriff's bailiff* to sell goods under a *fi. fa.* *Fairbrother* v. *Ansley*, 1 Camp. 343. Where a person has been induced ignorantly to commit an illegal act, an express promise of indemnity is valid. *Fletcher* v. *Harcott*, Hutt. 55. *Secus* where the party indemnified had notice, or may from the nature of his office, be presumed to have known, that the act was illegal. *Martin* v. *Blithman*, Yelv. 197. But it seems that where one person at the request of another ignorantly commits a trespass, he is entitled to a remedy in doing that which is apparently legal. An executor who has paid legacy duties in full, and afterwards paid the legacy duty, may recover from a legatee. *Foster* v. *Ley*, 2 Bing. N. C. 269.

(*n*) *Duffield* v. *Scott*, 3 T. R. 374. *Smith* v. *Compton*, 3 B. & Ad. 408.

(*o*) *Beard* v. *Boulcot*, 3 B. & P. 235.

(*p*) *Osborne* v. *Harper*, 5 East, 225; as where the two sureties jointly borrowed the money which they paid, and gave a joint note for it.

(*q*) *Cowell* v. *Edwards*, 2 B. & P. 268. *Secus*, where the surety who has paid induced the co-surety to join, and has taken a bill of sale from the principal for his own security. *Turner* v. *Davis*, 2 Esp. C. 478.

(*r*) *Catton* v. *Simpson*, 8 Ad. & Ell. 136.

(*s*) *Belldon* v. *Tankard*, 1 Marsh, 6.

(*t*) *Merryweather* v. *Nixon*, 8 T. R. 186. There may, however, be contribution if the plaintiff were not aware that the transactions were illegal or doubtful. *Betts* v. *Gibbins*, 2 Ad. & Ell. 57. *Pearson* v. *Skelton*, 1 M. & W. 504.

be evidence against them (*u*). But no action can be maintained by one of several co-trespassers, or other wrong-doers, to recover such contribution; for where the transaction is illegal, the law will not raise any implied assumpsit (*x*). So where the plaintiff, in consequence of the default of the defendant, has been compelled to pay money to relieve himself, which the defendant ought to have paid, the defendant's consent will be implied; as where the goods of the plaintiff, a lodger in the house of the defendant, are distrained upon by the landlord, and the plaintiff, on default of the defendant's paying his rent, pays the amount to redeem his goods (*y*). Where an accommodation acceptor defends an action at the request of the drawer, he may recover the costs as money paid to the use of the drawer (*z*). Where a carrier by mistake delivered to *B.* the goods of *C.*, and *B.* appropriated the goods, and the carrier on demand, and without action, paid the money, it was held that he might recover against *B.* for money paid to his use (*a*). Money paid by compulsion.

A. and *B.* were employed as assurance brokers, and *A.* paid the premium with his own money; after the bankruptcy of *B.* it was held that *A.* might maintain the action in his own name (*b*).

If one of two *debtors* pay the whole of a joint debt, the law gives him a right to recover a moiety in an action for money paid to the use of the other, on the ground that both are liable to pay; but if one pay the whole of a debt in furtherance of an illegal contract, he cannot recover a moiety upon an implied contract to pay, since no implied contract can arise out of an illegal transaction. And although the contrary was formerly held (*c*), it In an illegal transaction.

(*u*) Dic. in *Powel* v. *Layton*, 2 N. R. 365.

(*x*) *Merryweather* v. *Nixon*, 8 T. R. 186.

(*y*) *Exall* v. *Partridge*, 8 T. R. 308; *supra*, note (*m*). It has even been held, that an intermediate indorser of a bill who pays part of the amount to a remote indorsee, who has obtained a verdict against the acceptor for the whole amount, but who has not levied an execution for the part so paid, may recover the sum so paid from the acceptor, though there was no privity between them, except on the bill which the indorsee still continued to hold. *Pownal* v. *Ferrand*, 6 B. & C. 512. But he cannot recover the costs of a former action. *Dawson* v. *Morgan*, 9 B. & C. 618; and see *Smith* v. *Napier*, *supra*, 147; *Fisher* v. *Fallows*, *supra*, 76. Money *paid* by the drawer and indorser of a bill of exchange to the indorsee, is paid for the acceptor. *Le Sage* v. *Johnson*, Forrest. 23. *A.* holds a lease under a covenant for re-entry for non-repair, and underlets to *B.*, who undertakes to repair within three months after notice; after default by *B.* *A.* may repair, and recover the amount expended. *Colley* v. *Stretton*, 2 B. & C. 273. Note, the plaintiff declared specially.

(*z*) *Howes* v. *Martin*, 1 Esp. C. 162.

(*a*) *Brown* v. *Hodgson*, 4 Taunt. 189. But see *Sills* v. *Laing*, 4 Camp. 81.

(*b*) *Thacker* v. *Shepherd*, 2 Chitty's C. T. M. 652.

(*c*) In *Faikney* v. *Reynous*, 4 Burr. 2069, the defendant had given a bond to the plaintiff to secure the amount of one moiety of 3,000*l.*, paid by the plaintiff for the differences in certain illegal stock-jobbing transactions for himself and one Richardson, in which transactions the plaintiff and Richardson were jointly concerned; and the Court held, that since the bond was not given for the payment of the composition money, which is prohibited by the statute, but only to secure the repayment of money which the plaintiff had advanced for Richardson, upon contracts in which they had been jointly concerned, the bond was good.

It was observed by Lord Kenyon, in *Petrie* v. *Hannay*, 3 T. R. 418, that the decision in *Faikney* v. *Reynous* turned wholly on the consideration, that the action was upon a bond, and that nothing had been disclosed in the plea which showed any illegality between the parties, and that they could not take into consideration matter not properly introduced by the plea. But according to the report, 2 Burr. 2069, the Court seemed to have considered that the agreement to repay was not illegal; and see the opinions of Ashurst, Buller, and Grose, Justices, in *Petrie* v. *Hannay*.

That case was as follows: *A.* and *B.* having been jointly engaged in stock-jobbing transactions, came to a settlement with their broker, who paid all the differences; *A.* paid his own share to the broker, and drew a bill on *B.* for his share, which *B.* accepted; *A.*'s executors were afterwards sued upon the bill by the broker,

seems to be now settled, that if one of the parties pay the whole of such a debt at the express request of another party, and upon a promise of repayment, he cannot maintain the action, even upon the express promise. It seems to be now also settled on broad and satisfactory principles, notwithstanding the doubts which once prevailed, that money advanced by one person to another, with a knowledge that it is to be applied in furtherance of an illegal purpose, cannot, after it has been so applied, be recovered.

For another in an illegal transaction.

In the late case of *Cannan* v. *Bryce* (*d*), which was an action to recover money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, it was held, on very broad principles, that such an action could not be maintained. The distinction between *malum prohibitum* and *malum in se*, was denied. It was said, that if it be unlawful in one man to pay the money, how can it be lawful in another to furnish him with the means of payment; and it was held that the case was not distinguishable in principle from that of the druggist, who sold to the brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by act of parliament from mixing with the beer (*e*).

Where an officer permitted a prisoner to go at large, on his promise to pay the debt, in consequence of which the officer himself was obliged to pay the creditor, it was held that he could not recover the money from the

who recovered the amount, and the executors afterwards brought an action for money paid for the defendant's use. It seemed to be admitted on all hands, that the money was to be considered as paid with the consent of the defendant; and the question turned upon the illegality of the transaction. Three of the Judges, Ashurst, Buller, and Grose, were of opinion that the money was recoverable, since the action was not founded on any promise arising by implication of law out of the illegal transaction, but on an express subsequent promise; and they considered the case as undistinguishable from that of *Faikney* v. *Reynous*, and as standing upon the same footing as if the broker had paid the amount with the consent of the defendant, and brought the action; or the testator had himself paid him. Lord Kenyon was of opinion, that *A.* and *B.* were to be considered as *particeps criminis*, and that the money was not recoverable. In *Steers* v. *Lashley*, 6 T. R. 61, the defendant having engaged in stock-jobbing transactions with different persons, his broker paid the differences, and a bill was drawn by the broker, and accepted by the defendant, for part of the sum awarded by the plaintiff, and three others, to be due from the defendant to the broker on account of these differences; and it was held that the plaintiff, who was the indorsee of the bill, and privy to the transaction, could not recover upon it. And in *Brown* v. *Turner*, 7 T. R. 630, where the broker had paid the differences in stock-jobbing transactions, and the defendant, his employer, had accepted a bill for the amount, the Court held, on the construction of the act of parliament, and the authority of *Steers* v. *Lashley*, that the plaintiff, to whom the broker had indorsed the bill after it became due, was not entitled to recover. In *Mitchell and others* v. *Cockburne*, 2 H. B. 380, (Buller J. being absent), *A.* and *B.* had entered into a partnership for insuring ships in the name of *A.*, and *A.* had paid the whole of the losses, and it was held that he could not recover a moiety of such payments from *B.*; and Eyre, L. C. J. distinguished the case from those of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, since those cases were one step removed from the illegal contract itself, and did not arise immediately out of it; and Heath, J. observed, that it did not appear that the payments had been made by *A.* at the request or with the consent of *B.* In the case of *Aubert* v. *Maze*, (2 B. & P. 371,) it was held that money paid by one of two partners on joint insurances, could not be recovered from the other partner. Lord Eldon in this case questioned the soundness of the decision in *Petrie* v. *Hannay*, and the distinction grounded upon an express consent of the partner; and Heath and Rooke, Justices, denied the distinction between the case of money paid in a concern which is *malum prohibitum*, and where it is paid in a transaction which is *malum in se*. The cases of *Booth* v. *Hodgson* (6 T. R.) and *Sullivan* v. *Greaves* (Park on Insurance, 8), were also relied upon by the Court as strong instances to show that the Court would not assist a plaintiff in enforcing an agreement which is contrary to law.

(*d*) 3 B. & A. 179.

(*e*) *Langton and others* v. *Hughes and others*, 1 M. & S. 594.

debtor, having been guilty of a breach of duty, from which he could not derive a cause of action (*f*).

Money lent.

The assignment of a debt without the assent of the debtor does not confer a right of action, the ordinary rule being, that choses in action are not assignable; but if the debtor assent to the arrangement, it seems that the transaction is equivalent to a loan by the assignee to the debtor. If *A.* owe money to *B.*, and *B.* owe the same sum to *C.*, and the parties agree to the transfer, it is equivalent to a loan by *C.* to *A.* (*g*). Where the money has been advanced to the defendant's agent, the authority of the defendant to the agent must be proved. Such authority may arise out of the special circumstances. Thus a shipowner is liable for money advanced to the master in case of *necessity* (*h*).

A promissory note given by the defendant to the plaintiff is evidence under this count (*i*), since the note imports the maker's having so much money of the payee in his hands. But the mere circumstance of the defendant having received money from the plaintiff is *primâ facie* evidence of the payment of an antecedent debt, and not of the loan of money (*k*).

So the receipt of money by the defendant, on a cheque drawn by the plaintiff on his banker, *primâ facie* imports a payment, and not a loan, and is not evidence to go to a jury; unless the plaintiff can give evidence of money transactions between himself and the defendant, from which a loan can be inferred, or of some application by the defendant to borrow money (*l*).

Interest cannot be recovered without proof of a contract to that effect express or implied, or unless a written security be given for the payment of the money at a time specified (*m*).

A lender of money who has received goods as a security, may recover without proof of having returned or tendered the goods (*n*).

Money had and received.

Under the count for money had and received, the plaintiff must prove, 1st, the *receipt* of *money* by *the defendant* (*o*); 2ndly, that it was received to his (the plaintiff's) use; *i. e.* his title to it (*p*).

(*f*) *Pitcher* v. *Bailey*, 8 East, 171.

(*g*) *Wade* v. *Wilson*, 1 East, 195. The assent of the debtor is essential, for he may have an account against the assignor, and choose to insist on his set-off; but if there be anything like an assent on the part of the holder of the money, it seems that the action for money had and received may be supported. See Lord Ellenborough's observations in *Surtees* v. *Hubbard*, 4 Esp. C. 203; and *supra*, 75, note (*d*). It must appear that at the time of the promise to pay the debt a defined and ascertained sum was due, *Fairlie* v. *Denton*, 8 B. & C. 305. Where the debtor of the plaintiff having goods at the defendant's wharfs, gave an authority to the defendant to sell them, and out of the proceeds to pay the plaintiff the balance of freight due to him, and the defendant accordingly sold the goods and received the proceeds, held that the authority did not require a stamp as an order for payment of money, and that after the sale and receipt of the money, the plaintiff was entitled to sue for money had and received. *Humphreys* v. *Briant*, 4 C. & P. 157.

(*h*) *Rocher* v. *Busher*, 1 Starkie's C. 27. Even in an English port. *Robinson* v. *Lyall*, 7 Price, 502.

(*i*) *Story* v. *Atkins*, 2 Str. 719; B. N. P. 136, 137. *Harris* v. *Huntbach*, 1 Burr. 373.

(*k*) *Welsh* v. *Seaborn*, 1 Starkie's C. 474. If a parent advance money to a child, it is supposed to be by way of gift, per Bayley, J. *Hick* v. *Keats*, 4 B. & C. 71.

(*l*) *Cary* v. *Gerrish*, 4 Esp. C. 9.

(*m*) *Calton* v. *Bragg*, 15 East, 223. But see *Trelawny* v. *Thomas*, 1 H. B. 303, and tit. INTEREST.

(*n*) *Lawton* v. *Newland*, 2 Starkie's C. 73.

(*o*) It has been held that proof must be given of the receipt of some particular sum, and that in default the plaintiff must be nonsuited. *Bernasconi* v. *Anderson*, M. & M. 183. *Harvey* v. *Archbold*, 5 D. & R. 504. But see below, and *Leeson* v. *Smith*, 4 N. & M. 304.

(*p*) The action cannot be maintained if it be against equity and good conscience that the money should be recovered. *Davis* v. *Bryan*, 6 B. & C. 651.

Actual receipt of the money.

It must be proved that the money came into the hands of the defendant. And therefore the action will not lie to recover stock (*q*). The action is not maintainable against one of two grantors of an annuity, (upon failure of the annuity-deed for want of a memorial), who was a mere surety, and had received no part of the consideration (*r*). But a debt may be transferred to a third person by mutual arrangement between the parties, on a sufficient consideration. If *A.* be the creditor of *B.* for money had and received, and *A.* himself is indebted to *C.* in the same amount, and by mutual agreement *A.*'s debt is cancelled, and *C.* is to be the creditor of *B.*, the money in *B.*'s hands is had and received to the use of *C.* (*s*). A bill of

(*q*) *Nightingale* v. *Devismes*, 5 Burr. 2589. Nor against the finder of bank notes, although if they be not produced at the trial it may be presumed that their value in money has been received. *Noyes* v. *Price*, 16 G. 3; Roscoe on Evidence, 300; Select Ca. 242; Chitty on Bills, 426, 5th ed.; *Longchamp* v. *Kenny*, Doug. 138. Where the defendant, captain of the plaintiff's ship, drew at Rio a bill on the plaintiff's agent in London, for disbursements, and the bill was paid in London by the agent; it was held by the Court of C. P. that there was not sufficient evidence of the actual receipt of the money by the defendant. *Scott* v. *Millar*, 3 Bing. N. C. 811. *Qu.?*

(*r*) *Stratton* v. *Rastall*, 2 T. R. 366. Though he has given a receipt for the money, Ib. And see *Scholey* v. *Daniel*, 2 B. & P. 540. In an action for debt for penalties against the surveyors under the stat. 13 Geo. 3, c. 78, s. 48, by the succeeding surveyors, for not paying over monies in their hands, with a count also for money had and received, it was held that as it appeared that the monies collected had only come to the hands of one of the defendants, the count for money had and received could not be supported against the two, as there must be evidence of something done by each touching the receipt of the money, *Heudebourch* v. *Langton*, 3 C. & P. 566. A member in a banking firm forges a power of attorney to transfer stock belonging to trustees, and after the transfer makes entries of the crediting the trustees with supposed dividends upon the stock, on the ground of which cheques are drawn by the trustees on the firm, and paid. Though the circumstances afford *primâ facie* evidence against the firm of the receipt of such dividends, the amount is not money had and received by the firm to the use of the trustees; for the transfer being a nullity, they are entitled to receive the dividends at the Bank of England; but they may recover damages for the false representation that such dividends had been received. *Hume* v. *Bolland*, 2 Tyr. 575.

(*s*) *Wilson* v. *Coupland*, 5 B. & A. 228. For the debt may be considered as a loan by *C.* to *B.*, or as so much money had and received by *B.* to the use of *C.*, and as so much due on an account stated. See *Israel* v. *Dougals*, 1 H. B. 239. Ld. Ellenborough's observations in *Wade* v. *Wilson*, 1 East, 195. *Surtees* v. *Hubbard*, 4 Esp. C. 203; *supra*, 75. 79. It is essential to such an agreement that *A.*'s debt is extinguished. *Cuxon* v. *Chadley*, 3 B. & C. 591. *Wharton* v. *Walker*, 4 B. & C. 165. And the debt transferred must be a wrong demand. *Blackledge* v. *Harman*, 1 Mo. & R. 344. *Wharton* v. *Walker*, 4 B. & C. 163. The expenses of a conveyance on the sale of an estate were to be paid equally by the vendor and vendee, and it was afterwards agreed that if the vendor would pay the whole of the expense of another transaction, the vendor should be discharged of his moiety of the expense of the conveyance; it was held that the transaction was the same as if the vendor had paid the vendee a sum of money, the vendee taking upon himself the vendor's share of the expenses of the conveyance, and that an attorney who had for a consideration undertaken to effect the conveyance, and not to apply for further remuneration if the vendor objected to pay any expenses, was entitled to recover against the vendee the amount of such expenses as money had and received to his use. *Noy* v. *Reynolds*, 1 Ad. & Ell. 159. Such an arrangement of transfer is binding, although before its completion the intermediate debtor to the one and creditor to the other party becomes bankrupt. *Crowfoot* v. *Gurney*, 9 Doug. 372. Note, that in that case the debt due to the middle party was not ascertained at the time of the agreement, but had been ascertained previous to the bankruptcy. But see on this latter point *Fairlie* v. *Denton*, 8 B. & C. 935. So the taking credit from a third person is in some instances equivalent to a receipt of money. *A.* on the 18th paid notes of the Dartmouth bank into the Totnes bank, to receive interest from that time. The Dartmouth bank continued to pay on their notes till the evening of the 19th, when the bank failed. On the morning of the 19th, according to the course of dealing between the two banks, the Dartmouth *gave credit* to the Totnes bank for the amount of the notes, and it was held that *A.* was entitled to recover, for the giving credit was equivalent to payment. *Gillard* v. *Wise*, 5 B. & C. 134. See 2 Ad. & Ell. 36. *Spratt* v. *Hobhouse*,

exchange payable to the order of the drawer, is evidence in an action by the drawer against the acceptor of money had and received by the latter to the use of the drawer (*t*). The receipt of provincial notes by the defendant, which he has received as money, is evidence of a receipt of money by him (*u*); and it may be laid down as a general rule, that if a thing be received as money, it may be treated and recovered as such (*x*). Receipt of the money.

Upon a count for money had and received by the defendant to the use of the plaintiff, the latter may prove the receipt of money by the defendant and his deceased partner, and also the receipt of money by the defendant himself to the use of the plaintiff; for every partner is liable for the whole, and the proving that another person, together with the defendant, received the money, does not negative the allegation that the defendant himself received it, and therefore there is no variance (*y*).

Money received by the defendant's authorized agent is money received by the defendant. But where money is received by the mutual agent of both plaintiff and defendant, it cannot be recovered by the former as received by the latter to his use (*z*).

Where money was paid into a banking-house, for the purpose of taking up a particular bill then lying there for payment, although the banker's clerk said at the time that he could not give up the bill, but took the money, it was held to be money had and received to the use of the owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor, who had paid the money (*a*). But where *A.* sent bills to *B.*, his banker, directing him to pay part of the produce to *C.*, and *B.* refused to act upon the order, but received the produce of the bills, it was held that *C.* could not maintain an action against *B.* for so much money had and received to his use, since, as between the plaintiff and defendant, there was no privity, either express or implied (*b*).

And where money has been received, with directions to pay it to another in discharge of a bill, but the order is revoked before payment, and the receiver is directed to hold it for another purpose, the holder of the bill cannot maintain this action (*c*).

A banker who takes credit with the underwriter for a loss due to the principal, whereupon the name of the underwriter is proved from the policy, is

4 Bing. 173, where, per Best, C. J., the principle in all the cases is that if a thing be received as money, it may be treated as such in an action for money had and received.

(*t*) *Thompson* v. *Morgan*, 3 Camp. 101. And see BILLS OF EXCHANGE.

(*u*) *Pickard* v. *Banks*, 13 East, 20. *Fox* v. *Cutworth*, cited 4 Bing. 179. And even in a criminal case, on an indictment for obtaining money by means of a false token, the receipt of a bank-note of the amount has been held to be evidence to the jury of the receipt of the money at the Bank.

(*x*) Per Best, J. in *Spratt* v. *Hobhouse*, 4 Bing. 179. An agent for the sale of goods, refusing to account after a reasonable time, may be presumed to have sold them. *Hunter* v. *Welsh*, 1 Starkie's C. 224. But where a defendant, sued for the proceeds of a bill, admitted that he had paid it into his banker's, and the banker's clerk was called to prove that credit was given to the defendant for the bill, the evidence was held to be insufficient without the production of the bill. *Atkinson* v. *Owen*, 2 Ad. & Ell. 35; 4 N. & M. 123.

(*y*) *Richards* v. *Heather*, 1 B. & A. 29, in which the doctrine laid down in *Spalding* v. *Mure and others*, 6 T. R. 363, was overruled.

(*z*) Goods were consigned to *A.* and *B.*, in return for goods sent out by the plaintiff, with orders to sell and hold the proceeds to the order of the defendant who had a lien on the goods; it was held that the plaintiff could not recover the surplus from the defendant. *Tenant* v. *Mackintosh*, 4 B. & A. 504.

(*a*) *De Bernales* v. *Fuller*, 14 East, 590, in the note.

(*b*) *Williams* v. *Everett*, 14 East, 582.

(*c*) *Stewart* v. *Fry*, 7 Taunt. 339; 1 Moore, 74.

Receipt of the money.

estopped from objecting that he has not received the money (*d*). Where an agent refuses to account for property delivered to him *to be sold*, and the contrary does not appear, a presumption arises that he has sold it, and received the value. And the same presumption may be made against a wrong-doer who has wrongfully possessed himself of property which he refuses to produce or account for (*e*). But where goods distrained by the plaintiff were redelivered by him to the defendant, on a promise by the latter to pay the rent, it was held that the action for money had and received was not maintainable; for, as the goods were not delivered to be sold, no presumption as to the receipt of money could arise (*f*).

The plaintiff can recover no more than the net sum received, without interest (*g*).

To the use of the plaintiff.

The plaintiff must not only prove the receipt of the money, but also an undertaking, *express* or *implied*, on the part of the defendant, to pay it to him.

In numerous instances the undertaking is merely of the latter description. The action for money had and received resembles a bill in equity (*h*); and whenever the defendant has received money to which the plaintiff is in justice and equity entitled, the law implies a debt, and gives this action *quasi ex contractu*.

The plaintiff must, therefore, prove an undertaking on the part of the defendant to pay the money; or a *legal* (*i*), or at least an *equitable* title in himself to demand it.

(*d*) *Andrew* v. *Robinson*, 3 Camp. 122.

(*e*) *Longchamp* v. *Kenney*, Doug. 137. The defendant got possession of a masquerade ticket given to the plaintiff to dispose of, and to account to the owner for the proceeds; and on being required by the owner to pay the produce, said, Well if I have it, what then? go to the person who received it of you; let him pay it. The defendant on the trial did not produce the ticket, and it was held that there was presumptive evidence of the receipt of money.

(*f*) *Leary* v. *Goodson*, 4 T. R. 687.

(*g*) *Walker* v. *Constable*, 1 B. & P. 306. *Tappenden* v. *Randall*, 2 B. & P. 447.

(*h*) Per Ld. Mansfield, Cowp. 793. It has been held that assignees of a bankrupt may recover against his trustees in trust to permit the trader to receive the proceeds for his life, such proceeds as were received after notice of the bankruptcy. *Allen* v. *Impett*, 8 Taunt. 263.

(*i*) The plaintiff is not always entitled to recover in this form of action, even although he can show a legal or equitable title to money received, without showing some *privity* with the defendant, created either by the fact of receiving the money or by the circumstances. See *Baron* v. *Husband*, 4 B. & Ad. 611. *Wharton* v. *Walker*, 4 B. & C. 163. *Scott* v. *Parker*, 3 Mer. 652. *Wedlake* v. *Hurley*, 1 C. & J. 83. *Sims* v. *Britain*, 4 B. & Ad. 375. *A.*, *B.* and others, being owners of a ship in the East India Company's service, *B.* the managing owner employs *C.* as his agent, to receive and pay monies on account of the ship; *C.* receives a sum from the East India Company on account of the ship, on a receipt signed by *B.* as managing owner, and by another owner, and placed the money to *B.*'s credit: held that there was no privity between *C.* and the part owners, and that the action was not maintainable against *C.* *Ib.* The action does not lie against a sheriff for not paying rent due on an execution against the tenant. *Green* v. *Austin*, 3 Camp. 260. Where the plaintiff and defendant each paid *A.*, a witness, his expenses, the loser, after paying the winner his taxed costs, cannot recover from *A.* for money had and received. *Crompton* v. *Hutton*, 3 Taunt. 230. *Benson* v. *Schneider*, 1 Moore, 76. And see *Williams* v. *Everett*, 14 East; *supra*, 81. A bank bill was remitted to *A.*, with an indorsement, "pay to the order of *B.* (the defendant), under provision for my note in favour of *C.*" (the plaintiff); *B.* received the proceeds, but refused to pay them over to *C.*; held, in an action for money had and received by *C.*, that the action was not maintainable, without something having been done by the remitter of the bill amounting to privity or assent. *Wedlake* v. *Hurley*, 1 C. & J. 83. The clerk to an attorney, in the absence of the latter, receives a payment on account of a client of the attorney, and gives a receipt in his master's name; the attorney never returns; the client cannot recover from the clerk, for there was no privity of contract. *Stevens* v. *Badcock*, 3 B. & Ad. 354. But where an assignee under a bankrupt's commission was insane, it was held that his brother, who received money due to the

The mere bearer of money from one person to another cannot be sued (*k*). To the use of the plaintiff.

The assignees under a joint commission against *A.* and *B.* cannot recover money paid by *B.* before his own, but after *A.*'s bankruptcy, either as money had and received to the use of the bankrupts, before the bankruptcy, or to the use of the assignees since (*l*).

Where money has been paid into the hands of a *trustee* for a specific purpose, it cannot be recovered so long as the trust subsists, except according to the terms of the trust. Thus, money deposited by litigating parties in the hands of a trustee, in trust for the party entitled, cannot be sued for except by the party entitled (*m*). A holder of money to be paid over to the party entitled according to the decision of a referee, cannot be recovered by the party entitled, previously to notice to such holder of the decision of the referee (*n*). Where money has been deposited with an attorney to conduct a particular suit, it cannot be recovered till the specific purpose be proved to be at an end (*o*).

The plaintiff is entitled to recover where he can show that the defendant has received money belonging to him under any fraud, false colour or pretence; as, that he has received the rents of the plaintiff's estate (*p*), under pretence of title, or as an intruder into the plaintiff's office (*q*); and the title to the office may be tried in such an action (*r*). But in such case the plaintiff cannot maintain the action unless he has a legal title to the profits so received by possession of the office; and therefore the nominee of a perpetual curacy cannot maintain an action for money had and received against an intruder before he has been licensed (*s*), although it would be otherwise in the case of a donative (*t*). So the action will not lie to recover mere *gratuitous donations* to an intruder, such as are given by strangers for showing a church (*u*). Money obtained by fraud.

So the plaintiff may recover in any case where the defendant has by fraud or deceit received money belonging to the plaintiff; for he may waive the Waiver of tort.

estate, was liable to a new assignee. *Stead* v. *Thornton*, 3 B. & Ad. 357. A party, after improperly allowing the debtor to be discharged without paying the full debt, paid out of his own monies 100*l.*, which was agreed to be returned to him as soon as the residue of the debt was recovered; held, that as soon as received it became money had and received to the use of the person so paying it, and that he need not declare as on a contract depending on the contingency. *Platts* v. *Lean*, 3 C. & P. 561. Per Lord Mansfield, *Moses* v. *Macfarlane*, Burr. 1008; and per Ld. Ellenborough, (4 M. & S. 478); the action is maintainable wherever the money of one man has, without consideration, got into the pocket of another.

(*k*) *Coles* v. *Wright*, 4 Taunt. 198; and see *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 3 M. & S. 344. *Edwards* v. *Hodding*, 5 Taunt. 181. *Horsefall* v. *Handley*, 8 Taunt. 136. But an agent who pays over money after notice that the right is disputed, is liable. *Edwards* v. *Hodding*, 5 Taunt. 181.

(*l*) *Smith* v. *Goddard*, 3 B. & P. 465. But being joint assignees of both, they may recover for money had and received to the use of either. See tit. BANKRUPT.

(*m*) *Kerr* v. *Osborne*, 9 East, 378. And money so deposited can be recovered from the stakeholder only, and not from the principal debtor. *Ib.*

(*n*) *Wilkinson* v. *Godfrey*, 9 Ad. & Ell. 536. And it was held that his changing the cheque which he held, into money, did not render him liable.

(*o*) *Case* v. *Roberts*, Holt's C. 500.

(*p*) For in such case an action of account will lie; and whenever an account will lie, an action of *indebitatus assumpsit* will lie. *Aris* v. *Stukely*, 2 Mod. 260; 1 Salk. 9.

(*q*) *Aris* v. *Stukely*, 2 Mod. 260; T. Jon. 126; 1 Lev. 245; 2 Show. 21.

(*r*) *Ibid.* and 2 Vent. 170; 7 Mod. 147.

(*s*) *Powell* v. *Milbank*, 1 T. R. 399, n. *R.* v. *Bishop of Chester*, 1 T. R. 403.

(*t*) *Powell* v. *Milbank*, 1 T. R. 399, n; *R.* v. *Bishop of Chester*, 1 T. R. 403. For there the title accrues upon mere nomination.

(*u*) *Boyter* v. *Dodsworth*, 6 T. R. 681.

Fraud.

tort, and rely upon the contract which the law implies for him: as where the plaintiff's clerk having received bills from customers for the plaintiff pays them over to the defendant to effect illegal insurances (*x*). Where *A.* under false pretences procured a bill of exchange from *B.*, and *A.*'s assignees received the amount, it was held that *B.* might recover against the assignees for money had and received (*y*).

In the case of *Aris* v. *Stukely* (*z*), it was said by the Court, that *indebitatus assumpsit* would lie for rent received by one who pretended a title, because an action of account would lie. But this, it should seem, must be understood of rent received from a lawful tenant, where an ejectment cannot be brought; for it seems that an action of account does not lie against a disseisor, or other wrong-doer (*a*). And it has been held, that an action of assumpsit for rents received would not lie against a defendant who claimed title to the premises (*b*).

But it was held that a woman might recover against a man who, having a wife alive, pretended to marry her, and received the profits of her estates (*c*).

Where a creditor of a bankrupt received, in common with the rest of the creditors, a composition of 8*s.* in the pound, and then recovered the whole amount from the acceptor of a bill which he held as a security for the debt, it was held that the bankrupt was entitled to recover the amount as money had and received to his use (*d*).

(*x*) *Clarke* v. *Shee*, Cowp. 197. *Lightly* v. *Clouston*, 1 Taunt. 112. *Eades* v. *Vandeput*, 5 East, 39, n. See B. N. P. 130; *Kitchen* v. *Campbell*, 3 Wils. 304, where goods were sold under an execution after an act of bankruptcy committed. *Reed* v. *James*, 1 Starkie's C. 134; B. N. P. 131. *Thomas* v. *Whip*, B. N. P. 133, where Parker, Ch. J. said he knew of two cases only where the plaintiff had not such election; the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on a valuable consideration, after an act of bankruptcy committed); for you cannot confirm the act in part, and impeach it for the rest. So in general where goods have been wrongfully taken and distrained, and converted into money, the plaintiff may waive the tort, and recover the clear amount of the money produced by the sale of the goods. See *Feltham* v. *Terry*, B. N. P. 131; Cowp. 419; *Aris* v. *Stukely*, 2 Mod. 260; T. Jo. 126; 2 Show. 21; *Howard* v. *Wood*, 2 Lev. 245; 1 Ld. Ray. 703. The sheriff's seized and sold under an execution a pony claimed by a third party, who it appeared had originally purchased it whilst under coverture, and had, since her husband's death, kept and paid for its feed; and it was held, that as against a mere wrong-doer, she had a sufficient possessory title, and might waive the tort, and sue for the amount produced by the sale. *Oughton* v. *Seppings*, 1 B. & Ad. 241. See further *Manifold* v. *Morris*, 5 Bing. N. C. 420.

(*y*) *Harrison* v. *Walker*, Peake's C. 111. See *Willis* v. *Freeman*, 12 East, 656. So, *semble*, where a legatee obtains payment from an executor by fraud. *Crockford* v. *Winter*, 1 Camp. 124. So where the defendant, being a married man, married the plaintiff, and received the rents of her land. 1 Salk. 28. And see *Abbots* v. *Barry*, 2 B. & B. 369; 5 B. Moore, 98. *Hogan* v. *Shee*, 2 Esp. C. 522. *Bristow* v. *Eastman*, Peake, 223; 1 Esp. C. 172.

(*z*) 2 Mod. 260.

(*a*) Bac. Ab. ACCOMPT, [B].

(*b*) By Wilson, J. in *Cunningham* v. *Lawrents*, 1 Bac. Ab. 260, 5th edit. in the note; and he nonsuited the plaintiff. And see USE AND OCCUPATION; and *infra*, 85, n. (*o*).

(*c*) *Hassen* v. *Wallis*, 1 Salk. 28.

(*d*) *Stock* v. *Mawson*, 1 B. & P. 286. There was a clause in the deed by which the creditors agreed to release all debts and to *give up* all securities, &c.; and it was the clear intention of the parties that all should share *equally*; and it was a fraud on the other creditors to receive more than they did. Where the creditors, by an instrument not under seal, agreed to receive a composition of 12*s.* in the pound, payable by instalments, and the agreement did not contain any stipulation for delivering up collateral securities, it was held that a creditor might avail himself of a collateral security, (a bill drawn by the insolvent and accepted by a third person); *Thomas* v. *Courtnay*, 1 B. & A. 1; for an undertaking to deliver up securities was not to be implied. So where a plaintiff has been induced by a fraud and deceit to purchase

The defendant having obtained payment by a false representation of default in the plaintiff's agent in honouring a bill given for the amount, it is not necessary previous to the action to tender the bill; for the right accrues on the payment of the money upon the misrepresentation of facts (*e*).

So the plaintiff may show that he has been compelled by duress to pay money to the defendant; as that he was obliged to pay an exorbitant demand to retrieve his goods from pawn (*f*), or to procure his admission into a copyhold (*g*); or being a publican, that it was paid to the justices of a borough, who unlawfully demanded it in order to procure a renewal of his licence (*h*); or to the toll-keeper of a turnpike gate (*i*); or to a sheriff who exacts a larger fee than he is entitled to (*k*); for in such cases the parties are not on an equal footing, and the payment cannot be considered as voluntary (*l*). So it lies to recover money levied under a conviction which has been quashed (*m*); or money which has been paid to a revenue officer to procure the release of goods seized as forfeited (*n*), but which were not liable to be seized. The plaintiff cannot, however, substitute this form of action for the more appropriate ones of trespass or replevin, when they are the specific remedies provided by the law for the particular grievance (*o*). And therefore where the proprietor of cattle wrongfully Duress.

goods or an interest in land, to which the vendor has no title, in consequence of which he has lost the goods or lands, an action lies to recover the price. See *Matthews* v. *Hollings*, Woodfall's Landlord and Tenant, 2d edit. 35; *Cripps* v. *Reed*, 6 T. R. 606; *infra*, tit. FAILURE OF CONSIDERATION.

(*e*) *Pope* v. *Wray*, 4 M. & W. 451.

(*f*) *Astley* v. *Reynolds*, Str. 915; B.N.P. 132. The Court said that it was a payment by *compulsion*, for the plaintiff might have had such an immediate want of his goods, that an action of trover would not have answered his purpose; and the rule *volenti non fit injuria* holds only where the party has a freedom in exercising his will. *Fitzroy* v. *Gwyllim*, 1 T. R. 153. *Secus*, where there is no immediate and urgent necessity for the redemption of goods, or preservation of the person. *Fulham* v. *Down*, 6 Esp. C. 36, n.

(*g*) *Leake* v. *Lord Pigot*, Staff. Sum. Ass. 1799, Sel. N. P. 87.

(*h*) *Morgan* v. *Palmer*, 2 B. & C. 729.

(*i*) *Fearnley* v. *Morley*, 5 B. & C. 25. *Parsons* v. *Blundy*, Wightw. 22. See also *Shaw* v. *Woodcock*, 7 B. & C. 73. *Athe* v. *Backhouse*, 3 M. & W. 646.

(*k*) *Dew* v. *Parsons*, 2 B. & A. 568.

(*l*) *Waterhouse* v. *Keen*, 4 B. & C. 200. Notice of action ought to be given of such an action, where the statute requires it, *for anything done under the Act*. Ibid. Where the toll is imposed on *carriages drawn by horses*, and an exemption for persons repassing the same day with the same horses and carriage, or with the same horses *or* carriage, and the same carriage returns the same day drawn by *different* horses, no second toll is payable. *Williams* v. *Sanyar*, 10 East, 56. *Waterhouse* v. *Keen*, 4 B. & C. 200. *Jackson* v. *Curwen*, 5 B. & C. 31. *Chambers* v. *Williams*, 5 B. & C. 36. When the toll is upon *horses* drawing the carriage, with a similar exemption, no second toll is payable if the same *horses* return with a different carriage. *Gray* v. *Shilling*, 2 B. & B. 30; per Bayley, J. 5 B. & C. 34. *Norris* v. *Poate*, 3 Bingh. 41. Where the toll is on *horses*, and the exemption is in respect of the same horses and carriage, a second toll is payable unless both *carriage and horses* be the same. *Loaring* v. *Stone*, 2 B. & C. 515. An exemption of horses attending cattle returning from pasture, does not exempt a horse ridden by the owner to fetch cattle from pasture. *Harrison* v. *Brough*, 6 T. R. 706. See further as to the construction of Acts imposing tolls, &c., *Leeds and Liverpool Canal Company* v. *Hustler*, 1 B. & C. 424. *R.* v. *Trustees of Bury and Stratton Roads*, 4 B. & C. 363. *Phillips* v. *Hooper*, 2 Chitty, 112. *Major* v. *Denham*, 5 Taunt. 340. *Harrison* v. *James*, 2 Chitty's C. T. M. 547.

(*m*) *Feltham* v. *Terry*, B. N. P. 131, cited Cowp. 419; 1 T. R. 387.

(*n*) *Irving* v. *Wilson*, 4 T. R. 485.

(*o*) Where the defendant claims title, an action of *assumpsit* for the rents will not lie against him, *supra*, 84, note (*b*); and *semble*, he ought to bring ejectment, or if ejectment cannot be brought, an action against the tenant who paid the rent in his own wrong. *Cunningham* v. *Laurents*, 1 Bac. Ab. 260, 5th ed. And in an action for use and occupation by a stranger, the title cannot be tried. *Morgan* v. *Ambrose*, Peake's Ev. 258. And see *Staplefield* v. *Yeud*, and *Sadler* v. *Evans*, B. N. P. 133.

Duress.

distrained, pays money in order to obtain the possession of them, he cannot recover it in an action for money had and received, but must proceed in replevin or trespass (*p*). So it is if a tenant, under threat of distress, pays more rent than is due (*q*). But it was held by the Court of Common Pleas, in a subsequent case, that the action lies to recover money which has been obtained through fear of process by distress by an excess of authority, although it had been paid over to a third person, who was the proper officer to whom it should have been paid, in case the distress had been legally made (*r*).

Mistake.

So where money has been paid under a mistake to one who is not entitled to receive it, and who has no claim in conscience to retain it (*s*); as where money is paid to the assignees of a bankrupt by a debtor to the bankrupt, without claiming a set-off due to him (*t*). And so it was held where the defendant, supposing himself to be the legal representative of a lessee for years, sold the term and delivered the lease to the plaintiff, who was afterwards ejected by the rightful administrator (*u*). But, although the party paid the money under a mistake, in fact, yet if was guilty of negligence in doing so, where he might have known the fact, and ought to have known it, he cannot recover. As where the drawee of a bill of exchange, the signature of the drawer being forged, pays the amount (*x*). So where bankers paid the amount of a forged acceptance to an innocent holder for value (*y*). So *a fortiori*, if the party who pays by mistake occasions

(*p*) *Lindon* v. *Hooper*, Cowp. 414. In *Anscomb* v. *Shore*, 1 Camp. C. 285, Sir J. Mansfield, C. J. held, that an action on the case would not lie for detaining cattle distrained damage-feasant after tender of amends, the tender not having been made till after the impounding.

(*q*) *Knibbs* v. *Hall*, 1 Esp. 84. *Lothian* v. *Henderson*, 3 B. & P. 520.

(*r*) *Snowden* v. *Davis*, 1 Taunt. 359. Upon a distress made, the tenant, in consideration of forbearance, promised to pay the broker's charges; time was accordingly given, and the charges paid, but the amount thereof, as well as of the rent demanded, was at the time objected to; held that the payment was not voluntary, and that he might recover back such charges as were not usually allowed; the broker, as a public officer, cannot be permitted to exceed them. *Hills* v. *Sturt*, 5 Bing. 37, and 2 M. & P. 96. A creditor, upon threats of proceeding to a bankruptcy, obtained from his debtor, before signing a composition-deed, bills to the full amount of his debt, which he indorsed over to a third person, who, when they became due enforced payment from the debtor by action; held, that it was not to be deemed a case of *par delictum*, but as of money obtained illegally and extorsively, and might be recovered back as money had and received by the defendant, through the medium of the person to whom by his order it was paid. *Smith* v. *Cuff*, 6 M. & S. 160.

(*s*) *Bonnell* v. *Foulkes*, 2 Sid. 4. *Cripps* v. *Reed*, 6 T. R. 606.

(*t*) *Bize* v. *Dickinson*, 1 T. R. 285. *Milnes* v. *Duncan*, 6 B. & C. 671. *Hodgson* v. *Williams*, 6 Esp. C. 29. Vide *Cobden* v. *Kenrick*, 4 T. R. 432. in *not.* and *infra*.

(*u*) *Cripps* v. *Reed*, 6 T. R. 606.

(*x*) *Price* v. *Neale*, 3 Burr. 1554; Abbott, L. C. J. in *Wilkinson* v. *Johnson*, 3 B. & C. 428, observed that the opinion of Lord Mansfield in this case appears to have been grounded not on the delay, but on the general principle that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault and negligence than by his mistake that he pays on a forged signature. An *acceptor* of a bill of exchange is liable though the bill be forged. *Smith* v. *Chester*, 1 T. R. 654; *infra*, tit. BILL OF EXCHANGE. Where the drawee, without looking at the bill on its being presented for payment, desired the holder's clerk, who presented it, to call again on a subsequent day, Lord Kenyon held that he was not excluded from the defence of forgery of the drawer's signature, as he had not looked at the bill. But on proof that the defendant had in other instances paid bills so drawn, he being connected with the supposed drawer in business, Lord Kenyon held that he could not set up forgery as a defence. *Barber* v. *Gingell*, 3 Esp. C. 60.

(*y*) *Smith* v. *Mercer*, 1 Marsh. 453. Chambre, J., who tried the cause, thought that the plaintiffs were entitled to recover. Dallas and Heath, Js., were of opinion that they were not so entitled, on the ground of the fault or neglect of the plaintiffs, who ought to have known the signature of their customer. Gibbs, C. J. held, that the delay which had occurred (the forgery not

delay and inconvenience to the holders of the bill (*z*). But if one party, under a mistake, induce another to act on the same mistake, so that negligence is as imputable to the one as to the other, the latter is, on the general principle, entitled to recover (*a*). Mistake.

If *A.*, being indebted to *B.*, pay the amount to an attorney, who sues in *B.*'s name, but without any authority from *B.*, the latter may still recover against *A.*, but *A.* may recover against the attorney, although he was imposed on by a counterfeited warrant of attorney (*b*).

When money had been paid on account, and a dispute afterwards occurring, a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover as for money paid under a mistake of fact, in the hurry of business (*c*).

But money paid under a knowledge of all the facts, or where the party possesses full means of knowledge, cannot be recovered on the ground that the plaintiff mistook the law (*d*). Mistake in law.

having been discovered for a week) was sufficient for the decision of the cause; intimating, however, that he did not mean to dissent from the larger ground on which the case had been put by the two former Judges. See also *Hall* v. *Fuller*, 5 B. & C. 750; *infra*, tit. NEGLIGENCE.

(*z*) See the cases last cited. *Wilkinson* v. *Johnson*, 3 B. & C. 428; and see *Smith* v. *Chester*, 1 T. R. 654.

(*a*) *A.* paid to *B.* a navy bill, purporting to be of the value of 1,800 *l.*, but which was in reality worth 800 *l.* only, a figure having been forged, and it was held that *B.* was entitled to recover the difference from *A.* who was ignorant of the fraud. *Jones* v. *Ryde*, 5 Taunt. 488; 1 Marsh. 157. So in *Bruce* v. *Bruce*, 5 Taunt. 495. So where the plaintiff in London, at the request of the defendant, the holder of a bill purporting to have been indorsed by *H.* at *M.* and dishonoured, paid the amount the same day for the honour of *H.* (whose name was forged), but gave notice to the defendant in time to enable him to give notice of the dishonour of the bill to the previous parties by that day's post. *Wilkinson* v. *Johnson*, 3 B. & C. 428. And although the plaintiff in the above case had struck out the names of the indorsers subsequent to that of *H.*, it was held that this having been done by mistake, did not alter the rights of the parties, but was capable of explanation by evidence. *Ib.* So where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor, the latter of whom kept an account with the defendants, were forged. *Fuller* v. *Smith*, R. & M. 49.

(*b*) *Robson* v. *Eaton*, 1 T. R. 62.

(*c*) *Lucas* v. *Worswick*, 1 Mo. & R. 293. Where an estate is sold, which turns out to be of less value than the price given for it, the difference cannot, in the absence of fraud, be recovered. *Cox* v. *Prentice*, 3 M. & S. 349, per Le Blanc, J. But if the parties agree to abide by the weighing of any article at particular scales, and in the weighing an error not noticed at the time takes place, from misreckoning a weight, in consequence of which the article is taken to be of greater than its real value, and the price is paid, money had and received is sustainable. Per Ld. Ellenborough, *Ib.*

(*d*) *Bilbie* v. *Lumley*, 2 East, 469. *Lowry* v. *Bourdieu*, Dougl. 467. *Chatfield* v. *Paxton*, cited 2 East, 470. *Davies* v. *Watson*, 2 N. & M. 709; and see *The East India Company* v. *Tritton*, 3 B. & C. 280; and *infra*, 88, note (*m*). Ld. Ellenborough, in the case of *Bilbie* v. *Lumley*, observed that in the case of *Chatfield* v. *Paxton*, 2 East, 471, note (*a*), it was so doubtful on what the case turned, that it was not reported. Ashurst, J. had in that case intimated that if money was paid without full knowledge of the facts, and under, what he termed, a blind suspicion of the case, and was found to have been paid unjustly, it might be recovered. Ld. Kenyon observed that the plaintiff had not paid the money under a *fair knowledge*, and that he had done so under a protest; but Grose and Lawrence, Js. seem to have doubted the sufficiency of these grounds; and Lord Ellenborough, in *Bilbie* v. *Lumley*, seems to intimate that the principle of decision in that case was not sufficiently clear to make it a precedent. It makes no difference that the party paid the money under a protest, declaring his intention to bring an action to recover it. *Brown* v. *M'Kinnally*, 1 Esp. C. 279; see also S. P. *Cartwright* v. *Rowley*, 2 Esp. C. 723. Upon the same principle, the giving a bill of exchange or promissory note for the amount of a debt, precludes the debtor from afterwards disputing the amount. *Nash* v. *Turner*, 1 Esp. C. 217. *Solomon* v. *Turner*, 1 Starkie's C. 51. The same reasons also apply where the amount has been allowed in account. *Skyring* v. *Greenwood*, 4 B. & C. 281. So if the vendor waive a contract for the sale of goods, he cannot

Mistake in law.

Where the captain of a king's ship brought home in her public treasure, upon the public service, and also treasure of individuals for his own emolument, and received freight for both, and paid over one-third of it (according to the usual practice) to the admiral, and having afterwards discovered that the law would not have compelled him to pay the third, brought an action against the executrix of the admiral to recover it back; it was held, that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it under a full knowledge of the facts, although under ignorance of the law, and because it was not against conscience for the executrix to retain it (*e*). Where money has been paid by mistake, which the law would not have compelled the plaintiff to pay, but which in equity and conscience he ought to have paid, he cannot recover it (*f*). As where he pays a debt otherwise barred by the Statute of Limitations, or a debt contracted during his infancy (*g*).

A plaintiff who has paid the whole of an attorney's bill cannot after taxation recover the sum deducted from the bill (*h*). Where a tenant omitted to deduct the property-tax out of his rent, it was held to be a voluntary payment, which he could not recover back (*i*).

Money received by an agent.

In case of the payment of money to a *known* agent, the general rule is that the action ought to be brought against the principal (*k*); and mere evidence of the receipt of money by the defendant as the agent of another is insufficient to support the action (*l*); and an agent, who having received money pays it over without notice to the contrary, is not liable, for it would be unjust that he should suffer from the mistake of another (*m*); and the

afterwards insist on the contract because he waived the contract in ignorance of the law. *Gomery* v. *Bond*, 2 M. & S. 378; see also *Lothian* v. *Henderson*, 3 B. & P. 520. So if a drawer promise to pay a bill of exchange, with knowledge that time has been given to the acceptor. *Stevens* v. *Lynch*, 12 East, 38. See tit. BILLS OF EXCHANGE. It has even been held that a plaintiff cannot recover in respect of a claim which he might have insisted on in a former action when he was defendant, in reduction of damages. *Kist* v. *Atkinson*, 2 Camp. 68.

(*e*) Sir *C. Brisbane* v. *Dacres*, 5 Taunt. 143; and see *Stevens* v. *Lynch*, 12 East, 38.

(*f*) 1 T. R. 286.

(*g*) *Bize* v. *Dickinson*, 1 T. R. 286.

(*h*) *Gower* v. *Popkin*, 2 Starkie's C. 85.

(*i*) *Denby* v. *Moore*, 1 B. & A. 123. An unsuccessful party in a cause, who pays the witness a second time over (the winner having already paid) in the taxed costs, cannot recover it back. *Crompton* v. *Hutton*, 3 Taunt. 230. So it has been held that if a lessee be evicted, he cannot recover the rent which he has paid. See *Stainforth* v. *Staggs*, cited 1 Camp. 398, n. *King* v. *Martin*, cited 2 Camp. 268. But where the tenant, after payment of rent, was ejected by a third party establishing his title to the premises, and who subsequently recovered mesne profits during the time for which the rent had been paid, it was held that the tenant was entitled to recover it back from the party to whom it had been paid, as money had and received, he not having set up any title at the trial of the ejectment. *Newsome* v. *Graham*, 10 B. & C. 234. See 1 Freeman, 479, note (*d*), 2d edit. After the death of a bankrupt tenant for life, his assignees were allowed to recover as money had and received the by-gone rents, from one who had received them under a fraudulent assignment. *Brown* v. *Day*, cited 3 Russ. & Myl. 124. 481.

(*k*) B N. P. 133. *Sadler* v. *Evans*, 4 Burr. 1094. *Smith* v. *Bromley*, Doug. 696, n. *Horsfall* v. *Handley*, 2 Moore, 5; 9 Taunt. 136. The action does not lie against an excise officer who has received duties after the repeal of the Act, but who has paid over the amount to his superior. *Greenway* v. *Hurd*, 4 T. R. 553. *Whitbread* v. *Brookesbank*, Cowp. 69. And see *Campbell* v. *Hall*, Cowp. 204; there the duties remained in the hands of the officer for the purpose of trying the question. So where a churchwarden has paid over burial fees to the treasurer of the trustees of a chapel. *Horsfall* v. *Handley*, 8 Taunt. 136.

(*l*) As where the agent signs a receipt for his principals; *e. g.* "for *S. & W.*," *W. R. Edden* v. *Read*, 3 Camp. 399; and see *Stephens* v. *Badcock*, 3 B. & Ad. 354.

(*m*) *B.*, a banker, being the agent of *A.*, who indorses a bill of exchange to him, receives the amount from the acceptor and

party who made the mistake has his remedy against the principal. It is otherwise in special cases: as where the agent has, previous to the payment, received notice not to pay it over (*n*); or where he has received the money *malâ fide* (*o*) To make this defence available, it must appear that the money was paid to the agent expressly for the use of the person to whom he had so paid it over (*p*); and that he has paid it over, or done that which is equivalent to such payment (*q*). Money received by an agent.

Where an agent receives money for his principal under a claim of right, as for tithe, the right of the principal cannot be tried in an action against the agent, if he can show the least colour of right in the principal; as for instance, his having been some time in possession (*r*).

Where money is deposited with an agent of the party, his authority is in general revocable; and after countermand, the principal is entitled to recover it. Thus the authority of a stakeholder may be revoked *before* the decision has taken place (*s*), and the stake recovered.

pays it over to *A*. The acceptor cannot recover from *B*., although it turn out that the bill was indorsed to *A*., under a supposed authority, viz. a warrant of attorney, which did not warrant the transfer. *East India Company* v. *Tritton*, 3 B. & C. 280. Note, that the acceptors had made all such inquiries as they deemed to be necessary, and that the defendant was not privy to the facts. *Semble*, that an indorser does not warrant the genuineness of previous indorsements. If *A*. give a letter of attorney to *B*. to receive money from *C*., and bring an action against *C*., *C*. cannot, except in mitigation of damages, show that he has paid money to *B*. since the action brought, for the bringing the action is a revocation of the authority. B. N. P. 153. Ca. K. B. 408. So if *A*. receive quit-rents for *W*., and after notice to *A*. not to pay the money over to *W*., because it is not due, he afterwards pays it over, the action lies. *Sadler* v. *Evans*, B. N. P. 133.

(*n*) *Sadler* v. *Evans*, B. N. P. 133.

(*o*) As where a gaoler illegally receives rent from a prisoner for a room in the prison. *Miller* v. *Aris*, B. R. Midd. Sitt. after M. 41 G. 3, *cor.* Lord Kenyon. So where a sum of money has been paid by the putative father to a parish officer, for the purpose of indemnifying the parish against a bastard child. *Townson* v. *Wilson*, 1 Camp. 396. *Watkins* v. *Hewlett*, 1 B. & B. 1. *Clark* v. *Johnson*, 3 Bing. 424. *Stainforth* v. *Staggs*, 1 Camp. 398, n. & 564. *King* v. *Martin*, cited 2 Camp. C. 268. S. P. ruled by Hullock, B. Lanc. Spring Ass. 1826. So if money be paid to a bailiff, who exceeds his authority, under terror of process, see 1 Taunt. 359.

(*p*) *Snowden* v. *Davis*, 1 Taunt. 359; where money was paid by the plaintiff to a bailiff, who exceeded his authority, in order to redeem his goods, and not that it might be paid over to any one in particular.

(*q*) If things at the time of the notice remain unaltered as between the agent and his principal, if no advance has been made, bills accepted or new credit given by the agent, in consequence of the payment, he is still liable, although the money has been passed in account, or a *rest* made. *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 3 M. & S. 344. And although he has paid it over, yet if the defendant has induced the plaintiff to suppose that the money had not in fact been paid over before notice, he cannot avail himself of such payment. *Edwards* v. *Hodding*, 5 Taunt. 515. *Secus*, if the situation of the agent has been altered. The agents of the plaintiff in England were directed by him to pay, through the defendants, money to be placed to his credit in India, which was done, and an entry made in the defendant's books to the credit of their correspondents, to whom they sent advice to account for it to the plaintiff: before the letter of advice reached their correspondents, the latter failed, having drawn on the defendants, between the date of such letter and the failure, bills, which the defendant had accepted to an amount exceeding the amount paid in by the plaintiff. It was held, that the defendants having only acted as directed, and the situation in which they stood towards their correspondents being altered, the plaintiff could not maintain *assumpsit* against them for the money so paid in. *M'Arthy* v. *Colvin*, 1 Perr. & Dav. 429.

(*r*) *Staplefield* v. *Yewd*, Tr. 27 G. 2, *cor.* Lee, C. J., B. N. P. 153; Cas. K. B. 409.

(*s*) Although, as it seems, the wager be legal, for the situation of the stakeholder does not differ from that of an arbitrator, whose authority is countermandable. See *Eltham* v. *Kingsman*, 1 B. & A. 683, et vid. *infra*, 95. *Aliter*, where a legal wager has been determined against the plaintiff. *Brandon* v. *Hibbert*, 4 Camp. 37. *Bland* v. *Collett*, Ibid. 157.

Where the drawer of a bill paid the amount to an indorser, to take it up when due, but the bill not having been presented in due time, the drawer directed the indorser not to pay the amount, and offered to indemnify him; and notwithstanding this, the indorser afterwards paid the bill, it was held that he paid it in his own wrong, and that the drawer might recover the amount (*t*).

A trustee, such as the provisional assignee of a bankrupt, is not liable for money received by an agent appointed with due care, who has failed (*u*).

Failure of consideration.

Under this count the plaintiff may also show that he has paid money to the defendant upon a consideration which has failed. As, for a bill of exchange upon a banker who breaks before it can be tendered to him (*x*). Or for goods which have not been delivered (*y*); or money paid as a deposit on the purchase of an estate, where the vendor cannot make out a title (*z*). So he may recover the money paid as a consideration for an annuity, where the deeds for securing it have been set aside for informality (*a*). Or where one of the several securities fails (*b*). Or where one, having purchased a lease from the defendant as the supposed representative of the lessee, is ousted by the real administrator (*c*). But where a personal representative assigned a mortgage-deed, which turned out to be a forgery, for a valuable consideration, but without any knowledge of the forgery, it was held that the purchaser was not entitled to recover the price (*d*).

A. pays *B.* an annuity for the use of an invention, for which *B.* has obtained a patent, and it afterwards turns out that the patent was void, the invention having been in public use before. *A.* cannot recover the amount so paid (*e*); for he has had the use of it.

(*t*) *Whitfield* v. *Savage*, 2 B. & P. 277.

(*u*) *Raw* v. *Cutten*, 9 Bing. 96.

(*x*) B. N. P. 131. See also *Jones* v. *Ryde*, 1 Marshall, 157, where *A.* paid to *B.* a navy bill purporting to be of the value of 1,800*l.* but which was in reality worth 800*l.* only, a figure having been forged; it was held that *B.* was entitled to recover the difference from *A.* who was ignorant of the fraud. But where *A. & Co.*, bankers, paid the amount of a forged acceptance to an innocent holder for value, it was held that they could not recover the amount. *Smith* v. *Mercer*, 1 Marshall, 453; *supra*, 86.

(*y*) 8tr. 407; B. N. P. 131.

(*z*) 8 T. R. 516; 3 B. & P. 181. See VENDOR AND VENDEE.

(*a*) *Shore* v. *Webb*, 1 T. R. 732. In such case the deeds should be produced, and their execution proved, and the setting them aside proved by the production of the rule of court. See *Hicks* v. *Hicks*, 3 East, 16.

(*b*) *Scurfield* v. *Gowland*, 6 East, 241. The defendant is entitled to deduct for payments made by him in respect of the annuity. *Hicks* v. *Hicks*, 3 East, 16; and see *Davis* v. *Bryan*, 6 B. & C. 651.

(*c*) *Cripps* v. *Reed*, 6 T. R. 606. In such case the assignment should be produced and proved, and the ouster should be proved by evidence of the judgment in ejectment; and the writ of possession, and the revocation of the letters of administration, should be proved. Lord Kenyon observed that he did not wish to disturb the rule *caveat emptor*, adopted in *Bree* v. *Holbeach*, Doug. 654, and other cases; that where a regular conveyance was made, other covenants ought not to be added; and that, in general, a seller covenants for his own acts and those of his ancestors only; in which respect, the case of a mortgagor differed from it, as he covenants that at all events he has a good title; but that here the whole passed by parol, under a misapprehension by both parties that the defendant was the legal administrator of the lessee. In the case of *Bree* v. *Holbeach*, no action could have been maintained. Where a defendant in possession of premises which he formerly held under a tenant for life, who was dead, sold his interest, under a representation that it was a good lease for seven years, and was afterwards ejected, Lawrence, J. held, on the authority of *Cripps* v. *Reed*, that the price might be recovered. *Matthews* v. *Hollings*, Salop Summ. Ass. 1801; Woodfall's Landlord and Tenant, 2d. edit. 35.

(*d*) Doug. 655.

(*e*) *Taylor* v. *Hare*, 1 N. R. 260. Note, that the Judges in this case laid considerable stress on the consideration that the parties acted under a mistake; but so they did in the case of *Cripps* v. *Reed*; the true distinction seems to be, that in *Taylor* v. *Hare* the plaintiff did in fact derive benefit from the patent; and Heath, J. said, "We

So where an article, which the vendee has an opportunity of examining, is sold without fraud, the vendee cannot afterwards recover the price, upon discovering that the article was internally defective at the time of sale (*f*).

A putative father giving a note for a fixed sum to the parish officers, who receive the amount, may recover back such part as remains unexpended on the death of the child, as money had and received to his use (*g*). A plaintiff who has paid money on a consideration not performed, may either affirm the agreement by a special action for non-performance, or disaffirm it by reason of the fraud, and bring an action for money had and received (*h*).

Rescinded contract.

Where money has been paid by the plaintiff to the defendant, upon a contract which is afterwards *rescinded*, either in consequence of the nature of the contract, or by consent (*i*), or by the act of the defendant, then, since the consideration fails, the plaintiff is entitled to recover the money. As, where the plaintiff paid ten guineas to the defendant for a chaise, on condition that it should be returned in case the plaintiff's wife did not approve of it, paying 3*s.* 6*d.* per day. In the mean time the plaintiff's wife disapproving of it, the chaise was sent back to the defendant after three days, and left on his premises without his consent, and the 3*s.* 6*d.* per day was tendered, which the defendant refused to receive; and it was held that the plaintiff was entitled to recover the ten guineas (*k*). And in *Giles* v. *Edwards* (*l*), where the defendant by his neglect prevented the plaintiff from carrying a special agreement between them, for the sale of cord-wood to the plaintiff, into execution, it was held that the plaintiff might recover the sum which he had paid under the contract, as money had and received to his use. So, it was held in *Dutch* v. *Warren* (*m*), where the defendant

cannot take an account here of the profits; it might as well be said, that if a man lease land, and the lessee pay rent, and be afterwards evicted, he shall recover back the rent, though he has taken the fruits of the land. The defendant sold his patent right, such as it was, and there was no express or implied warranty that the patent should stand, and there was no fraud."

(*f*) *Bluett* v. *Osborne*, 1 Starkie's C. 384. But where the plaintiff, a stock-broker, sold for the defendant four Guatemala bonds, and paid him the amount, and after the bonds had been two days in the hands of the purchaser they were found not to be marketable, and the plaintiff took them back and reimbursed the purchaser, it was held that he was entitled to recover for the amount paid by him to the defendant. *Young* v. *Cole*, 3 Bing. N. C. 724

(*g*) *Watkins* v. *Hewlitt*, 1 B. & B. 1. See *Townson* v. *Wilson*, 1 Camp. 396. *Clarke* v. *Johnson*, 3 Bing. 444. S. P. cor. Hullock, B. Lanc. Sp. Ass. 1826. In the case of *Chappel* v. *Poles*, 2 M. & W. 867, the money was held to be recoverable although the defendants (the overseers who had received the money) had paid it over to their successors. It seems that the whole sum was to be considered as money had and received to the plaintiff's use, the contract being illegal and void.

(*h*) B. N. P. 132.

(*i*) The plaintiff agreed to let to the defendant land on building leases, and to advance him ——*l.*, to be repaid by a certain day, and the defendant engaged to build houses thereon, and to convey them as a security: after some of the houses had been built, and part only of the money agreed to be lent had been advanced, the plaintiff requested the defendant not to proceed further with the buildings, which was assented to, and the agreement rescinded by mutual consent; held, that the day for repayment being past, the plaintiff might recover the money advanced on the common counts, and was not bound to declare on the special agreement. *James* v. *Cotton*, 7 Bing. 266, and 5 M. & P. 26; and see *Oxendale* v. *Wetherell*, 9 B. & C. 386.

(*k*) *Towers* v. *Barrett*, 1 T. R. 133. Sale of an article by *A.* to *B.*, with liberty to return it in a month, *B.* allowing 10*l.* out of the price paid, and in case *B.* kept the article beyond the month he was to pay 10*l.* more to *A.*; *B.* returning the article within the month is entitled to recover the price, deducting the 10*l.* *Hurst* v. *Orbell*, 8 Ad. & Ell. 107.

(*l*) 7 T. R. 181.

(*m*) Cited 2 Burr. 1010. Subscriptions advanced under a scheme for establishing a tontine to directors, who abandon the

had refused to transfer to the plaintiff five shares in the Welsh Copper Mines, according to his agreement, under which the plaintiff had paid him the price.

Contract still open.

Where, however, the terms of the special contract are still open, this action does not lie. As, where money is paid as the price of a horse warranted sound, which turns out to be unsound (*n*); for an action for money had and received is not a proper form of action to try the warranty. So, in the case of *Cooke* v. *Munstone*, above cited (*o*), it was held that the money which had been paid for the delivery of the soil could not be recovered, whilst the contract for the soil remained still open. And in general it seems that money paid upon a contract cannot be recovered back after part execution of the contract, and where the parties cannot be placed in *statu quo* (*p*). If money be paid which is due in honour and conscience, it cannot be recovered, although payment could not have been compelled (*q*).

Recovered by legal process.

It is a general rule, that money recovered by means of legal process cannot be recovered, although it be afterwards discovered that it was not due (*r*). But the action lies against an overseer of the poor, to recover money in his hands levied under a conviction which has since been quashed (*s*). So it lies to recover money paid under a compromise of an action; the compromise having failed, and another action having been brought (*t*).

scheme, *Nockles* v. *Crosby*, 3 B. & C. 814; or for the purchase of shares in a joint-stock company, *Kempson* v. *Saunders*, 4 Bing. 5; may be recovered without any deduction for expenses.

(*n*) *Power* v. *Wells*, Doug. 24, n.; Cowp. 818. *Weston* v. *Downes*, 1 Doug. 23. *Payne* v. *Whale*, 7 East, 274; 1 T. R. 133.

(*o*) 1 N. R. 151. See also *Hull* v. *Heightman*, 2 East, 145; *supra*, 56.

(*p*) *Hunt* v. *Silk*, 5 East, 449. *Giles* v. *Edwards*, 7 T. R. 181. Where an infant has paid money to the defendant as a premium for a lease, and has taken possession of the premises, he cannot, after an avoidance of the lease on coming of age, recover back the money. *Holmes* v. *Blogg*, 8 Taunt. 508. The purchaser of a moiety of his partner's share of a vessel had entered upon and derived the full profits of the vessel, and also deposited the title-deeds with a third person, as a security for money advanced to him; held that the vendor could not recover as for money had and received. *Beed* v. *Blandford*, 2 Y. & J. 278. An original contributor to a foreign loan paid a deposit to the contractor upon scrip receipts, and transferred them to the defendant in error, and the contractor, the plaintiff, afterwards, from time to time extended the period of paying up the instalments to stated periods, on certain terms; held that the defendant, omitting to comply with the terms of such indulgence, could not afterwards insist upon the contractor accepting the instalments with interest, or returning the deposit, so as to maintain *assumpsit* for money had and received. *Rothschild* v. *Hennings*, 4 M. & Ry. 411; S. C. 12 Moore, 559. The plaintiff put money into the hands of the defendant to be paid to *J.*, with the qualification that it was not to be paid over until, &c.; before which the plaintiff demanded that it should be paid back; held that he was entitled to recover it back or not, according as the jury were satisfied that *J.* looked to the plaintiff or defendant for payment of that sum. *Owen* v. *Bowen*, 4 C. & P. 93.

(*q*) *Farmer* v. *Arundel*, 2 Bl. R. 824.

(*r*) *Marriott* v. *Hampton*, 7 T. R. 269. See *Moses* v. *Macfarlane*, Burr. 1006; B. N. P. 130. *Thorp* v. *How*, Ibid. See also *Brown* v. *M'Kinnally*, 1 Esp. C. 279. There the money was paid under a protest that it was paid without prejudice, but Ld. Kenyon, C. J. held that it was to be regarded as a voluntary payment. And see *Hamlet* v. *Richardson*, 9 Bing. 644. See also *Barbone* v. *Brent*, 1 Vern. 176; where the defendant demurred to a bill, which stated that the plaintiff having paid the defendant for goods but lost the receipt, the latter recovered in an action, and the demurrer was allowed. In that case North, Ld. Keeper, said, that if *A.* having paid money in part satisfaction, afterwards is compelled by an action to pay the whole value, the party who paid the money may recover it at law. The assignee of a bankrupt cannot recover from the plaintiffs, in an action against the bankrupt, money deposited in lieu of bail, and paid over by order of court to the plaintiffs, on default of depositing a further sum in lieu of bail. *Reynolds* v. *Wedd*, 4 Bing. N. C. 694. 6 Dowl. P. C. 728.

(*s*) *Feltham* v. *Terry*, cited in *Birch* v. *Wright*, 1 T. R. 187; and B. N. P. 131.

(*t*) *Cobden* v. *Kenrick*, 4 T. R. 432.

And where the defendant, knowing that he had no real claim, arrested the plaintiff, a foreigner, at Falmouth, on his arrival from abroad, for 10,000*l.*, and under the compulsion of a colourable legal process extorted from him 500*l.* as in part payment, the Court held that the action was maintainable to recover the money so paid (*u*).

Where the holder of a bill of exchange, being a trustee for the plaintiff, sued the drawer, and after his bankruptcy his assignees recovered against the sheriff, in the name of the bankrupt, for an escape, damages to the amount of the bill; it was held that the plaintiff might recover the damages from the assignees, allowing them the costs and expenses (*x*).

Illegal consideration.

It seems to be a general rule, that where money has been paid by the plaintiff to the defendant, on a consideration which is illegal in itself (*y*), as being prohibited by some statute, but where the plaintiff does not stand in *pari delicto* with the defendant, and cannot be considered as *particeps criminis*, the money may be recovered. And therefore, where a statute is made for the protection of persons standing in the plaintiff's situation, the party injured may, even after the transaction prohibited by the statute has been finished and completed, recover the money so paid. Here the law acts in furtherance of the provisions of the statute; hence a debtor may recover from a creditor all the usurious interest which he has paid beyond legal interest (*z*).

Action by one not particeps.

So the plaintiff may recover the premiums for illegal insurances of numbers in a lottery after the chances have terminated in his favour, since the contract is not criminal, but merely void (*a*). Or money given by the plaintiff, as a friend of a bankrupt, to the defendant, a creditor, to induce him to sign

(*u*) *Duke de Cadaval* v. *Collins*, 4 Ad. & Ell. 858. Where a certificated bankrupt, on being arrested on a *ca. sa.*, for a debt proveable under the commission, paid the money under a protest stating his bankruptcy and certificate, and warning the plaintiff that he should apply to the Court to have the money returned, it was held, that he was not precluded from maintaining the action. *Payne* v. *Chapman*, 4 Ad. & Ell. 364.

(*x*) *Randoll* v. *Bell*, 1 M. & S. 714, Ld. Ellenborough *dissentiente*: *qu.* therefore.

(*y*) See further on this subject, tit. VENDOR AND VENDEE.

(*z*) Per Ld. Mansfield, in *Smith* v. *Bromley*, Doug. 696, (n); B. N. P. 133. *Lowry* v. *Bourdieu*, Doug. 471. The authority of *Tomkyns* v. *Barnet*, Skinn. 411, and Salk. 22, has frequently been denied. In *Clarke* v. *Shee*, Cowp. 199, Ld. Mansfield said that it had been denied a thousand times. And see *Alsop* v. *Milton*, Sel. N. P. 89, 4th edit.; *Shore* v. *Webb*, 1 T. R. 732; *Scurfield* v. *Gowland*, 6 East, 241.

(*a*) By the statute 14 Geo. 3, c. 76. *Jacques* v. *Golightly*, 2 Bl. R. 1073. *Jacques* v. *Withy*, 1 H. B. 65; S. P. *Clarke* v. *Shee*, Cowp. 199. *A.*, who buys a horse from *B.* on a Sunday, not knowing that *B.* was a horse-dealer, may recover the price, for he was not *particeps criminis*, and the consideration has failed. *Bloxsome* v. *Williams*, 3 B. & C. 232; and see *Drury* v. *Defontaine*, 1 Taunt. 134. But note, that the horse was of the value of 10*l.*, and there was no memorandum in writing; and the horse was not delivered or the money paid till the Tuesday after; and therefore, as there was no complete contract of sale on the Sunday, the case was not within the stat. 29 C. 2, c. 7, s. 2. *Qu.* per Bayley, J. whether the statute is not confined to manual labour, and other work visibly laborious, and the keeping of open shops? A horse-dealer cannot maintain an action upon a contract for the sale and warrant of a horse, made by him on a Sunday; *Fennel* v. *Ridler*, 5 B. & C. 408; although the contract was made by an agent, and was entered into at the request of the party who takes the objection. *Smith* v. *Sparrow*, 4 Bing. 84. Where goods having been bought on a Sunday, the buyer afterwards whilst the goods were in his possession promised to pay for them, it was held, that the seller was entitled to recover on a *quantum meruit*. *Williams* v. *Paul*, 6 Bing. 653. The hiring of a servant by a farmer on a Sunday is good, *R.* v. *Whitnash*, 7 B. & C. 596; and see *Begbie* v. *Levi*, 1 C. & J. 180. The object of the Act was to prevent parties from carrying on their *trade* and ordinary *occupations* and *callings* on a Sunday.

Illegal consideration.

the bankrupt's certificate, which he actually did (*b*). So, where the defendant, having brought an action against the plaintiff, on the ground of an alleged usurious transaction between the plaintiff and *A. B.*, procured money from the plaintiff to compromise the action, it was held that the plaintiff might recover the money, on the ground that the prohibition and penalties of the stat. 18 Eliz. 2, c. 5, s. 4, solely attached upon, and were confined to, the informer or plaintiff in the penal action, and did not attach upon or extend to the person compounded with; and the distinction was taken as laid down by Lord Mansfield in the case of *Smith* v. *Bromley* (*c*), that if the act itself be immoral, or a violation of the general laws of public policy, the party paying the money shall not be allowed to recover it; but that in the case of other laws which are calculated for the protection of the subject against oppression, extortion, and deceit, if such laws be violated, and the defendant take advantage of the plaintiff's situation or condition, then the plaintiff shall recover (*d*).

Action by a particeps criminis.

Where money is paid by the plaintiff to the defendant upon an *illegal agreement*, to which both are parties, and equally culpable, it may be recovered whilst the agreement remains *executory*, but not afterwards. *A.*, in consideration of 210 *l.*, gave *B.* a bond for the payment of an annuity of 100 guineas until the hop duties should amount to a certain sum, and it was held that *B.*, who brought his action before that event happened, was entitled to recover, on the ground that the contract still remained executory (*e*). So it was held where a sum of money had been paid to procure a place in the customs (*f*). So, where a prisoner in custody in Newgate, for clipping coin, gave a sum of money to a solicitor to procure his discharge (*g*).

Where, however, money is paid by the plaintiff to the defendant, upon an agreement grossly immoral, it seems that it cannot be recovered, although the agreement remain *executory*: for in such case it is contrary to sound policy to yield the plaintiff any assistance. As where the money is paid as a consideration for the murder of a third person (*h*). It is however to be observed, that the distinction between *malum in se* and *malum prohibitum* has frequently been disapproved of (*i*); and if the doctrine is to prevail that the party ought to be allowed a *locus pœnitentiæ*, is it not reasonable that he

(*b*) *Smith* v. *Bromley*, Doug. 696. *Cockshott* v. *Bennett*, 2 T. R. 763; *Jackson* v. *Lomas*, 4 T. R. 166; 3 T. R. 551. *Leicester* v. *Rose*, 4 East, 472; B. N. P. 133. The stat. 5 G. 2, c. 30, s. 11, formerly, and now the stat. 6 G. 4, c. 16, s. 125, *vacates* all securities given by the bankrupt, or any person on his behalf, as the consideration for signing his certificate. See *Nerot* v. *Wallace*, 3 T. R. 25. A creditor executing a composition deed, takes bills from the debtor to the full amount; the debtor may recover the surplus. *Turner* v. *Hoole*, 1 D. & R. 27.

(*c*) Doug. 670, n.

(*d*) *Williams* v. *Hedley*, 8 East, 378. *Browning* v. *Morris*, Cowp. 790.

(*e*) *Tappenden and others* v. *Randall*, 2 B. & P. 467. In this case the Court considered the distinction between executed and executory contracts as completely established. See Sir J. Mansfield's observations in *Aubert* v. *Walsh*, 3 Taunt. 281. *Busk* v. *Walsh*, 4 Taunt. 960. *Webb* v. *Bishop*, B. N. P. 16. 132. It seems, however, that the Courts do not consider wagers on the amount of duties to be illegal or immoral, but refuse to enforce them, on account of the public inconvenience which might otherwise result. *Shirley* v. *Sunbury*, 2 B. & P. 130.

(*f*) *Walker* v. *Chapman*, cited by Buller, J. in *Lowry* v. *Bourdieu*, Doug. 471.

(*g*) *Wilkinson* v. *Kitchen*, 1 Ld. Raym. 89. But see *Norman* v. *Cole*, 3 Esp. 253, where Lord Eldon is reported to have held, that a sum of money placed in the hands of the defendant, in order to procure a pardon for one who was under sentence of death in Newgate, could not be recovered.

(*h*) Per Heath, J. *Tappenden* v. *Randall*, 2 B. & P. 471.

(*i*) *Aubert* v. *Maze*, 2 B. & P. 371. *Cannan* v. *Bryce*, 3 B. & A. 179.

should be allowed and induced to repent of his intention to perpetrate a great and heinous crime, as well as of his intention to commit a more trivial offence?

Money in hands of stakeholder, &c.

In cases of illegal transactions, money may always be stopped whilst it is *in transitu* to the person who is to receive it (*k*).

Where the money has been paid to a mere depositary or stakeholder, the plaintiff may recover it at any time before it is paid over, although the agreement *be illegal* and no longer *executory*. As, where a wager is deposited with a stakeholder on the event of a battle to be fought by the parties, and the battle be fought, either party may recover his deposit before it be paid over (*l*). So, where the plaintiff, in order to avoid a prosecution for a misdemeanor, paid a sum of money to the defendant for the use of the poor, it was held that after notice not to pay the money over he might recover it (*m*).

Of an agent.

It is a general rule that an agent shall not be allowed to set up the title of a third person against his principal (*n*).

Where the defendant, a broker, had received from the underwriters the amount of an illegal insurance, it was held that he could not set up the illegality of the transaction as a defence in an action by the assured (*o*). For having received money to the use of another, he cannot in conscience retain it, and no one is entitled to it but the plaintiff. So, where the defendants, who were carriers, received for the plaintiffs the price of a quantity of counterfeit halfpence, it was held that the plaintiff was entitled to recover, and the illegality of the transaction was considered as unimportant to the decision of the question (*p*), since the plaintiff sought but to recover his own. But it is otherwise where the money has not been actually paid, but credit only has been given. An underwriter on an illegal insurance cannot recover the premium from the broker, though the broker has given the underwriter credit for it in their account; no money having been actually received by the broker (*q*).

In the case of *Booth* v. *Hodgson* (*r*), *A.*, *B.* and *C.* being partners in underwriting insurances, which were underwritten in the name of *A.* alone; *C.*, one of the partners, and *D.*, as the brokers of *A.*, *B.* and *C.*, received

(*k*) Per Ld. Ellenborough, C. J. in *Edgar* v. *Fowler*, 3 East, 222. See the cases cited below. A premium is *in transitu* if not actually paid by the broker to the underwriter, although the former has given credit for it to the latter. *Ibid.*

(*l*) *Cotton* v. *Thurland*, 5 T. R. 405. *Eltham* v. *Kingsman*, 1 B. & A. 683. And see *Howson* v. *Hancock*, 8 T. R. 575. *Smith* v. *Bickmore*, 4 Taunt. 474 *Aubert* v. *Walsh*, 3 Taunt. 277. *Farmer* v. *Russell*, 1 B. & P. 296. Vide *etiam*, *Bate* v. *Cartwright*, 7 Price, 540, which was the case of a wager on a foot-race. A stakeholder having paid over the money deposited, after the wager had been decided against the plaintiff, who claimed the whole as winner; it was held that the plaintiff might recover back his own deposit in an action for money had and received, against the stakeholder; the Court distinguishing between actions by one party to an illegal contract against the other, and those against the stakeholder paying over without authority, and in opposition to his desire. *Hastelow* v. *Jackson*, 8 B. &. C. 221, and 2 M. & Ry. 209; and see *Hodson* v. *Terril*, 1 C. & M. 797. Vide *infra*, tit. WAGER.

(*m*) *Taylor* v. *Lendey*, 9 East, 49.

(*n*) *White* v. *Bartlett*, 9 Bing. 378. *Nicholson* v. *Knowles*, 5 Mad. 47. *Crosskey* v. *Mills*, 1 C. M. & R. 298. An agent receiving money to be paid over to a third person, is accountable to his principal until he has entered into some binding engagement to hold the money to the use of such third person. See *Williams* v. *Everett*, 14 East, 582; *supra*, 81. *Wedlake* v. *Hurley*, 1 C. & J. 83. *Baron* v. *Husband*, 4 B. & Ad. 612; and tit. APPROPRIATION.

(*o*) *Tenant* v. *Elliott*, 1 B. & P. 3. The case was distinguished from that of a stakeholder.

(*p*) *Farmer* v. *Russell*, 1 B. & P. 296.

(*q*) *Edgar* v. *Fowler*, 3 East, 222.

(*r*) 6 T. R. 405.

Illegal contract.—Receipt by an agent.

premiums of insurance to their use, and it was held that *A.* was not entitled to recover the amount of those premiums from *C.* and *D.* as money had and received to his use. Here it is to be observed, that the party could not recover except through the medium of the illegal transaction, and the case differs from that of money paid to a mere agent of the plaintiff, where the illegality of the transaction is out of question.

In the case of *Sullivan* v. *Greaves* (*s*), the plaintiff and one *Bristow*, being partners in an insurance underwritten by the plaintiff in his own name, a loss happened, and the plaintiff paid the whole to the defendant, a broker; *Bristow* afterwards paid his moiety of the loss to the broker, and then the plaintiff brought his action against the broker to recover half of what he had paid; and Lord Kenyon held, that since the plaintiff came to enforce an illegal contract, he could not recover (*t*). This case may seem at first view to be inconsistent with that of *Tenant* v. *Elliott* (*u*); but it appears to be distinguishable from it; for there the ground of the decision was, that the agent of the plaintiff having received money for his use, the illegality was out of the question; it was the plaintiff's own money; but in the latter case the plaintiff sought to recover money which he had paid under an executed illegal agreement; *before Bristow*'s payment of the money, the plaintiff, for the reason just stated, was not entitled to recover any part of it; and when *Bristow* paid the money he did not actually pay it to the plaintiff's use, as in the case of *Tenant* v. *Elliott*, but in discharge of his own share in an illegal contract; and the law will not raise an implied assumpsit in favour of a *particeps criminis*.

Illegal executed consideration.

Money paid over to a party cannot be recovered after the event has happened; for where the parties are in *pari delicto, potior est conditio possidentis* (*x*). And therefore a plaintiff cannot recover from the underwriter the premium of a re-assurance void by statute (*y*) *after capture* (*z*). So, where an insurance was made on a ship belonging to a British subject, without interest (*a*), it was held that the assured could not recover the premium after the ship *had arrived safe* (*b*). And in such cases it is presumed that all parties know the law, and the municipal laws of this country are as binding in that respect upon foreigners as upon natives (*c*).

Where, however, an insurance has been effected in ignorance of particular

(*s*) Park on Ins. 8.

(*t*) Lord Kenyon afterwards mentioned the case to the other Judges of the Court of K. B., who approved of it; and the doctrine was recognized and approved of by the Court of C. P. in the case of *Mitchell and others* v. *Cockburn*, 2 H. B. 379.

(*u*) 1 B. & P. 3, and *supra*, 95. See Mr. Selwyn's quære, 1 Selw. N. P. 4th ed. 90.

(*x*) There is no case to be found where money has been paid by one of two parties to another, on an illegal contract, both being *particeps criminis*; an action has been maintained to recover it back again. Per Lord Kenyon in *Howson* v. *Hancock*, 8 T. R. 577. The case of *Lacaussade* v. *White*, 7 T. R. 535, where money paid on an illegal wager was allowed to be drawn after the event had taken place, has been considered as completely over-ruled by *Howson* v. *Hancock*, 8 T. R. 575, where the contrary was decided. See *Vandyck* v. *Hewitt*, 1 East, 96; *Williams* v. *Headly*, 8 East, 382; *Aubert* v. *Walsh*, 3 Taunt. 284; *Morck* v. *Abel*, 3 B. & P. 35; *Thistlewood* v. *Craycroft*, 1 M. & S. 500; *Stokes* v. *Twitchen*, 8 Taunt. 492; *Bayntun* v. *Cattle*, 1 Mo. & R. 265.

(*y*) 19 Geo. 2, c. 37.

(*z*) *André* v. *Fletcher*, 3 T. R. 266. *Webb* v. *Bishop*, B. N. P. 132.

(*a*) Which is illegal by 19 Geo. 2, c. 37.

(*b*) *Lowry* v. *Bourdieu*, Doug. 467. See also *Lubbock* v. *Potts*, 7 East, 449.

(*c*) *André* v. *Fletcher*, 3 T. R. 266. *Morck* v. *Abel*, 3 B. & P. 35. *Vandyck* v. *Hewitt*, 1 East, 96; where the money was paid on an illegal insurance to cover a trading with the enemy, and the plaintiff declared on the policy as well as on the money counts.

facts which avoid the policy, it has been held that the premium may be recovered (*d*).

So, where money had been paid by an illegal insurer of lottery tickets, in consequence of having insured the defendant's tickets, it was held that the plaintiff could not recover, because the contract was executed; and the distinction was taken between that case and that of a plaintiff who seeks to recover premiums paid for such illegal insurances (*e*).

In some instances this form of action cannot be maintained, even though the plaintiff be entitled to receive the money, without proof of notice of action (*f*), according to the special provision of some statute. Notice of action.

The count, upon *an account stated*, is supported by evidence of an acknowledgment on the part of the defendant of money due (*g*) to the plaintiff (*h*), upon an account between them (*i*). A qualified acknowledgment is not Account stated.

(*d*) *Hentig* v. *Staniforth*, 1 Starkie's C. 254; 5 M. & S. 122. *Oom* v. *Bruce*, 12 East, 225.

(*e*) *Browning* v. *Morris*, Cowp. 790.

(*f*) Thus the action does not lie against an excise officer in respect of duties received after the repeal of the Act which imposed them, without notice, according to the 23 G. 3, c. 70, s. 30. For this Act protects them in all cases where intending to act within the statute they exceed it. *Greenway* v. *Hurd*, 4 T. R. 555. See also *Wallace* v. *Smith*, 5 East, 114. But where the defendants made an excessive charge on a distress for arrears of taxes, it was held that the defendants in an action of *assumpsit* were not entitled to notice, for the act was not done *colore officii*. *Umphelby* v. *Maclean*, 1 B. & A. 42; and *supra*, 66, note (*t*), Ind. tit. NOTICE.

(*g*) *Tucker* v. *Barrow*, 7 B. & C. 623. A mere acknowledgment of a debt being due, and a promise to pay it, but no amount specified, is insufficient to entitle the plaintiff even to nominal damages on an account stated. *Bernasconi* v. *Argyle*, 1 M. & M. 183, and 3 C. & P. 29. Unless the amount be proved *aliunde*. *Dickson* v. *Doveridge*, 2 C. & P. 109. *Leeson* v. *Smith*, 4 N. & M. 304. The plaintiff sued as executrix, and proved that the defendant being applied to by her for payment of interest, stated, that she would bring her some on the following Sunday; it was held, that although there was an admission that something was due, yet that as it did not appear what the nature of the debt was, nor whether it was due to the plaintiff as executrix, or in her own right, nor if it was one for which *assumpsit* would lie, the plaintiff was not entitled to recover even nominal damages. *Green* v. *Davies*, 4 B. & C. 235; and see *Hall* v. *Auty*, 2 B. & B. 101. The plaintiff must show some precise sum, per Tindal, C. J., *Kirton* v. *Wood*, 1 Moo. & R. 253. Where at a meeting of the plaintiff and defendant to settle an account, the clerk of the former made the entries into one book which the defendant copied into another, but no admission was made as to the correctness of the items; and the defendant admitted that the balance against him, as stated by the clerk, was correct; but added, that as he had done many things, there would not be much, if any thing, between them; held, that the plaintiff's book would not bind the defendant so as to require its production, or its absence to be accounted for; held also, that the defendant's admission was evidence of something due on the account stated. *Rigby* v. *Jeffrys*, 7 Dowl. (P. C.) 561. Where the declaration contained counts, on an instrument in the form of a promissory note, payable at "nine years after date, provided *D. M.* did not return to England, or his death be certified in the mean time," with common counts for money lent, and upon an account stated; and the only evidence was of handwriting, and that *D. M.* had never been heard of for 25 years; held that the plaintiff, failing to prove the consideration stated in those counts to have been given for the promise, could not recover upon the latter counts; the instrument not raising any presumption of money lent; on the contrary, the contingency on which it was payable raising rather a different presumption. *Morgan* v. *Jones*, 1 Cr. & J. 162; and 1 Tyrw. 21.

(*h*) Where a plaintiff could not prove his title as indorsee of a bill by evidence of an indorsement, it was held that letters written by the defendant in answer to applications, in which the defendant did not admit any liability to the plaintiff or to any particular holder, but only a liability on the bill to the holder, were not sufficient evidence of title to recover. *Jardine* v. *Payne*, 1 B. & Ad. 663.

(*i*) *A.* agrees with *B.* to purchase a house, and take the fixtures at a valuation; an inventory and valuation are made, and the gross amount stated at the foot; *A.* takes possession and enjoys, and pays part of the amount. In an action for goods sold and delivered, and on an account stated, *B.* is entitled to recover the

sufficient (*k*); neither is a casual acknowledgment, made to a mere stranger (*l*); nor one made after action brought, without proof of previous dealings (*m*). Where accounts are submitted to an arbitrator, not by bond, his award is evidence on this count (*n*). A promissory note given by the defendant to the plaintiff is evidence under this count, even where the note cannot be given in evidence under a special count, because of variance (*o*). It is unnecessary to prove the items of which the account consists, but sufficient to prove the account stated (*p*); for the stating of the account is the consideration of the promise (*q*); and therefore an action upon this count cannot be maintained against an infant (*r*); for since an infant cannot state an account, the consideration fails.

It is sufficient, although the account be stated of that which is due to the plaintiff only, without making deduction for any counter-claim by the defendant (*s*). An acknowledgment of a single item in an account is sufficient to support the count (*t*). It is also sufficient that the account be

remainder on the account stated. *Salmon* v. *Watson*, 4 Moore, 73. Upon a verbal agreement for the sale of growing turnips, part of them being drawn, the purchaser promised to pay the amount before he drew any more, but which he did not do; held that that sum was recoverable on the account stated. *Pinchon* v. *Chilcott*, 3 C. & P. 236. Where the defendant, an incoming tenant, agreed to pay the plaintiff, the offgoing tenant, for all crops sown before a certain day, and the defendant, in answer to a demand of 40 *l.*, tendered 17 *l.*; held that it did not amount to an acknowledgment of debt to support an account stated, but was to be considered as a mere offer to purchase peace. *Wayman* v. *Hilliard*, 7 Bing. 101.

(*k*) *Evans* v. *Verity*, R. & M. 239. As where the defendant said, "I would have paid you, if you had not removed the grates." And see *Wayman* v. *Hilliard*, 4 M. & P. 629; 7 Bing. 101, S. C.; and *supra*, note (*i*).

(*l*) *Buchan* v. *Smith*, 1 Ad. & Ell. 488.

(*m*) *Allen* v. *Cook*, 2 Dowl. P. C. 546. The offer of a *cognovit* after action brought, is not evidence of an account stated. *Spenser* v. *Parry*, 3 Ad. & Ell. 331.

(*n*) *Keen* v. *Batshore*, 1 Esp. C. 194.

(*o*) See tit. BILLS OF EXCHANGE. In *Leaper* v. *Tatton*, 16 East, 420, Bayley, J. held, that an acknowledgment by the defendant of his having accepted a bill of exchange, and that he had not paid it, created a debt, and was evidence on the account stated; although the defendant, when he acknowledged the acceptance, said that he had been liable, but was not liable then, because the bill was out of date. See the observations of Wood, B. in *Partridge & Ux.* v. *Court*, 5 Price, 412. Where a memorandum had been given to the plaintiff on a receipt stamped, in the terms "received of *E. A.* 150 *l.*, which we promise to pay," &c., and was not receivable in evidence for want of a promissory-note stamp, and there was no count for goods sold, which had been the consideration, but the defendant had acknowledged that he owed the testatrix 150 *l.*, without referring to the note; held, that the plaintiff might recover on the count for an account stated. *Ashby* v. *Ashby*, 3 M. & P. 186. A plaintiff may recover on an I. O. U. upon the account stated, although it may have been given as the consideration of an agreement not declared upon. *Payne* v. *Jenkins*, 4 C. & P. 324. A promissory note not duly stamped is not evidence by way of admission. *Green* v. *Davies*, 4 B. & C. 235. Neither is a note payable upon a contingency. *Morgan* v. *Jones*, 1 C. & J. 162. Where a promissory note by the defendant to the plaintiff is admissible, it is evidence of an account stated at the time of the date, and shows that the cause of action did not accrue till the time of payment. *Whattey* v. *Williams*, 1 M. & W. 533.

(*p*) *Bartlett* v. *Emery*, Hil. 2 G. 2, B. R. 1 T. R. 42, n.

(*q*) B. N. P. 129. *May* v. *King*, Ca. K. B. 537, where the evidence was, that the parties had come to an account, and that 5 *l.* was due on the balance; and held, that the plaintiff was entitled to recover on that account. Per Buller, J. *Truman* v. *Hurst*, 1 T. R. 40.

(*r*) *Truman* v. *Hurst*, 1 T. R. 40. In *Ingledew* v. *Douglas*, 2 Starkie, C. 36, Lord Ellenborough held, that an account stated by an infant was not evidence after he had attained his age, even to show that he had had the necessaries mentioned in the account.

(*s*) *Stuart* v. *Rowland*, 1 Show. 215.

(*t*) *Highmore* v. *Primrose*, 5 M. & S. 65.

stated with the wife of the plaintiff (*u*). An entry in a bankrupt's examination of a sum due to *A.* is evidence of an account stated between them, and sufficient to take case out of Statute of Limitations (*x*).

An account alters the nature of the debt (*y*); and therefore, if a tenant, being in arrear of rent, settle an account with his landlord, and promise to pay him, *assumpsit* lies (*z*). And it seems to be immaterial in which way the debt arose, if there be an account stated, and an express undertaking to pay the balance (*a*). The action lies, even although the items of account were secured by a specialty (*b*).

Thus, after an account has been liquidated between two partners, *assumpsit* will lie for the balance upon an account stated, and a promise to pay, although the partnership deed contains a covenant between the parties to account at certain times (*c*); for if a partnership be dissolved, and an account settled, it is a good consideration for a promise to pay (*d*). But in general, so long as any partnership concerns remain unadjusted, no action can be maintained by one partner against another (*e*).

Although it appear that there was a memorandum of agreement for the sale of growing trees, but neither stamped nor signed, an admission of the sum due, after the trees have been cut and carried away, is evidence on this count (*f*).

(*u*) 1 Show. 215; B. N. P. 129.

(*x*) *Eicke* v. *Nokes*, 1 M. & R. 359. As amounting to an absolute admission of an existing debt. Per Tindal, L. C. J.; see *Knowles* v. *Mitchell*, 13 East, 249; *Brigstock* v. *Smith*, 1 C. & M. 483; *Kennett* v. *Milbank*, 8 Bing. 38. But where a party examined before Commissioners of Bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt, it was held to be insufficient.

(*y*) Vent. 268; Allen, 73; 2 Lev. 110.

(*z*) Roll. Ab. 9; Bro. Account, 81; Ray. 211; 2 Keb. 813.

(*a*) In *Foster* v. *Allanson*, 2 T. R. 479, where the partnership had been dissolved, and an account stated, which the defendant *promised to pay*, Buller, J. distinguished the case from that of *Drue* v. *Thorne*, Alleyn, 72, on the ground of the express promise. In that case a feme sole being indebted to the plaintiff for goods, married, and she and her husband stated an account with the plaintiff, which the husband promised to pay, and it was held that the wife must be joined.

(*b*) *Moravia* v. *Levy*, 2 T. R. 483.

(*c*) *Moravia* v. *Levy*, 2 T. R. 483, (*n*).

(*d*) *Foster* v. *Allanson*, 2 T. R. 479. And a judgment in that action might be pleaded in bar of an action on the covenant, per Buller, J. 2 T. R. 483; and see *Brimley* v. *Cripps*, 7 C. & P. 709. It seems, however, that as between partners such an action cannot be maintained but on a final balance. *Fromont* v. *Copeland*, 2 Bing. 170. *Goddard* v. *Hodges*, 1 C. & M. 37; and see tit. PARTNERS; and *Wilson* v. *Cutting*, 10 Bing. 436. It has been questioned whether an express promise be not necessary. But see *Clark* v. *Glennie*, 3 Starkie's C. 10. *Henley* v. *Soper*, 2 M. & R. 166; 8 B. & C. 20, S. C.; *Rackstraw* v. *Imber*, Holt's C. 368; and the cases above referred to, and tit. PARTNERS.

(*e*) *Foster* v. *Allanson*, 2 T. R. 479. *Robson* v. *Curtis*, 1 Starkie's N. P. C. 78. Plaintiff and defendant agree to buy goods on their joint account, the defendant agreeing to furnish the plaintiff with half the amount in time for payment, the plaintiff having paid the whole, may recover the moiety, although an account is still to be taken between them as partners, on the disposal of the whole stock. *Venning* v. *Leekie*, 13 East, 7. Where *A.* a partner with *B.* & *C.*, supplied his own money to *B.* for the benefit of the firm, on a promise by *B.* to repay him out of proceeds already received for goods of the firm; it was held that *A.* might recover the amount from *B.* as money had and received to his use. *Coffer* v. *Brian*, 3 Bing. 54.

(*f*) *Teale* v. *Auty*, 2 B. & B. 99. *Knowles* v. *Mitchell*, 13 East, 249; *secus*, if no precise sum be admitted. *Ibid.* So on an agreement for purchase of furniture and fixtures, the inventory containing a mixed valuation of goods and *fixtures*, the plaintiff may recover the value on this count. *Salmon* v. *Watson*, 4 Moore, 73. But not on the count for goods sold and delivered, *semble*, Ibid. And see *Lee* v. *Risdon*, 7 Taunt. 188.

Where the plaintiff had sold a ship to the defendant who became the sole registered owner, and afterwards, by way of security to the plaintiff for advances for the ship, executed a bond conditioned for making a bill of sale to the plaintiff, which he failed to do, and subsequently sold the ship to a third person; and, on being applied to by the plaintiff, promised to render to him an account of the produce of the sale and disbursements; it was held to be evidence that he had sold the ship on account of the plaintiff, and an admission of his liability to pay over the balance in his hands (*g*).

The plaintiff may recover on an account stated by the defendant with the plaintiff's wife; but not on an account stated by the defendant's wife, unless her agency be proved (*h*).

Parties. Where an account was stated between the defendant and his wife with the plaintiff, of an account due from the wife whilst sole, to the plaintiff, for goods sold, it was held that the action could not be maintained against the husband alone (*i*). So, the plaintiff cannot recover against the defendant upon an account stated by him partly as administrator, and partly in his own private capacity (*k*).

Where the defendant dealt with *B.*, and then with *B.* and *C.*, his partner, and an account was settled between the defendant and *B.* and *C.*, which included both the accounts, it was held that *B.* and *C.* might maintain an action on this account (*l*).

And the plaintiff may recover on an account stated with the defendant, including debts due from the defendant alone, and from the defendant and a deceased partner jointly (*m*).

An account stated is not so conclusive in its effect as to exclude evidence of errors which have crept into the account (*n*). The accounting with the plaintiff in a particular character, is an admission of the character (*o*).

Variance. A variance in evidence between the amount of the balance proved and that averred in the declaration, is now held to be immaterial (*p*).

It seems that under this count, one account only is admissible (*q*).

Breach. Interest is not recoverable in the absence of a contract, express or implied, for the payment of interest on the balance (*r*).

An omission to prove the whole breach, as alleged in the declaration, is not material. The plaintiff in an action upon a policy of insurance may allege a total loss, and recover for a partial or average loss (*s*).

Where the breach alleged that the defendant had treated the estate con-

(*g*) *Prouting* v. *Hammond*, 1 Gow's C. 41.

(*h*) B. N. P. 129.

(*i*) *Drue* v. *Thorne*, Alleyn, 72. But Buller, J., in *Foster* v. *Allanson*, 2 T. R. 483, intimated that it would have been otherwise if the defendant had expressly promised to pay.

(*k*) *Herrenden* v. *Palmer*, Hob. 88.

(*l*) *Moor* v. *Hill*, Sitt. Guildhall after Easter, 1795; Peake's Ev. 257, 3d edit. *Qu.* whether there was not an express promise in this case to transfer the credit to the new firm, and pay the consolidated account? And see *Gough* v. *Davis*, 4 Price, 214; *David* v. *Ellis*, 5 B. & C. 196.

(*m*) *Richards* v. *Heather*, 1 B. & A. 29.

(*n*) Formerly it was considered to be more conclusive. See Ld. Mansfield's observations in *Truman* v. *Hurst*, 1 T. R. 42. But see *Roper* v. *Holland*, 3 Ad. & Ell. 22. S. C. 4 N. & M. 668.

(*o*) *Peacock* v. *Harris*, 10 East, 104.

(*p*) *Thompson* v. *Spencer*, B. N. P. 129.

(*q*) Per Littledale, J. *Kennedy* v. *Withers*, 3 B. & Ad. 769.

(*r*) *Nichol* v. *Thompson*, 1 Camp. 52. *Dawes* v. *Pinner*, 486, n. *Moore* v. *Voughton*, 1 Starkie's C. 487. See tit. INTEREST.

(*s*) *Gardiner* v. *Croasdale*, Burr. 905; and see the cases, 2 Will. Saund. 205; Bl. 198.

trary to good husbandry and the custom of the country, it was held to be supported by showing that the defendant had treated it contrary to the prevalent course of good husbandry in that neighbourhood; as by tilling half his farm at once, when no other farmer tilled more than one third; and that it was not necessary to prove any precise definite custom or usage in respect to the quantity tilled (*t*).

In an action against the defendant, as wharfinger, for not procuring a sufferance for goods, in consequence whereof the goods were seized as forfeited to the king, it appeared that it was the defendant's duty, as wharfinger, to obtain a sufferance from the custom-house for the shipping of the goods, which he had not done, and in consequence of which the right of seizure had attached. It was also proved that the goods had been seized by a custom-house officer, and sold in the usual manner. It was objected that the record of a sentence of condemnation ought to be proved, but it was held that the proof was sufficient (*u*).

Proof by defendant on non-assumpsit.

Previous to the late rules, the defendant, by the plea of *non-assumpsit*, might have put the plaintiff to the proof of his whole case, and in answer he might in general have adduced any evidence which disproved the case set up by the plaintiff, and showed that at the time when the action was brought the plaintiff had no cause of action, or at least no right to maintain this form of action.

The evidence admissible under the plea of *non-assumpsit* is much limited by the following rules of Hil. T., 4 W. 4.

Defence under the new rules.

1. In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non-assumpsit* shall operate only as a denial in fact (*v*) of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law (*w*).

(*t*) 4 East, 154.

(*u*) *Baker* v. *Liscoe*, 7 T. R. 171.

(*v*) And, therefore, in the case of an express contract the plea does not operate as a denial of the alleged consideration. Where the declaration alleged, that in consideration of receiving a horse and 2 *l.*, the defendant agreed to sell a horse on warranty to the plaintiff; it was held that the plaintiff, on *non assumpsit* pleaded, was not bound to prove the delivery of the horse and 2 *l.* *Smith* v. *Parsons*, 8 C. & P. 199. And where the plaintiff alleged that, as author, he had a right to the music and poetry of an opera, and that in consideration of the premises, and that the plaintiff would sell him such right, the defendant undertook to buy it; Tindal, C. J., held, that under a similar plea it was not competent to the defendant to contend, either that the plaintiff was not the author, or had not the right, or did not sell it to the defendant. *De Pinna* v. *Polhill*, 8 C. & P. 78. And in *Passenger* v. *Brookes*, 1 Bing. N. C. 587, it was held, that the defendant could not prove want of consideration as a defence under this plea. But see the observations of Parke, B. on this case in *Bennion* v. *Davison*, 3 M. & W. 1. 9. In *assumpsit* on a guarantee for goods supplied to *A.*, the plea admits the supply, and the fact need not be proved, except to show the amount of damages. *Taylor* v. *Hilary*, 7 C. & P. 30. See *Gibson* v. *Harris*, 8 C. & P. 379. But it is clear that the plea does not admit the truth of any immaterial averment in the declaration. When the declaration on a special agreement to carry goods safely in a vessel lying in a certain river, alleged that they were to be carried by the defendants as *owners* of the said vessel; it was held that this plea did not admit the *ownership*. *Bennion* v. *Davison*, 3 M. & W. 19.

(*w*) The defendant may, under the general issue, show that the action was brought on a partnership transaction between himself and the plaintiff. *Pearson* v. *Shelton*, 1 M. & W. 504. *Worrel* v. *Grayson*, 1 M. & W. 166. So in an action by one joint-owner of a ship against another for contribution to recover a proportion of the damages paid by the plaintiff to a third party for the value of goods sent by the ship and lost, the defendant may show that the goods were lost, and damages incurred, through the plaintiff's own misconduct. *Gregory* v. *Hartnell*, 1 M. & W. 183. In

Defence under the new rules.

Ex. gr. in an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk of the loss, or of the alleged compliance with warranties. Bills of exchange, bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

In every species of *assumpsit*, all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Denial of the contract.

Subject to these rules, which regulate the form of the plea by which the defence to the action is properly to be raised, the defendant may insist that the agreement was under hand and seal, for then the form of action is mistaken (*x*): That the action has not been brought by the proper parties, the promise having been made to the plaintiffs jointly with others (*y*); or that the defendant was a partner with the plaintiff (*z*): That the plaintiff who sues as a feme sole was married when the contract was made (*a*): That one of the defendants did not promise jointly with the rest: That the action was commenced before the cause of action arose (*b*).

He may controvert the promise in fact by showing that none such was ever made; or if in fact made, may avoid it in point of law, by proof that it was obtained by duress, or whilst the party was in a state of intoxica-

an action for work and labour, he may show that the work was done under a special contract, on which nothing is due. *Jones* v. *Nanney*, 1 M. & W. 333. And see *Grounsell* v. *Lamb*, 1 M. & W. 352; *Dicken* v. *Neale*, 1 M. & W. 556. By the express provision of the statute 55 G. 3, c. 194, the plaintiff in an action on an apothecary's bill must, under this plea, prove his certificate, or that he was in practice before August 5, 1815. *Wagstaffe* v. *Sharpe*, 3 M. & W. 521; and see tit. APOTHECARY. It has been held at Nisi Prius, that in an action for goods sold and delivered, the defendant under this plea could not prove that the goods were of no value. *Roffey* v. *Smith*, 6 C. & P. 662. It seems, however, to be impossible to *imply* a contract to pay anything for that which is of no value. On a *quantum meruit* for service rendered, it has been held that the defendant, under the general issue, may show the worthlessness of the alleged service. The defendant, under the plea of *non assumpsit*, may show that the goods did not correspond with the warranty. *Dicken* v. *Neale*, 1 M. & W. 556. *Grounsell* v. *Lamb*, 1 M. & W. 352. See tit. VENDOR AND VENDEE.

(*x*) Gilb. Law of Ev. 183; Cro. J. 506. 508; Hutt. 34; *infra*, 78, (*y*). Where the plaintiff had contracted by deed to perform certain works, and for extra works at prices to be fixed by a third party, who fraudulently awarded that nothing was due in respect thereof; held that the plaintiff could not reject the deed upon the ground of fraud, and recover in assumpsit, as on a simple contract; the defendant having paid into court a sum upon certain counts, held that it could only be applied to the sums which were recoverable under those counts on which it was paid in. *Churchill* v. *Day*, 3 M. & Ry. 71.

(*y*) Gilb. Law of Ev. 189; Tri. per Pais, 187; B. N. P. 152; on the ground of variance.

(*z*) *Cheap* v. *Cromond*, 4 B. & A. 663. See *Waugh* v. *Carver*, 2 H. B. 235. Such evidence would, it seems, be admissible under the general issue. *Worrel* v. *Grayson*, 1 M. & W. 166. *Pearson* v. *Shelton*, 1 M. & W. 504.

(*a*) 3 Camp. 438.

(*b*) Ld. Raym. 1249.

tion, or by proof of infancy (*c*), coverture (*d*), lunacy (*e*), illegality (*f*) or fraud (*g*).

Or that a condition precedent was not performed (*h*); or he may show that the promise has been discharged by the plaintiff before breach (*i*), or by a subsequent contract inconsistent with the former. Thus if *A.* promise to marry *B.* within three months, and it is afterwards agreed that he shall marry her in half a year, this will discharge the former promise; for by taking the latter promise of a longer time, the parties must be supposed to intend to discharge the former, for otherwise the latter could have no intent at all (*k*). Discharge from the contract.

Or that it had been discharged by accord and satisfaction (*l*); or by a

(*c*) Gilb. Law of Ev. 186; 2 Lev. 144; Tri. per Pais, 398; Lord Raym. 389; Salk. 279; B. N. P. 152. Vide *infra*, tit. INFANT.

(*d*) Gilb. Law of Ev. 183. *Cowley* v. *Robertson and Mary his wife*, 3 Camp. 438; where it was proved in bar, that when the goods were supplied to the defendant *Mary*, she was the wife of one *Gilley*, who was still living. Vide *infra*, HUSBAND AND WIFE.

(*e*) Gilb. C. P. 65. It is a good defence that the defendant at the time of the contract was of unsound mind, and that the plaintiff took advantage of the circumstance to impose upon him. *Browne* v. *Joddrell*, M. & M. 105. *Long* v. *Baker*, Ib. 106. *Sentance* v. *Poole*, 3 C. & P. 1. But lunacy is no defence to an implied promise for necessaries. *Baxter* v. *Lord Portsmouth*, 5 B. & C. 170.

(*f*) The defence must be specially pleaded. Lord Lyndhurst, in *Colburn* v. *Patmore*, observes, "I know of no case in which a person who has committed an act deemed by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of a crime." Vide *supra* and *infra*, tit. VENDOR AND VENDEE. *Bensly* v. *Bignold*, 5 B. & A. 635. *Stephens* v. *Robinson*, 2 C. & J. 209. A promise to indemnify the plaintiff in consideration of the plaintiff having published a libel and defended an action brought against him, is void. *Stockdale* v. *Rosier*, 2 Bing. N. C. 634. Money expended for the purposes of an unlicensed theatre cannot be recovered against one at whose request the money was expended, and who participated in the profits. *De Begnis* v. *Armistead*, 10 Bing. 107. The proprietor of a newspaper cannot, before the filing of the affidavit required by the statute, recover on a contract for the printing of the paper. *Houston* v. *Mills*, 1 M. & R. 325. And see *Poplett* v. *Stockdale*, R. & M. 337. *Coates* v. *Hatton*, 3 Starkie's C. 61. So as to money lent for the purpose of playing at an illegal game. *M'Kinnell* v. *Robinson*, 3 M. & W. 434. See also *Cannan* v. *Bryce*, 3 B. & A. 179, as to money advanced for settling illegal stock-jobbing transactions. Money advanced to an agent to be expended in illegal disbursements, as (*semble*) paying the travelling expenses of voters, cannot be recovered. *Bayntun* v. *Cattle*, 1 M. & R. 265. A broker cannot, unless duly licensed according to the stat. 6 Anne, c. 16, maintain an action for work and labour for buying and selling stock. *Cope* v. *Rowlands*, 2 M. & M. 149.

(*g*) *Campbell* v. *Fleming*, 1 Ad. & Ell. 40. As in consideration of puffing at an auction. *Icely* v. *Grew*, 6 C. & P. 671. And see *Hill* v. *Grey*, 1 Starkie's C. 434. *Boxwell* v. *Christie*, Cowp. 395. *Crowder* v. *Austen*, 3 Bing. 368. *Wheeler* v. *Collier*, M. & M. 126; and *infra*, tit. FRAUD, and VENDOR AND VENDEE. This defence must be specially pleaded.

(*h*) *Supra*, but he cannot show that the condition was not performed with intent to insist on the promise. *Williams* v. *Carnardine*, 4 B. & Ad. 621.

(*i*) And this may be proved by parol agreement; but after a breach, it cannot be discharged by any new agreement without a deed, unless it operate in satisfaction. B. N. P. 152; 2 Lev. 144; 1 Mod. 259; Ca. K. B. 518.

(*k*) Gilb. Law of Ev. 193; Tri. per Pais, 402. But a second promise to marry in a fortnight would not discharge the former. Ibid.

(*l*) Salk. 140; B. N. P. 152; Ld. Ray. 566. See tit. ACCORD AND SATISFACTION, *supra*, 15. A debtor being unable to meet the demands of his creditors, they signed an agreement, which was assented to by the debtor, to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon. The debtor appeared to have been always willing to perform his part of the engagement; held that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for

Discharge. release (*m*); or that it has been merged in some higher security (*n*); or has been rescinded (*o*); waived (*p*); or suspended (*q*); or that the recovery would occasion circuity.

That the performance became impossible, by the act of God; as that a

which to each creditor was the forbearance of the rest; and as there appeared no failure of performance on the part of the debtor. *Good* v. *Cheeseman*, 2 B. & Ad. 328.

(*m*) B. N. P. 152; Doug. 107.

(*n*) Vide *Pudsey's Case*, cited 2 Leon, 110; 3 East, 258. *Hosier* v. *Lord Arundell*, 3 B. & P. 7. *Partridge* v. *Court*, 5 Price, 412. Where the contract is under seal, *assumpsit* does not lie, for the law will not raise an *assumpsit* where the party resorts to a higher security; therefore, if the obligor of a bond, without some new consideration, as forbearance, promise to pay the money, *assumpsit* will not lie. *Toussaint* v. *Martinnant*, 2 T. R. 100. There the surety took a bond from the principal. So where a sum is due for freight and demurrage under a specialty contract, the plaintiff cannot recover in *indebitatus assumpsit*. *Atty* v. *Parish*, 1 N. R. 104. But a freighter may recover against ship-owners for negligence, although the captain (one of the ship-owners) has entered into a charter-party under seal with the plaintiff. *Leslie* v. *Wilson*, 3 B. & B. 171. For ship-owners are chargeable upon their general liability in respect of the duties which belong to them as such, and which are not inconsistent with the charter-party. The only exception to the rule is an action of *debt* for *rent*, and that rests on the consideration that by the demise an interest in the land passes. 1 N. R. 104. And vide Hardr. 332; *Warren* v. *Consett*, 8 Mod. 107; Com. Dig. tit. PLEADER, [O.] 15; *Kemp* v. *Goodall*, 1 Salk. 277. Hence in an action for rent due under a demise by deed, *nil debet* is a good plea. *Ib.* Where the obligor of a *respondentia* bond, by indorsement upon it agreed to pay the money to *any assignee*, it was held that an assignee might maintain *indebitatus assumpsit*. *Fenner* v. *Mears*, 2 Bl. 1269. But this has been doubted by Lord Kenyon, in *Johnson* v. *Collins*, 1 East, 104; and Bayley, J. *White* v. *Parkins*, 12 East, 582. But where there is a subsequent parol agreement not inconsistent with the deed, and founded on a sufficient consideration, *assumpsit* lies. See *Leslie* v. *De la Torre*, cited 12 East, 583; *White* v. *Parkins*, 12 East, 578. A guarantee by the deed of a third person is no merger. *White* v. *Cuyler*, 1 Esp. C. 200; 6 T. R. 176.

(*o*) Where the defendant hired a carriage of the plaintiff for a certain time, and before it had expired sent it back; held that if the plaintiff sold it within that time, it would have been a *rescinding* of the contract, and he could not be entitled to the stipulated hire. *Wright* v. *Melville*, 3 C. & P. 542. See further, *Garrard* v. *Woolner*.

(*p*) The seller of goods, on the buyer's refusing to accept them, requested him to sell them, which the buyer agreed to do, but could not; this amounts to a waiver by the seller. *Gomery* v. *Bond*, 3 M. & S. 378.

(*q*) Stock having been transferred to another name under a forged power of attorney, whilst it was doubtful whether the Bank of England was by law liable to make good the loss, the stock owners entered into a contract with the Bank, whereby the latter agreed to replace the stock and pay the intermediate dividends, and the former agreed, in the first instance, and before they claimed the stock, adversely to tender a proof on the estate of the party who had fraudulently transferred it, and had received one payment of such dividends, but had refused to tedner the proof; held that the Bank were entitled to avail themselves of the agreement, as a suspension of the plaintiff's right to sue, until they had performed their part of the stipulation. *Stracey* v. *Bank of England*, 6 Bing. 754; and see *Longridge* v. *Dorville*, 5 B. & A. 117. Action by the drawer against the acceptor of two bills, the latter, upon an arrangement, assigned certain property as a security for certain sums then due, as well as for future demands, with a power of sale after six months' notice; held that it could only be considered a collateral security, and did not suspend the personal remedy. *Emes* v. *Widdowson*, 4 C. & P. 151. Upon an agreement with their general creditors, the defendants surrendered all their stock to trustees, and agreed to execute a conveyance of all their estate, the trustees entered on the management and paid dividends to the amount of 10*s.* in the pound; the defendants afterwards being called upon to execute the conveyance, required that it should contain a general release from the creditors, and deeming the one inserted insufficient, refused to execute; but all the creditors had not then executed it; and before an adjourned meeting was held to obtain such execution, the plaintiff commenced his action; held that the agreement, purporting to contemplate a *suspension* of the right of action by the creditors until a final meeting and execution of the instrument by the creditors, and refusal by the defendants, the creditors were not remitted to their former rights, and the action was therefore premature. *Tatlock* v. *Smith*, 6 Bing. 339.

horse hired by the defendant for a journey died on the journey, without the defendant's fault (*r*).

He may show that no consideration ever existed; or that it has wholly failed through the negligence of the plaintiff (*s*); or was insufficient in law (*t*), or illegal (*u*); or, lastly, he may prove that the promise has been performed, as by payment (*x*), or the delivery of the thing contracted for (*y*).

(*r*) Gilb. Law of Ev. 187; Tri. per Pais, 399. *Secus*, where performance was impossible at the time of the promise. Com. Dig. ACTION ON THE CASE ON ASSUMPSIT, [G.]; and see Com. Dig. CONDITION, [D.] 1. And a *plaintiff* cannot show that performance of the *consideration* became impossible by the act of God. *Ibid.* If the condition of a feoffment be impossible at the time of making, and precedent, the estate does not vest; if subsequent, the estate becomes absolute. If a condition subsequent on the feoffment be possible at the time of the feoffment, but afterwards become impossible, the estate is absolute, for it has vested; *secus*, in the case of an obligation, which is executory. Co. Litt. 206. A condition to create an estate is to be construed according to the intention of the parties; to destroy an estate, is to be construed strictly. 1 Ins. 219 b.; 3 B. & C. 246.

(*s*) See tit. GOODS SOLD AND DELIVERED. — NEGLIGENCE. — WORK AND LABOUR. *Grimaldi* v. *White*, 4 Esp. C. 95. *Basten* v. *Butter*, 7 East, 479. *Farnsworth* v. *Garrard*, 1 Camp. 48. *Fisher* v. *Samuda*, Ibid. 190. *Lewis* v. *Cosgrave*, 2 Taunt. 2. The inference from these cases seems to be, that where a contract is made for a specific thing, at a specific price, and the contract be not performed, the party must either rescind the contract in *toto*, or pay the price; but that where there is no specific contract, and the plaintiff proceeds on a *quantum meruit*, he must recover according to the *value* of the work, or the article to the *defendant*; and consequently where there has been no beneficial service, he is not entitled to recover anything. In *Roffey* v. *Smith*, 6 C. & P. 662, it was held that the defendant in an action of *indebitatus assumpsit*, was not at liberty, under the plea of *non-assumpsit*, to show that the goods were of no value; *tamen qu*, for in such a case the plea is to operate as a denial of the matters of fact, from which the contract may be implied by law. In the case of *Fowler* v. *Marksell*, York Summer Ass. 1836, Parke, B. admitted evidence of negligence in defence of an action of *indebitatus assumpsit* for work and labour under this plea. Where the action is on a special contract, the want of consideration is not, it seems, admissible under this plea. *Passenger* v. *Brookes*, 1 Bing. N. C. 587; but see *Bennion* v. *Davison*, 3 M. & W. 179. In an action for contribution by one joint owner of a ship against another, to recover a portion of damages recovered by a third person against the plaintiff for the recovery of the value of goods sent by the ship, the defendant may show, under the general issue, that the goods were lost and damages incurred through the misconduct of the plaintiff. *Gregory* v. *Hartnall*, 1 M. & W. 183. Under the same issue, the defendant may show that the goods were not equal to the warranty. *Dicken* v. *Neale*, 1 M. & W. 556. *Grounsell* v. *Lambe*, 1 M. & W. 352; or that the work was done under a special contract, under which nothing is due. *Jones* v. *Nanny*, 1 M. & W. 333.

(*t*) The receiver of the wife's estate, by the direction of the husband, but without the wife's authority, accepted a bill for the husband's debt to the drawer, and being afterwards called upon by the husband and wife to pay over to them the rent received, when the bill became due having refused to pay it, unless the plaintiff would give him an indemnity for being reimbursed by the husband and wife, which was accordingly given; the bill not being ultimately paid, held, that to avoid circuity of action, the drawer could not maintain the action. *Carr* v. *Stephens*, 9 B. & C. 758.

(*u*) *Supra*, 63. Every such defence must be specially pleaded; as that the work and labour were illegal. *Potts* v. *Sparrow*, 1 Bing. N. C. 594; 3 Dowl. P. C. 630. *Marten* v. *Smith*, 4 Bing. N. C. 436. So where a contract is made void by statute. *Barnett* v. *Glossop*, 3 Dowl. P. C. 625; 1 Bing. N. C. 633. But it seems that the want of a sufficient memorandum of the contract may be objected under the general issue. *Johnson* v. *Dodgson*, 2 M. & W. 653. *Elliott* v. *Thomas*, 3 M. & W. 170.

(*x*) By a late rule of pleading, T. T. 1 Vict., it is ordered that payment shall not be allowed in any case to be given in evidence, in reduction of damages or debt, but shall be pleaded in bar.

(*y*) B. N. P. 152; Salk. 140; Ld. Ray. 566. Although it was once held that performance must be pleaded. *Ibid.*; and 1 Mod. 210. See tit. PAYMENT. So it is a defence that the amount has already been recovered in a former action; or that the plaintiff, in a former action where he was defendant, might have availed himself of his present claim in diminution of damages. *Hirst* v. *Atkinson*, 2 Camp. 63; see *Basten* v. *Butter*, 7 East, 479. A consignee is not liable for the delay of the vessel, if he cannot get his goods because

Defence—damages.

The defendant cannot give evidence of any matter which arose after the commencement of the action, not even payment of the debt and costs, except for the purpose of diminishing the damages, which in such case would be merely nominal (*z*). So for the same purpose he may give in evidence any other payment (*a*). The Statute of Limitations will be no bar under this issue, although it appear from the plaintiff's own showing, or even from the declaration itself, that the cause of action did not arise within the six years (*b*).

The fact that others who are not joined contracted jointly with the defendant, is available by plea in abatement only; if it be proved it shows no variance; for it is still true as alleged, that the defendant undertook and promised (*c*).

The evidence under the pleas of a tender of the money before action brought; the Statute of Limitations; a set-off; payment; infancy (*d*); coverture (*e*), will be afterwards considered.

ATTAINDER OF FELONY (*f*).

Is pleadable in bar against a demand accruing after the attainder (*g*). The proof is by the record of the judgment (*h*). For the effect of an attainder as to competency, see title INFAMOUS WITNESS; and see also tit. CERTIFICATE.

ATTORNEY.

Proof that the plaintiff is an attorney.

IN an action by an attorney for slandering him in his profession, he may prove that he is an attorney by means of an examined copy of the Roll of Attornies (*i*), or by the book of admissions from the Master's Office (*k*). But it is sufficient to prove that he has acted as an attorney of the court of which he is alleged to be an attorney (*l*). It is not necessary to prove that he has taken out his certificate (*m*). And if the defendant's words assume

another's goods prevent him; but where the delay is occasioned by his own default, it is no answer to the claim for demurrage that other consignees have already paid to a larger amount for the same period. *Dobson* v. *Droop*, 1 M. & M. 441. In an action on the charter-party for not taking a full cargo, which appeared to have arisen from waste of room in making the arraugements for stowage, which varied from that stipulated by the charter-party; but one of the plaintiffs and their broker, who managed the business, were present at the time, and allowed the expense to be incurred without making any objection; held that they were not entitled to recover. *Hovill* v. *Stephenson*, 4 Carr. & P. C. 470.

(*z*) *Holland* v. *Jourdain*, Holt's C. 6. After money has been paid without a rule of court, the defendant cannot try the merits, and the costs inevitably follow. Per Ld. Ellenborough. *Atkinson* v. *Thornton*, 1 Camp. C. 559, n.

(*a*) B. N. P. 153; 2 Lev. 81. But the payment of must be pleaded; see the new rule, *supra*, 105, note (*x*).

(*b*) B. N. P. 152; 1 Will. Saund. 283, n. (*z*); Ib. vol. 2, 63, (*a*); Salk. 278.

(*c*) 1 Will. Saund. 291, note (4); but see Gilb. L. Ev. 189; Vent. 52; and see B. N. P. 152.

(*d*) The evidence applicable to these will be considered under those respective titles.

(*e*) See HUSBAND AND WIFE.

(*f*) The stat. 54 Geo. 3, c. 145, takes away corruption of blood as a consequence of attainder, except in high and petit treason, murder.

(*g*) *Bullock* v. *Dodds*, 2 B. & A. 273.

(*h*) *Vide* Vol. I. and Index, tit. JUDGMENT.

(*i*) 4 T. R. 366. When an attorney is admitted and takes the oath, he subscribes his name upon the roll. 2 Esp. C. 526.

(*k*) This contains the names copied from the original roll, and is admissible for the purpose of such proof upon an indictment for perjury. *R.* v. *Crossley*, 2 Esp. C. 526.

(*l*) *Berryman* v. *Wise*, 4 T. R. 366.

(*m*) *Jones* v. *Stevens*, 11 Price, 235. And the court were of opinion that although the plaintiff had, previously to the libel and the action, omitted to take out his certificate for one whole year, during which he continued to practise, he still so far retained his character of an attorney as to be entitled to recover in respect of a

that the plaintiff is an attorney, it operates as an admission that he is so, and supersedes the necessity of other proof (*n*).

Proofs in actions for costs.

In an action by an attorney on his bill (*o*), he must prove (*p*) his *retainer* (*q*) by the defendant; which may be proved by evidence that the defendant attended at the plaintiff's office, and gave directions from time to time whilst the business was going on. Undertaking to pay what is due is an admission of a retainer; and therefore in an action on the bill, the production of the Judge's order for taxation, the defendant's undertaking, and the master's *allocatur*, is sufficient evidence of the fact. He should next prove that the business was done as stated in the bill, which is usually proved by a clerk or other agent who was concerned in the management of the suit or business, without proving the bill item by item (*r*).

Business done.

libel published against him in that capacity, although he could maintain no action for fees, and was subject to penalties under the stat. 37 G. 3, c. 90, (*tamen quære*). At all events it would be insufficient, as in that case, merely to show the omission to take out the certificate, without evidence to negative a readmission. *Pearce* v. *Whale*, 5 B. & C. 38; where the point was ruled in an action by the plaintiff, as an attorney, for fees.

(*n*) P. C. Ib. Where the plaintiff alleged generally that he was an attorney, and declared for the words, "he is a pettifogging, blood-sucking attorney," proof of the words was held to be sufficient, without any evidence of attorneyship. *Armstrong* v. *Jordan, cor.* Hullock, B. Carlisle Summ. As. 1826.

(*o*) *Indebitatus assumpsit* lies for fees against a third person who has retained the plaintiff as an attorney. *Sands* v. *Trevilian*, Cro. Car. 194. *Ambrose* v. *Roe*, Skinn. 217. Though the business has been transacted in another Court. *Thursby* v. *Warren*, Cro. Car. 159. But a solicitor on the equity side of the Exchequer is not entitled to practise in Chancery; and it seems that a solicitor in Chancery cannot authorize a solicitor on the equity side of the Exchequer to practise there in his name. *Vincent* v. *Holt*, 4 Taunt. 452. But an attorney may recover the costs of a commission of bankrupt, though he be not a solicitor in Chancery. *Wilkinson* v. *Diggell*, 1 B. & C. 158. Although an attorney may, it seems, practise in another court, in the name of, and with the consent of, an attorney of the latter court, he cannot do so in his own name. *Latham* v. *Hyde*, 1 C. & M. 28; 3 Tyr. 143. But see *Vincent* v. *Holt*, 4 Taunt. 452. Where several sued as attornies of the Palace Court, and it appeared that but one of them was an attorney of that court, it was held that they could not recover. *Arden* v. *Tucker*, 1 M. & R. 191; 5 C. & P. 258.

(*p*) That is in an action of *indebitatus assumpsit*, which is the usual form, and when the general issue has been pleaded.

(*q*) An attorney made an agreement with his client to conduct all his suits in consideration of the client giving to him exclusively the drawing of his leases, it was held, that the breach of this agreement would not enable the attorney to recover on his bill, he must either put an end to the agreement, or sue for a breach of it. *Parker* v. *Harcourt*, 5 Esp C. 249. A declaration by the plaintiff's clerk on a taxation of costs, that the attorney undertook the cause gratis, is evidence for the defendant in an action by the attorney. *Ashford* v. *Price*, 3 Starkie's C. 135. *Quære*, whether an attorney can legally guarantee the petitioning creditor against the costs of the commission, on condition of being employed as solicitor to the commission. *Gillet* v. *Rippon*, 1 M. & M. 406. And see *Murray* v. *Reeves*, 8 B. & C. 421. An agreement to pay at a certain specified rate is not binding upon the client; at all events it is not conclusive. *Drax* v. *Scroope*, 2 B. & Ad. 581. In order to entitle the attorney to proceed in the action for costs, after the debt has been settled without his intervention, he is bound to make out a clear case of collusion between the plaintiff and the defendant, to deprive him of such costs; where there was only a ground for suspicion, the Court stayed the proceedings, but without costs. *Nelson* v. *Wilson*, 6 Bing. 568. Where the defendant alone employed the plaintiff in suing out a commission of bankrupt on the petition of a third person who never employed him in it, the defendant is alone liable to the plaintiff. *Pocock* v. *Russell*, 4 C. & P. 14. Where the commission had not been proceeded in, nor anything received under it, held that the attorney was entitled to recover his charges against the creditor employing him. *Pocock* v. *Russell*, 1 M. & M. 357. Where one attorney does business for another, the ordinary implication is that credit is given to the latter, and not to the client; although the business was known to have been done on behalf of the client. *Scrace* v. *Whittington*, 2 B. & C. 11.

(*r*) *Phillips* v. *Roach*, 1 Esp. D. N. P. 10.

Delivery of a bill.

If the charge be not for business done in court, evidence must also be given of the reasonableness of the charges (*s*); but if it be for business done in court, he must (*t*) prove the delivery of a bill to the defendant (*u*) according to the statute (*x*), or that he left one at his dwelling-

(*s*) It is not however unusual to give evidence of the reasonableness of the charges, although the bill be for business done in court; and I have known such evidence to be required.

(*t*) Such evidence is unnecessary, unless the plea deny the delivery. *Moor* v. *Dent*, 1 M. & R. 462; *Robinson* v. *Roland*, 6 Dowl. 271; *Lane* v. *Glenny*, 7 Ad. & Ell. 83.

(*u*) Where there were two defendants not partners, held to be sufficient to deliver the bill to the one who managed the business. *Finchett* v. *Howe*, 2 Camp. 277. Per Ld. Ellenborough, C. J. 1 Camp. 438; and *semble*, that it would be insufficient to deliver it to the party who did not intermeddle. 2 Camp. 277. Where several parties have a joint interest in resisting a claim for tithes, though their individual interests be separate, and jointly retain an attorney, the delivery of the bill to the party who actually retains him is sufficient. And see further as to a joint retainer. *Hildeys* v. *Gregory*, 1 C. & P. 627; *Oxenham* v. *Lemon*, 2 D. & R. 461. See *Snowden* v. *Shee*, 1 Camp. 437. Where a party in a cause changed his attorney *pendente lite*, and the second attorney obtained an order for the delivery to him of a bill signed by the first, it was held that such delivery was a delivery to the party charged, within the words and meaning of the statute. *Vincent* v. *Slaymaker*, 12 East, 372, by three of the judges; Ld. Ellenborough, C. J. *dissentiente*. The showing and explaining the bill without a delivery is insufficient. *Crowder* v. *Shee*, 1 Camp. 437. Personal service is not necessary; a redelivery to an agent appointed for the purpose is sufficient. *Finchett* v. *Howe*, 2 Camp. 277. As to the attorney of the party, *Warren* v. *Cunningham*, Gow. 71. *Vincent* v. *Slaymaker*, 12 East, 372. Where a bill has been delivered containing taxable items, the unreasonableness of the charges cannot in strictness be disputed on the trial. *Anderson* v. *May*, 2 B. & P. 237. *Lee* v. *Wilson*, 2 Chitty's R. 65. But it is not unusual to give such evidence.

(*x*) 2 G. 2, c. 23, s. 23; which enacts that no attorney or solicitor in any of the courts aforesaid (viz. any court of record in England, wherein attornies have been accustomably admitted and sworn,) shall commence or maintain any action, &c. for the recovery of any fees, charges, or disbursements at law, or in equity, until the expiration of one month, or more, after such attorney, &c. shall have delivered unto the party or parties to be charged therewith, or left for him, &c. at his, &c. dwelling-house, or last place of abode, a bill of such fees, &c. written in a common legible hand, and in the English tongue (except law terms, and the names of writs), and in words at length, except terms and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively. The month is to be reckoned exclusively of the days on which the bill is delivered and action brought. *Blunt* v. *Heslop*, 8 Ad. & Ell. 577. This statute extends to business done at the quarter sessions. *Clark* v. *Donovan*, 5 T. R. 694; *Ex parte Williams*, 4 T. R. 496; *Silvester* v. *Webster*, 9 Bing. 388; although attornies be not admitted there contrary to the ruling of Buller, J. in *Stephenson* v. *Taylor*, York Summer Assiz. 1786. To a charge for a *dedimus potestatem, ex parte Prichett*, 1 N. R. 266; or warrant of attorney with a view to business in court, under the head of "fees at law." *Sandon* v. *Bourne*, 4 Camp. 68. But see *Burton* v. *Chatterton*, 3 B. & A. 488; *Weld* v. *Crawford*, 2 Starkie's C. 538; *Wilson* v. *Gutteridge*, 3 B. & C. 157. For business done in the Insolvent Court. *Smith* v. *Wattleworth*, 4 B. & C. 364. In the County Court. *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 356. In a criminal suit in the Great Sessions in Wales. *Lloyd* v. *Maund*, 6 Tidd, 330. For drawing an affidavit of debt and getting it sworn. *Winter* v. *Payne*, 6 T. R. 645. Obtaining the Chancellor's signature to a bankrupt's certificate. *Collins* v. *Nicholson*, 2 Taunt. 321. See *Ford* v. *Webb*, 3 B. & B. 241. Attending at a lock-up house, procuring the defendant's release, and filling up a bail bond. *Fearne* v. *Wilson*, 6 B. & C. 87. Attesting a replevin bond. *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 356. Attending bail and endeavouring to arrange and procure *cognovits*. *Watt* v. *Collins*, 1 R & M. 284. Charges for attending and advising steps in a suit which has been brought against his client are taxable, and bring the whole bill within the effect of the statute of 2 Geo. 2; the advance of money to the client to pay the costs of such suit does not vary the case. *Smith* v. *Taylor*, 7 Bing. 259, and 5 M. & P. 66. (diss. Alderson, J.) To money paid by the attorney on a judgment against his client. *Crowder* v. *Shee*, 1 Camp. 437. It has even been held, that if any one of the items in the bill relate to business done in court, the plaintiff cannot recover as to items which are not within the statute, but which are connected with his professional capacity, unless he prove the delivery of a bill. *Winter* v. *Payne*, 6 T. R. 645.

house (*y*) or last place of abode (*z*), subscribed by him, one month (*a*) or

(*y*) Leaving at the counting-house is not a good delivery. *Hill* v. *Humphreys*, 2 B. & P. 343.

(*z*) It is not sufficient to show that the bill was delivered at a particular place, without evidence that it was the defendant's place of abode; and that the defendant afterwards delivered it to his attorney's clerk. *Eicke* v. *Noakes*, M. & M. 305. But it is sufficient to show that it was left at the last known place of abode, and it is not sufficient for the defendant to show a change of abode without also showing a later *known place* of abode. *Wadeson* v. *Smith*, 1 Starkie's C. 324.

(*a*) A lunar month sufficient. *Hurd* v. *Leach*, 5 Esp. C. 168. By the uniformity of process Act, 2 W. 4, c. 39, s. 11, the issuing of the writ is for all purposes the commencement of the suit. *Alston* v. *Underhill*, 1 C. & M. 492. See tit. TIME.

R. 645. *Hill* v. *Humphreys*, 2 B. & P. 343. But although the bill contains items not specified according to the statute, he may recover in respect of a portion of his bill as to which the provisions of the statute have been complied with. *Waller* v. *Lacy*, 1 M. & G. 54. The bill ought to contain the whole charges, one containing only the items of the extra costs, and omitting the items of taxed costs received from the other side, is not a compliance with the statute. *Ib.* But where no bill has been delivered, although the plaintiff cannot recover costs out of pocket, he may recover in respect of mere conveyancing business, per Lord Kenyon. *Miller* v. *Towers*, Peake's C. 102; and per Ld. Eldon, in 2 B. & P. 345. So, where an attorney had not delivered any bill, but merely particulars of demand under a judge's order, held, that he was entitled to recover for monies paid to his client's use, having no reference to his business of an attorney, although the particulars contained some taxable items. *Mowbray* v. *Fleming*, 11 East, 285. *Weld* v. *Crawford*, 2 Starkie's C. 538. An attorney cannot split his demand, and thereby exempt part of it from taxation; where therefore a second bill containing items not taxable, was found not to have been delivered a month before the action, it was held that he could not recover. *Thwaites* v. *Mackerson*, 1 M. & M. 199; & 3 C. & P. 341. But an attorney may recover for money lent on a distinct occasion, and not being disbursements in the cause. *Heming* v. *Wilton*, 1 M. & M. 529; & 4 Carr. & P. C. 318. Although his bill has been regularly delivered according to the statute. And see *Hill* v. *Humphries*, 2 B. & P. 343; *Benson* v. *Garcia*, Esp. C. 149. This rule seems however to be subject to the proviso, that the distinct and untaxable items have no reference to the plaintiff's professional character. An attorney not having delivered any bill before action brought, and delivered particulars containing some taxable items, it was held that he could not recover in respect of items not taxable, but which was due in respect of business done, as money paid to his client's use in his character of an attorney. *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 356. Business done by an attorney for assignees, the greater part of which relates to proceedings under the commission, is not within the 2 Geo. 2, c. 23, s. 23; charges also for attending to advise with the solicitor of a creditor as to opposing the bankrupt's discharge from custody, and a like charge as to opposing his discharge under the Insolvent Act, are not taxable charges within the Act; proceedings in bankruptcy are not proceedings in equity within the statute. *Crowder* v. *Davies*, 3 Y. & J. 433. The statute does *not* extend to mere charges for conveyancing. *Hill* v *Humphreys*, 2 B. & P. 345; B & P. 145. Nor to a charge for searching at the Judgment Office, whether issues had been copied or docketted, or satisfaction entered on the roll. *Fenton* v. *Corria*, 1 R. & M. 262. Nor to business done in the House of Lords upon an appeal. *Williams* v. *Odell*, 4 Price, 479. Or in the Middlesex Court of Requests, *Becke* v. *Wells*, 1 C. & J. 75. Nor to business done under a commission of bankruptcy. *Crowder* v. *Davies*, 3 Y. & J. 433. *Hamilton* v. *Jones*, 4 M. & P. 869. Nor to a payment of debt and costs by an attorney, who has put in bail for the defendant, and paid such debt and costs without having them taxed, and without making any charge *for his own labour*. *Prothero* v. *Thomas*, 6 Taunt. 106; *tamen qu.* for the statute uses the term *disbursement* as well as *fees*; and see *Crowder* v. *Shee*, 1 Camp. C. 437; nor to a charge for preparing an affidavit of a petitioning creditor's debt (which is not sworn), and bond to the Chancellor. *Barker* v. *Chatterton*, 5 B. & A. 686; in which case the court questioned the decision in *Sandon* v. *Bourne*, *supra*; *secus*, (*semble*) had the affidavit been sworn. *Ib.* Where the bill contained abbreviations of whose meaning there could be no doubt, it was held to be sufficient to enable the plaintiff to recover. *Froud* v. *Stillard*, 4 C. & P. 51; and see *Reynolds* v. *Caswell*, 4 Taunt. 193. Where the bill charged for attendances on particular days, and at the end a charge for "several attendances," the Judge directed the latter to be deducted. *Rowson* v. *Earl*, 4 C.

Delivery of a bill.

more previous to the commencement of the suit. It is sufficient to show that the bill was left at the defendant's last known apparent place of abode at the time when the bill was delivered (*b*), although the defendant prove that he had another known place of abode subsequently to the delivery of the bill. It must be proved that the bill was *left* with the client, and not taken back again (*c*). Where a bill was produced, with an indorsement upon it in the hand-writing of a deceased clerk of the plaintiff, whose duty it was to have delivered the bill, purporting that he had delivered a copy on a particular day, and the indorsement was proved to have existed at that date, it was held that the entry was evidence of the delivery of the bill (*d*). It is unnecessary for an executor or administrator to prove the delivery of a bill for business done by his testator or intestate (*e*); so where the defendant is also an attorney (*f*); or where the plaintiff sues as the assignee of an insolvent attorney (*g*): nor is such proof necessary where the attorney sets-off the amount of his bill; it should not, however, be produced at the trial by surprise, but be delivered time enough for the plaintiff to have it taxed before the trial (*h*). The bill may be proved by a duplicate, original, or copy, without notice to produce the one delivered (*i*), provided proof be given that it was signed by the plaintiff. A mistake in the date of the items, which does not mislead the plaintiff, will not vitiate the delivery (*k*).

It was held that an action might be maintained by a solicitor against an assignee for business done under a commission of bankruptcy, although the bill had not been taxed by a master in chancery, under the stat. 5 Geo. 2, c. 30, s. 45 (*l*).

& P. 44. An item of costs charged to have been paid according to the *allocatur*, but not stated in detail, is not sufficiently described, but the plaintiff is not precluded by the misdescription from recovering the residue of the bill. *Drew* v. *Clifford*, 1 R. & M. 280. See the statute, 3 J. 1, c. 7, s. 1, and *Brooks* v. *Hague*, T. Ray. 245; *Clark* v. *Godfrey*, Str. 633; *Milner* v. *Crowdall*, 1 Show. 338. It seems that the name of the court need not be stated in the bill. *Frowd* v. *Stillard*, 4 C. & P. 512; *Reynolds* v. *Caswell*, 4 Taunt. 193. Where attornies sue as partners, a bill signed in the name of the firm is sufficient. *Smith* v. *Jago*, 1 C. & J. 542. In *assumpsit* by the plaintiff, as attorney and agent for the defendant, a country client of the plaintiff, for work and materials, and for fees, &c.; held, that the plaintiff was not the attorney of the defendant within the statute requiring the delivery of the bill a month before action; but the court would not limit the term "monies in the first count mentioned" to the fees. *Hill* v. *Weight*, 5 S. c. 662.

(*b*) *Wadeson* v. *Smith*, 1 Starkie's C. 354.

(*c*) *Brooks* v. *Mason*, 1 H. Bl. 290. The object of the statute is, that the defendant shall have due time to consider the charges. *Ib.* It is not sufficient that the client acquiesce in the reasonableness of the charges. *Crowder* v. *Shee*, 1 Camp. 437.

(*d*) *Campneys* v. *Peck*, 1 Starkie's C. 404.

(*e*) 1 Barnard, K. B. 433; Andr. 276; 1 Tidd, 316. *Barrett* v. *Moss*, 1 C. & P. 2.

(*f*) Although the business was done before the defendant became an attorney. *Ford* v. *Maxwell*, 2 H. B. 589; 12 G. 2, c. 13. *Bridges* v. *Francis*, Peake's C. 1; 1 Esp. C. 221. *Wildbore* v. *Bryan*, 8 Price, 677. And such a bill is not within the st. 3 J. 1, c. 7, s. 1. *Sandys* v. *Hornby*, 1 M. & Ry. 33. So agents are not within the statute. *Ib.* and *Jones* v. *Price*, *cor.* Lee, C. J. 1748, Sel. N. P. 163. *Hill* v. *Sydney*, 7 Ad. & Ell. 956.

(*g*) *Lester* v. *Lazarus*, 2 C. M. & R. 665. So in case of a set-off it has been held to be sufficient to deliver it to the plaintiff in time to have it taxed before the trial. *Martin* v. *Winder*, Doug. 199, n.; but see *Bulman* v. *Burkett*, 1 Esp. C. 449. Where Lord Kenyon intimated that in such case a written notice is necessary; and see also *Murphy* v. *Cunningham*, *contra*.

(*h*) Dougl. 199; 1 Esp. C. 499; 1 Tidd, 318. *Bulman* v. *Birket*, 1 Esp. C. 449.

(*i*) *Anderson* v. *May*, 2 B. & P. 237. And see *Jory* v. *Orchard*, 2 B. & P. 39. *Philipson* v. *Chase*, 2 Camp. 110. *Colling* v. *Treweeke*, 6 B. & C. 394. *Fyson* v. *Kemp*, 6 C. & P. 72. Vide *supra*, Vol. I. and Ind. tit. INSTRUMENTARY PROOF; and *infra*, tit. NOTICE.

(*k*) *Williams* v. *Barber*, 4 Taunt. 806.

(*l*) *Tarn* v. *Heys*, 1 Starkie, 278. See *Arrowsmith* v. *Barford*, Ib. in note; 2 Camp. 277.

Delivery of a bill.

It is a general rule in such cases that the bill cannot be taxed at the trial, for the defendant might have had it taxed previously, and his delay for the space of a month before the commencement of the action is evidence of his acquiescence (*m*). It is sufficient to give in evidence a Judge's order to tax the bill, the defendant undertaking to pay what should appear to be due on the master's *allocatur* thereon (*n*). The delivery of a former bill is conclusive evidence against any increase of charge in a subsequent bill, on any of the items contained in it, and is strong presumptive evidence against any additional items (*o*); but it will not estop the plaintiff from proving that in fact he had transacted other business for the defendant.

An admission by the defendant of the delivery of the bill to enable the attorney to prove it under the defendant's commission, does not afford such a presumption as to dispense with proof in an action of the delivery required by the statute, no such delivery being necessary to enable him to prove his bill under the commission (*p*).

The plaintiff must also prove that the action was not commenced till a month after the delivery of the bill, by the production of the writ, or by the Nisi Prius record (*q*).

The contract to conduct a suit is entire, and where the suit has ended within six years, the Statute of Limitations will not bar the demand for such business as was done more than six years ago (*r*).

Defence.

The defendant may insist (under a proper plea) in bar of the action that the plaintiff, at the time the business was done, was disqualified from practising as an attorney, by having omitted to take out his certificate for one whole year (*s*).

It has been doubted whether the defendant can set up the plaintiff's negligence, however gross, as a defence to the action (*t*); there seems, however, to be no reason to except this case from the operation of the general rule now established, that a plaintiff shall not be allowed to recover in respect of services so negligently rendered that the employer has derived no benefit from them (*u*).

(*m*) *Williams* v. *Frith*, Doug. 197. *Hooper* v. *Till*, Ib. 198; Barnes, 124; 1 Tidd, 317. *Anderson* v. *May*, 2 B. & P. 237. But the bill may be taxed at any time before verdict or judgment. Sel. N. P. 166, cites *Shaw* v. *Pickering*, Doug. 198, in *not*.

(*n*) *Lee* v. *Jones*, 2 Camp. 496. As to taxation, where the attorney pays proctor's fees in Ecclesiastical Court. See *Franklin* v. *Featherstonhaugh*, 1 A. & E. 475.

(*o*) *Loveridge* v. *Botham*, 1 B. & P. 49.

(*p*) *Eicke* v. *Nokes*, 1 M. & M. 303.

(*q*) See WRIT.—COMMENCEMENT OF ACTION. *Webb* v. *Prickett*, 1 B. & P. 263.

(*r*) *Harris* v. *Osborne*, 2 C. & M. 629.

(*s*) Under the st. 37 G. 3, c. 90. But it would not be sufficient to show that he had merely neglected to take out his certificate, unless at the time a full year had elapsed. See *Prior* v. *Moore*, 2 M. & S. 605, where it was held that in such case the attorney might still sue by attachment of privilege.

(*t*) *Templer* v. *M'Lachlan*, 2 N. R. 146. *Pasmore* v. *Birnie*, 2 Starkie's C. 59.

(*u*) See *Farnsworth* v. *Garrard*, 1 Camp. 38; *Denew* v. *Daverell*, 3 Camp. 451, *Fisher* v. *Samuda*, 1 Camp. 190; *infra*, tit. WORK AND LABOUR. It is a good defence to show that the costs sought to be recovered have been incurred through want of proper caution on the part of the attorney. As that they have arisen from his neglect to enter into the recognizances, and give the notice necessary, in order to appeal against a claim of tithes. *Montriou* v. *Jefferys*, 1 R. & M. 317; 1 C. & P. 113. *Hopkinson* v. *Smith*, 1 Bing. 15. Where an attorney had incurred expenses which were useless for the object in view, although done *bonâ fide*, held that he was not entitled to recover them from his client. *Hill* v. *Featherstonhaugh*, 7 Bing. 569. Entire items for useless work may be discarded by the jury. *Shaw* v. *Arden*, 228. And such evidence is admissible under the general issue. *Hill* v. *Allen*, 2 M. & W. 283. If other causes besides the defendant's negligence conduce to the loss of benefit, such negligence will not supply a defence to the action. *Dax* v. *Ward*, 1 Starkie's C. 409. It is no defence to such an action that the plaintiff was instructed to put in a plea of abatement for *delay*, which he

The defendant may also show in defence, that the plaintiff lives at a remote place from that where the business is conducted by his clerk (*x*). That by agreement the work was to be done gratis (*y*), or was not to exceed a certain sum (*z*). That the plaintiff has neglected to take out his certificate (*a*). But he may recover in respect of business done at a time when he was uncertificated, provided he take out his certificate before the end of a year after the expiration of the time to which the former certificate extended (*b*).

It is no defence, under the plea of *non-assumpsit*, that one of the plaintiffs was not admitted an attorney of such court (*c*); nor that no bill of costs has been delivered (*d*); nor where the attorney acts as agent (*e*).

An attorney receiving an offer of compromise, if not communicated to his client, goes on at his own risk, and cannot charge his client with subsequent costs; but as it is his duty to communicate such offer, it will be presumed he did so unless the negative be shown (*f*).

Proof in actions against an attorney.

In an action against an attorney for misconduct, it must be proved that he is an attorney of the particular court, as alleged in the declaration (*g*). The retainer of the defendant by the plaintiff must also be proved.

With respect to the misconduct of the defendant, and proof of the loss which has resulted in consequence, it is to be observed, that it is not every neglect which will subject the party to such an action. An attorney is only bound to use reasonable care and skill in managing the business of his client; if he were liable further, no one would venture to act in that capacity (*h*). He is not liable, unless he has been guilty of *crassa negligentia* (*i*). This, however, is usually a question of fact to be decided by a jury (*k*).

neglected to do. *Johnson* v. *Alston*, 1 Camp. 176. An attorney is entitled to recover in respect of preparing document, although its legality at the time was doubtful, and it turns out to be illegal. *Polter* v. *Sparrow*, 6 C. & P. 749. An attorney cannot abandon his client's cause for want of being supplied with funds, unless he give reasonable notice to the client. *Hoby* v. *Built*, 3 B. & Ad. 350. And per Lord Eldon, C., in *Cresswell* v. *Bryan*, 14 Ves. 271; see also 1 Sid. 31, Say. 173; *secus*, for reasonable cause and on reasonable notice. *Vansandau* v. *Brown*, 7 Bing. 402. Where he gave notice of giving up the papers, unless supplied with funds, and did so; held, that he was justified, after such notice, in refusing to go on with the cause, and might recover for the business done. *Rowson* v. *Earle*, 1 Mood. & M. C. 438.

(*x*) *Taylor* v. *Glassbrooke*, 3 Starkie's C. 75. *Hopkinson* v. *Smith*, 1 Bing. 13.

(*y*) *Ackford* v. *Price*, 3 Starkie's C. 145.

(*z*) *Jones* v. *Read*, 5 Ad. & Ell. 529.

(*a*) *Pearce* v. *Whale*, 5 B. & C. 38; *infra*, tit. PRESUMPTIONS.

(*b*) *Bowler* v. *Brown*, 2 Ad. & Ell. 16.

(*c*) *Hill* v. *Sydney*, 7 B. & C. 956; under the statute, 2 G. 2, c. 23.

(*d*) *Lane* v. *Glenny*, 7 Ad. & Ell. 83.

(*e*) *Hill* v. *Sydney*, 7 B. & C. 956.

(*f*) *Sill* v. *Thomas*, 8 C. & P. 762.

(*g*) As to this proof, see above, 106. It is said that a bill for business done in a particular court is not evidence that the party was an attorney of that court. *Green* v. *Jackson*, Peake's C. 236. *Sed qu.*

(*h*) Per Le Blanc, J. in the case of *Compton* v. *Chandless*, cited 3 Camp. 19.

(*i*) 4 Burr. 2060. Per Ld. Ellenborough, *Baikie* v. *Chandless*, 3 Camp. 17; *infra*, note (*a*).

(*k*) *Reece* v. *Rigby*, 4 B. & A. 202; *Ireson* v. *Pearman*, 4 B. & C. 709; where an attorney acts for both vendor and purchaser, it seems that a small defect in title is sufficient to render him responsible. It is the duty of an attorney to examine the original securities for money to be advanced by his client, unless he be expressly absolved by his client. *Wilson* v. *Tucker*, 3 Starkie's C. 154. Although a party has undertaken to procure the attendance of a witness upon the trial, it is the duty of the attorney to ascertain that the witness is in attendance when the cause is called on. *Reece* v. *Rigby*, 4 B. & A. 202. Although it be no part of an attorney's duty to know the legal operation of conveyances, yet it is his duty to take care that he does not draw wrong conclusions. And, therefore, where an attorney in stating a title to counsel on behalf of an intended purchaser, instead of stating the deeds, states his own conclusions, he does so at his peril. In

Before the point had been fully settled that the grant of an annuity is void, unless the trusts of the annuity-deeds be recited in the memorial, it was held that such an omission did not amount to *primâ facie* evidence of gross negligence (*l*). It has been held that an action for negligence in conducting a suit against excise-officers, cannot be maintained if the seizure was lawful, since no damage can have been sustained (*m*). Proof of negligence.

Where a declaration against an attorney for suffering the defendant in a former suit to be superseded, alleged that she was justly indebted to the plaintiff, and it appeared that she was a married woman, the plaintiff was nonsuited (*n*).

In the case of *Russell* v. *Palmer* (*o*), the Court held that the action had been well conceived against the defendant for negligence in omitting to cause one *Stewart*, against whom the plaintiff had recovered a judgment, to be charged in execution within two terms next after judgment.

The evidence for the plaintiff in such cases must be regulated by the declaration which sets out the whole of the case. If he complain that he has lost the debt which was due to him from the former defendant, he must prove the existence of the debt; and if he has obtained judgment to recover it, he should prove the fact, if alleged, by an examined copy of the judgment-roll. If the former defendant has been arrested on mesne-process, the writ should be produced, or an examined copy, if it has been returned, and the actual time of commitment may be proved by the books of the prison. The grounds of the discharge will be shown by means of the *supersedeas*, or order for the discharge.

In such cases where the question is, whether the defendant has been guilty of gross negligence contrary to the known and usual practice, those who are conversant in the same kind of practice may be examined as witnesses on either side (*p*).

If the ground of action be negligence in completing a conveyance, where there is a defect in the memorial of an annuity, in consequence of which it is set aside, the plaintiff, to prove the defect, after having proved the retainer

such a case, where the attorney erroneously stated that *M.* was tenant in fee, whereas another was tenant for life, and the counsel in consequence gave an opinion in favour of the title, which he would not have done had he been correctly instructed; it was held that the jury were warranted in finding for the plaintiff. *Ireson* v. *Pearman*, 3 B. & C. 799. In an action against an attorney for negligence in a former action brought by him for the plaintiff, against attorneys for negligence, in which he had been nonsuited for want of proper proof of a judgment as set out in the declaration, there being an ambiguity in stating such judgment, whether it was stated as a direct allegation of a judgment on record, or only as a consequence of that negligence; held that this was not to be considered as such gross negligence as would render the defendant liable; held also, that his liability would not be altered by his showing that he had consulted others, but must depend on the nature of the mistake, in a case where the law presumes him to have the requisite knowledge himself. *Godefroy* v. *Dalton*, 6 Bing. 460. Where an attorney improperly assumes to himself the character of a receiver, and neglects the duty thereof, he will be responsible (in equity) for any rents lost by his neglect. *Wood* v. *Wood*, Russ. 558. So if he abandon a suit, and unnecessarily institute another, the Court will take care that the client does not suffer. *Ib.*

(*l*) 4 Burr. 2060. Per Ld. Ellenborough, *Bakie* v. *Chandless*, 3 Camp. 17.

(*m*) *Aitcheson* v. *Maddock*, Peake's C. 162. See *Alexander* v. *Macauley*, 4 T. R. 611; also tit. SHERIFF.

(*n*) *Lee* v. *Ayrton*, Peake's C. 34.

(*o*) 2 Wils. 325.

(*p*) 2 Wils. 328. In the case of *Pitt* v. *Yalden*, 4 Burr. 2060, Mansfield, L. C. J. said (alluding to the case of *Russell* v. *Palmer*), "L. C. J. Wilmot told me, that it came out upon the defendant's own evidence, and the verdict went upon that fact, that it was *lata culpa*, or *crassa negligentia*, in Palmer the attorney; and that there appeared to be in reality no ground for the pretence of compromise, which had been made part of Mr. Palmer's excuse and defence."

of the defendant, his conduct of the business, and the execution of the deeds which should be produced, should prove the rule of court ordering it to be set aside, and an examined copy of the affidavits used upon the motion. So, if the plaintiff has been evicted in consequence of a defect in title, arising from the negligence of the defendant, he should produce the deeds, and prove the execution of them and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession, producing the writ or an examined copy, if it has been returned.

In an action against an attorney for negligence in omitting to take any step in defence, it is not necessary to show special damage, nor to show that the plaintiff had a good defence; it is for the attorney to show, if he can, that there was no defence (*q*).

If an attorney sue out a writ in the name of a party, without any authority express or implied, and receive the debt and costs of the writ, such costs may be recovered back as money had and received (*r*).

Where an arrest is made under process, afterwards set aside for irregularity, the attorney in the suit, as well as the plaintiff, is liable in trespass (*s*).

Damages. An action of this nature sounds in damages, and the jury are not to give a verdict for the whole original debt, but only such damages as are commensurate with the loss which has probably resulted from the defendant's negligence (*t*). And therefore the plaintiff should be prepared with evidence to show the probability that he should have recovered the whole or part of the debt, if the defendant's negligence had not intervened; as by evidence of the circumstances of the party indebted to him.

The solicitor under a commission is not liable to the messenger whom he nominates; but it is otherwise where he agrees with the petitioning creditor to work the commission for a sum certain (*u*). An attorney cannot set-off against a demand of his client for money received on account of his client as damages, in an action for services barred by the Statute of Limitations (*x*).

An attorney is not personally liable to a witness whom he subpœnas (*y*) to give evidence for his client.

Competency of.—On grounds of policy, as has already been seen, an attorney is not allowed to disclose the secrets of his client; neither can he be permitted to give parol evidence of a deed, or prove a copy of one which has been entrusted to him by his client (*z*).

(*q*) *Godefroy* v. *Jay*, 7 Bing. 413; and see *Marzetti* v. *Williams*, 1 B. & Ad. 415. It seems that an attorney, where there is no defence, is not justified in omitting to put in a plea, but ought to plead the general issue, and watch that the plaintiff proves his case against his client. *Ib. Quære tamen.*

(*r*) *Dupen* v. *Keeling*, 4 C. & P. 102. *Secus* if he had such authority, although the client had no cause of action.

(*s*) *Codrington* v. *Lloyd*, 8 Ad. & Ell. 449.

(*t*) 2 Wils. 328.

(*u*) *Hartop* v. *Juckes*, 2 M. & S. 438. See 6 Geo. 4, c. 16, s. 14. He is personally liable on an agreement to withdraw the record, &c. tax costs, &c. and pay them. *Iveson* v. *Conington*, 1 B. & C. 160; 2 D. & R. 307. See *Burrell* v. *Jones*, 3 B. & A. 47. Where an attorney selects an officer to execute writs, he is personally liable to the party so employed. *Foster* v. *Blakelock*, 5 B. & C. 328.

(*x*) *Waller* v. *Lacy*, 1 G. & M. 55.

(*y*) *Robins* v. *Bridge*, 3 M. & W. 115. The Court will compel an attorney to pay the undersheriff's fees on a commission of lunacy, credit having been given him in his professional character. *Ex parte Bodenham*, 8 Ad. & Ell. 959.

(*z*) Per Bayley, J. Leicester Lent Ass. 1809, Phillips, 140. And see *Copeland* v. *Watts*, 1 Starkie's C. 95.

Admissions made by an attorney on the record, with a view to the trial of the action, as of the execution of a deed or agreement, are evidence against his client (*a*); but mere admissions in conversation are not admissible, for they are not warranted by a presumption that they were authorized by the client (*b*). So an admission, proved to be in the handwriting of the attorney on the record, consenting to a verdict for the plaintiff, will be sufficient evidence of the defendant's consent. An admission by the party's attorney on record, in a letter written before the action, is not admissible without proof of authority (*c*).

ATTORNMENT. *See* 4 Anne, c. 16, s. 9.

AUGMENTATION.

A CURACY may be proved to have been augmented, by showing an order for the augmentation entered in a book, and signed by the governors of Queen Anne's Bounty, according to the stat. 1 Geo. 1, stat. 2, c. 10, s. 20, without proof that the money was laid out in land, and allotted by deed under the corporation seal of the governor, to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute and the stat. 9 Geo. 2, c. 36 (*d*).

AUTERFOITS ACQUIT. *Vide supra*, Vol. I. and Index.

AUTHORITY (*e*).

As to the authority of an agent, *see* tit. AGENT.
Of a partner, *see* tit. PARTNER.
See also TRESPASS.—REPLEVIN.
As to proof of authority to receive money, *see* tit. PAYMENT.
To give notice to quit, *see* EJECTMENT.
See also tit. POWER.

AVOIDANCE.

PROOF of, when necessary to avoid a license. See *Roberts* v. *Davey*, 4 B. & Ad. 664.

(*a*) *Young* v. *Wright*, 1 Camp. 139. *Goldie* v. *Shuttleworth*, 1 Camp. 70. *Milward* v. *Temple*, Ibid. Vide *supra*, tit. ADMISSIONS, and Index tit. ADMISSIONS.

(*b*) *Parkins* v. *Hawkshaw*, 2 Starkie's C. 239. But where it is proved that he is the attorney of the other party, proof of a proposal made by him on behalf of his client is admissible. *Gainsford* v. *Grammar*, 2 Camp. 9. If an attorney appear without authority, the appearance is good, and the remedy is by action. *Anon.* Salk. 86. An offer by the attorney of the father of the defendant, an infant, is not admissible, although the defendant afterwards employ the same attorney. *Burghart* v. *Angerstein*, 6 C. & P. 690. An undertaking to appear for Messrs. *T.* & *M.*, joint owners of the sloop *A.*, given by the attorney on the record, is evidence of joint ownership, *Marshall* v. *Cliff*, 4 Camp. 133. See further as to admissions by an attorney, *Truslove* v. *Bruton*, 9 Moore, 64.

(*c*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339. *Secus*, if the letter from defendant's attorney contains an undertaking to appear. *Marshall* v. *Cliff*, 4 Camp. 133. And see *Roberts* v. *Gresley*, 3 C. & P. 380. *Peyton* v. *Governors of St. Thomas's Hospital*, 3 C. & P. 363. *Wilmot* v. *Smith*, 3 C. & P. 453.

(*d*) *Doe* d. *Graham* v. *Scott*, 11 East, 478.

(*e*) See Vin. Ab. tit. AUTHORITY; and *Vernon* v. *Crew*, Cro. C. 57.

AWARD (*f*).

It has been seen, that an award regularly made under a submission by the parties, operates conclusively as a judgment of a Court of competent jurisdiction (*g*).

Proof of submission.

In an action upon an award, it is necessary to prove the authority conferred by the parties on the arbitrator, and his making the award. The authority may be by parol. If it be by deed, it must be produced, and the execution (*h*) by all (*i*) the parties to the reference must be proved. To prove the appointment of an umpire it is not sufficient to produce the joint award of the arbitrators and umpire in which the appointment is recited (*j*).

Where four parties agreed to refer the co-partnership accounts, and all matters in difference between them, and any two of them, and the arbitrator awarded that a separate debt was due from *A.*, one of the partners, to *B.* another partner, it was held, that in order to establish the existence of this debt it was necessary to prove the execution of the submission by *A.* and *B.*, and also by the two other partners (*k*). The appointment of an umpire out of two persons whom two arbitrators have chosen by lot is bad, and is not cured by an acquiescence of the parties before they knew the fact (*l*).

A variance as to the day to which the time for making the award was alleged to be enlarged, will not be material (*m*).

Where the original time for making the award has been enlarged, the plaintiff must show that it was duly enlarged, either in pursuance of authority given to the arbitrator by the terms of the submission, or by subsequent consent. If the enlargement has been made under a Judge's order, consent of the parties must be shown to warrant the order (*n*). An irregular enlarge-

(*f*) No precise form of words is necessary to constitute an award. *Lock* v. *Vulliamy*, 5 B. & Ad. 600. In debt on bond conditioned for the due discharge and accounting by a clerk, to be ascertained by the inspection of *A.*, held that a paper in the handwriting of *A.* showing the deficiency was in the nature of an award, and required a stamp. *Jebb* v. *M'Kiernan*, 1 M. & M. 340. Where, on reference of an action in which several issues were joined, the arbitrator found for the defendant on some issues, but not going to the whole cause of action, and for the plaintiff on the others, but omitted to award damages; held, that the award was insufficient, as it was impossible to say how the verdict was to be entered. *Howard* v. *Duncan*, 7 Dowl. 91. But where one plea covered the whole cause of action, which the arbitrator found in favour of the defendant, held, that he had done right in awarding no damages on those issues which he found for the plaintiff. *Savage* v. *Ashwin*, 4 M. & W. 530. See further as to the sufficiency of an award, *Petch* v. *Conlan*, 7 Dowl. P. C. 426. *Petch* v. *Fountain*, 5 Bing. N. C. 442. Where the award finds a certain sum to be due, but no express order to pay it, there being no contempt, the payment cannot be enforced by an attachment, but only by action on the award. *Seaward* v. *Howey*, 7 Dowl. 318.

(*g*) *Supra*, Vol. I. Index, tit. JUDGMENTS. *Doe* v. *Rosser*, 3 East, 11. *Herbert* v. *Cooke*, Willes, 36; *infra*, 86, n. (*c*). *Whitehead* v. *Tattersall*, 1 Ad. & Ell. 491. Where the parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, his decision was held to be final, although he recommended that the printed statute should be compared with the parliament roll; and the Court said, that if the statute was misprinted, the plaintiff (who sought to repudiate the arbitrator's decision) should have shown it. *Price* v. *Hollis*, 1 M. & S. 105.

(*h*) See tit. DEED.

(*i*) *Farr* v. *Owen*, 7 B. & C. 427.

(*j*) *Still & another* v. *Halford*, 4 Camp. 17. And see *Maule* v. *Stowell*, 15 East, 99. As to the appointment of an umpire, see *Bates* v. *Cooke*, 9 B. & C. 409. *Soulsby* v. *Hodgson*, 3 Burr. 1474. Such appointment must be the result of the will and judgment of the two. *In re Cassell*, 7 B. & C. 626.

(*k*) *Antram* v. *Chace*, 15 East, 209.

(*l*) *Greenwood* v. *Titterington*, 9 Ad. & Ell. 699.

(*m*) *Swinford* v. *Burn*, 1 Gow. 5. See 2 Saund. 290, a.; *Gilbert* v. *Stanislaus*, 3 Price, 54.

(*n*) 5 B. & C. 390, on motion for an attachment. A direction by an arbitrator, "I direct that a rule of this court shall be

ment is waived by the subsequent appearance of the parties before the arbitrator (*o*).

Where the submission is to *A.* and *B.*, and such third person as they shall appoint, in order to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not sufficient to produce an award executed by the three, reciting that *A.* and *B.* did appoint *C.*, even although *C.* acted along with them in the arbitration (*p*).

Where an award has been made on a reference by rule of court, to prove the order (in the same court) it is sufficient to produce the office-copy of the rule, making the order a rule of court (*q*).

Of the award.

Next, the execution of the award itself must be proved, by means of the attesting witness, if it has been subscribed by one, or proof of his handwriting, and perhaps that of the arbitrator, if the witness be dead (*r*).

Where a parish had continued to repair a road within it, notwithstanding an award made by commissioners under an inclosure Act, sixteen years ago, which awarded that the highway was in a different parish, it was held that upon an indictment against the first parish for not repairing the road, it was incumbent upon them to prove that the previous notices to the parishes to be affected by the award had been given as required by the Act (*s*); for the repairs subsequent to the award raised a presumption that notice had not been given. But in the absence of such a presumption, a presumption arises in such a case that the commissioners have done their duty (*t*). The plaintiff is entitled to recover interest from the time of demanding the sum awarded as a liquidated sum (*u*). Notice of the award need not be proved, for the parties are bound to take notice of the award (*v*). An indorsement (unstamped) on an award is a sufficient authority to a third person to demand the sum awarded (*x*).

Defence.

The defendant may insist that one or more of the parties to the award were minors or married women, and that they were not bound by the submission, and consequently that there was no mutuality (*y*).

The authority of an arbitrator is revocable, and the defendant may show that the authority was in fact revoked previous to his making the award (*z*).

applied for, by counsel's hand, to enlarge the time of making my award," is of itself a sufficient enlargement. *Hallett* v. *Hallett*, 5 M & W. 25. An irregularity as to enlarging the time is waived by attending subsequent meetings before the arbitrator. *Ib.*

(*o*) *Re Hick*, 8 Taunt. 694. *Lawrence* v. *Hodgson*, 1 Y. & J. 16. *Holden* v. *Glasscock*, 8 D. & R. 151.

(*p*) *Still* v. *Halford*, 4 Camp. 17.

(*q*) *Ibid.* But if the action be brought in another court, *semble*, the rule itself should be produced.

(*r*) Where the making and publishing of an award are sworn to, but without fixing the time, the Court will presume that it was made in due time. *Doe* v. *Stillwell*, 8 Ad. & Ell. 645. See PRIVATE WRITING, Proof of.—ATTESTING WITNESS.

(*s*) *R.* v. *Haslingfield*, 2 M. & S. 558.

(*t*) According to the general rule. See Lord Ellenborough's observations, 2 M. & S. 561; *Williams* v. *East India Company*, 3 East, 192; and tit. PRESUMPTION. As to awards under inclosure Acts, see *Doe* d. *Sweeting* v. *Hellard*, 9 B. & C. 789; *Revell* v. *Jodrell*, 4 T. R. 424; *Townley* v. *Gibson*, 2 T. R. 701; *Doe* v. *Davidson*, 2 M. & S. 175.

(*u*) *Johnson* v. *Durant*, 4 C. & P. 327.

(*v*) 2 Saund. 62; unless such notice be made necessary by the special terms of the contract or award.

(*x*) *Langman* v. *Holmes*, 2 W. Bl. 991.

(*y*) A submission, stated to be an order by the Vice-Chancellor in a suit pending before him, by consent of the attornies in the suit, where some of the parties were minors, without any averment (in a declaration on the award) to show that the next friends of the infants took the obligation on themselves, is not binding, for it is not *mutual*. *Biddell* v. *Dowse*, 6 B. & C. 255; 1 Ch. Ca. 279.

(*z*) As by the death of one of the parties, unless the case be provided for by the terms of the rule or submission. See *Potts* v. *Ward*, 1 Marsh. 366; *Cooper* v *Johnstone*, 2 B. & A. 394; *Edmunds* v. *Cox*, 2 Chitty's

Proof in defence.

But he cannot go into any collateral evidence to impeach the award (*a*); as by shewing that the arbitrator acted corruptly or erroneously (*b*), or as it seems by mistake (*c*). But he may take any objection which is apparent on the proceedings: as that the award is bad for excess of authority in the whole or in part (*d*). So he may show, either by special plea or under the general issue, in an action on the award, that the submission was obtained by fraud (*e*); or he may object that the award is not final or certain (*f*).

It is no defence to an action on the submission, that the defendant revoked the authority before the award made (*g*).

An award made under bonds of submission, that certain premises should be delivered up to the lessor of the plaintiff in ejectment, was held to be

C. T. M. 432. And see *In re Hare*, 6 Bing. N. C. 158. *Secus*, where the arbitrator was merely to settle the amount of a verdict previously taken. *Bower* v. *Taylor*, cited 7 Taunt. 574. Where a stranger to the suit became party to a rule by which the parties were bound to pay to him or his executors the sum awarded, it was held that his executors were entitled to an attachment, notwithstanding his death before the award made. *Rogers* v. *Stanton*, 7 Taunt. 576. A party may, after submission even by deed, revoke his act previous to the award made. *Milne* v. *Gratrix*, 7 East, 608. So a party may revoke a submission by rule of *Nisi Prius* before it is made a rule of court. *Clapham* v. *Higham*, 1 Bing. 87; 2 B. & A. 395; though he would be guilty of a contempt in revoking it after it had been made a rule of court. *Ibid.* But if a Judge's order direct a reference, and that either party wilfully preventing, &c. should pay such costs as the Court should think fit, though the party may revoke his own submission, he cannot revoke the latter part of the order. *Aston* v. *George*, 2 B. & A. 399. An intervening bankruptcy of one of the parties held to be no revocation. *Andrews* v. *Palmer*, 4 B. & A. 250. In an action of covenant for not performing an award, a plea that the defendant by deed revoked the authority, is good, without expressly alleging notice to the arbitrators: for the allegation imports notice. *Marsh* v. *Bulteel*, 5 B. & A. 507; and see *Vynior's Case*, 8 Co. 162. It seems, that where power is given to an arbitrator to examine the parties, he may examine those also who ought to have been made parties. See *Lloyd* v. *Archbowle*, 2 Taunt. 324; *Campbell* v. *Twemlow*, 1 Price, 81. And although the arbitrator may have examined a witness not legally competent, the Court will not set aside the award. *Laird* v. *Dixon*, K.B. Mich. T. 1827. Note, that the verdict had been entered on the arbitrator's certificate at the assizes, and the ground of motion was, that the arbitrator, in an action against one of the members of a joint-stock company, had admitted the evidence of other members of the company for the defendant. On motion for an attachment, the Court will not notice objections not appearing on face of award. *Macarthur* v. *Campbell*, 2 Ad. & Ell. 52. The ordering a sum of money to be paid on a Sunday does not vitiate an award. *Hobdell* v. *Miller*, 6 Bing. N. C. 292.

(*a*) *In re Cargey*, 2 D. & R. 222. For the plaintiff would be unprepared at the trial. The plea in that case was *nil debet*. The remedy in case of partiality or corruption is by application to the Court, or by an action against the arbitrators. *Ibid.*; and see *Swinford* v. *Burn*, 1 Gow, 5. Where evidence had been taken at a meeting irregularly convened, and at which the parties did not attend, but it was afterwards struck out, and the arbitration proceeded, the Court refused to set the award aside. *Kingwell* v. *Elliott*, 7 Dowl. 423.

(*b*) This at all events cannot be done where application might have been made to the Court to set the award aside on that ground. *Braddick* v. *Thompson*, 8 East, 344. *Wills* v. *Maccarmick*, 2 Wils. 148.

(*c*) *Ashton* v. *Poynter*, 1 C. M. & R. 738. *Johnson* v. *Durrant*, 2 B. & Ad. 931.

(*d*) *Bonner* v. *Liddell*, 1 B. & B. 80. As where, according to an agreement for a lease, the term was to be for 63 years; but there was to be no payment of rent for the first three years, and the arbitrator authorized to direct a lease to be executed according to the agreement, awarded the execution of a lease for 63 years, to commence from the payment of rent.

(*e*) *Sackett* v. *Owen*, 2 Chitty's R. 39.

(*f*) *Wills* v. *Maccarmick*, 2 Wils. 148. Vide *supra*, p. 118, note (*b*). See further *Ross* v. *Boards*, 8 Ad. & Ell. 290; *Wykes* v. *Shipton*, 8 Ad. & Ell. 246, n.; *Brown* v. *Croydon Canal Co.*, 9 Ad. & Ell. 422; *Taylor* v. *Shuttleworth*, 6 Bing. N. C. 277; *Seccombe* v. *Babb*, 6 M. & W. 129; *Gisborn* v. *Hart*, 5 M. & W. 50.

(*g*) *Brown* v. *Tanner*, 1 M. & Y. 464. For a revocation of authority is a breach of an agreement to perform an award. See *Grazebrook* v. *Davis*, 5 B. & C. 534. And see *Doe* v. *Horner*, 8 Ad. & Ell. 235.

conclusive as to his right (*h*). And in general, an award made under competent authority is binding and conclusive upon the parties (*i*). And before the new rules it was evidence under the general issue in assumpsit. Proof in Defence.

But an award, although under a submission of all matters in difference, will not be conclusive upon any matter which was not at all contested before the arbitrator (*k*). And the arbitrator may be examined in order to prove that no evidence was given upon a particular subject (*l*). An award made upon a parol submission, is evidence under a count on the original demand (*m*) or on the account stated (*n*). An arbitrator may demand a compensation for his trouble, and the plaintiff may compel contribution from the parties (*o*). An agreement by parties to refer all disputes that shall occur, does not oust the jurisdiction of the courts of law or equity (*p*).

Property awarded to be delivered up on payment of a sum specified, in satisfaction, does not vest on tender of the money, which is refused, and therefore the party entitled to the property cannot maintain trover, but must bring an action on the award (*q*).

BAIL (*r*).

The bail of a party are incompetent, from interest, to give evidence for him (*s*). Where the testimony of one or both the bail is necessary, the party on application to the Court, may substitute another in his place, and so render him competent (*t*).

BAIL-BOND.

The plaintiff in an action on a bail-bond, whether he be the sheriff, or his assignee, under the plea of *non est factum*, need prove the execution only (*u*), in the ordinary way. If the defendant plead that the bond was taken for ease and favour, and the plaintiff reply that it was taken for the security of his prisoner, and issue be joined thereon, slight evidence will, it is said,

(*h*) *Doe* v. *Rosser*, 3 East, 11.

(*i*) See *Campbell* v. *Twemlow*, 1 Price, 81; 6 Ves. 282; 9 Ves. 364; 14 Ves. 271; 1 Swanst. 55. *Price* v. *Hollis*, 1 M. & S. 105. Where an action of debt, to which the general issue and a set-off were pleaded, was referred, "the costs of the reference and of the award to abide the event," and the arbitrator found that the plaintiff had no cause of action, and not entitled to recover in the action, but the award was silent as to the set-off; held, that the award was final, and the defendant entitled to recover the costs; the *event*, being taken to *mean* the event as to the action, and not as to the determination of particular issues, which the arbitrator was not distinctly required to do. *Duckworth* v. *Harrison*, 4 M. & W. 432; and 7 Dowl. 71.

(*k*) *Ravee* v. *Farmer*, 4 T. R. 146. *Marten* v. *Thornton*, 4 Esp. C. 180. But see *Dunn* v. *Murray*, 9 B. & C. 780; Lord Ellenborough's observations in *Smith* v. *Johnson*, 15 East, 213; *Seddon* v. *Tutop*, 6 T. R. 610.

(*l*) *Martin* v. *Thornton*, 4 Esp. C. 180, *cor.* Ld. Alvanley. But in *Johnson* v. *Durant*, 4 C. & P. 237, it is said that he cannot be asked under what impression he made his award.

(*m*) *Kingston* v. *Phelps*, Peake's C. 227.

(*n*) *Ibid.*

(*o*) *Swinford* v. *Bruce*, 1 Gow, 5.

(*p*) *Thompson* v. *Charnock*, 8 T. R. 139. *Kill* v. *Hollister*, 1 Wils. 129. *Wellington* v. *Mackintosh*, 2 Atk. 585.

(*q*) *Hunter* v. *Rice*, 15 East, 100.

(*r*) The refusing bail where it ought to be granted, is a misdemeanour, and the subject of an action or indictment; 2 Haw. c. 15, s. 13.

(*s*) 1 T. R. 164; 2 Esp. C. 606. *Collett* v. *Jenners*, Rep. temp. Hardw. 133.

(*t*) Tidd's Pr. 264. *Collett* v. *Jenners*, R. T. Hardw. 133. This is done by an application to the Court, on affidavit, stating that the witness is a material one, upon the terms of adding and justifying another.

(*u*) But if the plaintiff should inadvertently have joined issue upon the plea of *nil debet*, instead of having demurred, he will, it is said, be bound to prove all the averments in the declaration, the issuing the writ, the arrest, the execution of the bond, and the assignment, if the action be brought by the assignee. *Qu.*

Bail bond.

maintain the replication (*x*). Upon a plea of *comperuit ad diem*, the appearance, being matter of record, is tried by the record (*y*).

When the defendant pleaded that there was no assignment of the bond by the sheriff or undersheriff, it was held that the seal (of office) to the assignment was sufficient whoever had signed it (*z*).

Where the bond is taken by the sheriff after the return of the writ, it is void; since the condition is, that the defendant in the original action shall appear at the return of the writ, which is impossible. The defendant may take advantage of the defence under the plea of *non est factum*, by producing the writ, or relying upon the statement of the writ and return on the record (*a*).

The bail are estopped from saying that there was no arrest. A return of *non est inventus*, after the taking and before assigning the bond, may make the sheriff liable for a false return, or be the foundation for an application to the Court to set the bond aside, but cannot come in question in an action on the bond (*b*).

Bail are not discharged by the plaintiff's taking a cognovit from their principal, without their consent or knowledge, unless by the terms of it he is to have longer time for payment of the debt and costs than by regularly proceeding in the action (*c*).

BANK, JOINT STOCK. See St. 7 G. 4, c. 30, and tit. PARTNERS.

BANKRUPTCY.

UNDER this head may be considered:—1st, Proofs in actions *by the assignees*.—2dly, Those in actions by creditors or others *against the assignees*.—3dly, Those in actions between the bankrupt and creditors.—4thly, Those on indictments against the bankrupt.—5thly, The competency of witnesses, &c.

Proofs by assignees.

I. *Of proofs by Assignees.* Assignees sue either in their representative character, or in their own right. If they claim in their character of assignees, they must (if their character be put in issue) (*d*), prove themselves to be such. The fact that commissioners have already declared the party a bankrupt is not even *primâ facie* evidence of the bankruptcy, for they act upon *ex parte* evidence, and have a mere authority without jurisdiction, and consequently their determination is not in the nature of a decree or judgment

(*x*) 1 Sid. 383. See 1 Saund. 162; 1 Lev. 254; Com. Dig. PLEADER, 2 W. 25.

(*y*) The plea is proved by the production of the recognizance roll, containing an entry of the appearance. *Whittle* v. *Oldaker*, 9 B. & C. 478. If the issue depend on the date of the appearance, the Court of C. P. will order the *date* of the appearance to be entered on the filazer's book, although before the application to the Court, issue has been joined on the plea of *comperuit ad diem*. *Austen* v. *Fenton*, 1 Taunt. 23.

(*z*) *Harris* v. *Ashley*, 1 Sel. N. P. 554, cor. Lord Mansfield. And on a traverse of the assignment, it is not necessary to show that the witnesses subscribed their names in the presence of the officer executing the assignment. *Phillips* v. *Barlow*, 1 Bing. N. C. 433.

(*a*) 4 M. & S. 338. For other evidence on the plea of *non est factum*, see tit. DEED.—NON EST FACTUM.

(*b*) *Taylor* v. *Clow*, 1 B. & Ad. 223.

(*c*) *Stevenson* v. *Roche*, 9 B. & C. 707.

(*d*) By the rule H. T. 4 W. 4, in all actions by and against assignees of a bankrupt or insolvent, or executors, or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially denied. A plea to a declaration in trover by the assignee of a bankrupt puts in issue the petitioning creditor's debt, trading, and act of bankruptcy, as well as the plaintiff's appointment as assignee. *Butler* v. *Hobson*, 4 Bing. N. C. 290. *Buckton* v. *Frost*, 1 P. & D. 102.

by a Court of competent authority (*e*). But where the assignees declare upon a cause of action which accrued *after* the bankruptcy, without describing themselves as assignees, no evidence of title is necessary (*f*). Proofs by assignees.

To establish their title to the bankrupt's property, they must prove, 1. The commission or fiat (*g*). 2. The trading. 3. The act of bankruptcy. 4. The petitioning creditor's debt. 5. The appointment of assignees.

(*e*) Ld. Raym. 580. See *Bonham's Case*, 8 Coke, 114, Callis, 216. The act of a Judge is not traversable if he be the absolute Judge of the cause; *secus*, in cases for a certificate by such as be no absolute Judge of the cause, as commissioner of bankrupt. *Bonham's Case*, 8 Coke, 114.

(*f*) *Evans v. Man*, Cowp. 569, B. N. P. 37. *Thomas v. Rideing*, Wightw. 65.

(*g*) By the stat. 1 & 2 W. 4, c. 56, s. 12, the Lord Chancellor is empowered, on petition, and on filing such affidavit and giving such bond as the law requires, to issue his fiat under his hand in lieu of a commission; and by sec. 13, such fiat, prosecuted in the Court of Bankruptcy, shall be filed and entered of record in the said court, and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners, &c.

By sec. 28, the Judges of the Court of Bankruptcy are to seal all such proceedings, documents, and copies as are required to be sealed.

By sec. 29, a certificate of the appointment of assignees, purporting to be under the seal of the said court, shall be received as evidence of such appointment, without further proof.

The st. 2 & 3 W. 4, c. 114, recites that the provisions of the st. 6 G. 4 (ss. 96 and 97), had been found defective, and that no provision had been made in the 1 & 2 W. 4 for entering of record fiats and other proceedings not prosecuted in the Court of Bankruptcy; and enacts, that the records of all commissions of bankrupt, and all proceedings under the same which may have been heretofore entered of record, pursuant to or under colour of the st. 6 G. 4, c. 16, or any other Act, shall be removed into the Court of Bankruptcy, and shall be kept as records of the said court, in such place as the Judges of the said court shall from time to time direct; and it shall be lawful for the Judges of the Court of Bankruptcy to nominate the person heretofore appointed by the Lord Chancellor, to enter such proceedings of record; or in case of his refusal to accept such office, some other fit and proper person as the clerk of enrolment to the said court; and that such clerk of the enrolments, and his successors, shall have the care and custody of all the said records so removed, and shall in like manner enter of record all matters and proceedings in bankruptcy which by this Act or the said recited Acts (6 G. 4, c. 16, and 1 & 2 W. 4, c. 36), or by any order made in pursuance thereof, are or may be directed to be entered of record, upon payment of the fees thereinafter mentioned.

Sect. 2 provides that all commissions of bankruptcy issued before the 1st day of Sept. 1825, and all depositions and other proceedings relating to such commissions, directed to be enrolled, and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record.

Sect. 3. Provided nevertheless, that the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the said 1st day of Sept. 1825, and shall be received in evidence, without proof of the appointment or handwriting of such person.

Sect. 4. Any Judge of the Court of Bankruptcy may direct such officer to enter upon the records of the court any commission of bankrupt at any time heretofore issued, and the depositions and proceedings had and taken under the same, or such part or parts thereof as such Judge shall think fit; provided, that such officer may enter of record the several matters directed by the said recited Acts, or either of them, upon the application of any party interested therein, without any special order.

Sect. 5. All fiats already issued, or to be hereafter issued, to be prosecuted elsewhere than in the said Court of Bankruptcy; and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners; and all appointments of assignees, and certificates of conformity made and allowed under such fiats, may and shall be entered of record in the said Court of Bankruptcy, upon the application of any party interested therein, on the payment of the fees thereafter mentioned, without any petition; and that any one of the Judges of the said court may, upon petition, direct any deposition or other proceedings under such fiat to be entered of record as aforesaid.

Sect. 7. In the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued, or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority in the cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceed-

Fiat. *First.* The commission or fiat is proved by the production of the commission or fiat itself, recorded according to the statute, or by an office-copy (*h*).

ings in maintenance and support of such commission or fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited Acts or of this Act; and the production or reading of such deposition, or of any copy thereof duly authenticated according to the provisions of the said recited Acts or of this Act, shall have the same effect as if the matters therein had been deposed to by the same witness in such court according to the ordinary course and practice thereof: Provided always, that the before-mentioned depositions shall be read in evidence in such cases only where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand which the bankrupt might have claimed, maintained, or defended in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending, by which the validity of any commission or fiat is or may be brought into question.

Sect. 8. No fiat nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy aforesaid.

Sect. 9 provides, that upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in Bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: Provided nevertheless, that all fiats and proceedings under the same, which may have been entered of record before the passing of this Act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, anything herein contained notwithstanding.

Where an action was pending, and before the late Act, the party applying was entitled to have the proceedings produced for the purpose of their being given in evidence upon a *subpœna duces tecum*: the assignees when called upon are bound to have the proceedings enrolled at the request of the parties interested, and if they refuse, it is at the peril of costs; but in such cases the application to the Court against them must be by petition, and not by motion. *Ex parte Johnstone*, 1 Mont. & M. 82. It was held that the courts of law had no jurisdiction under sections 95 & 96 of the stat. 6 G. 4, c. 16. *Johnson* v. *Gillett*, 5 Bing. 5, and 2 M. & P. 8. Where the title appears in the assignment from the provisional assignee and the commissioners, to the general assignee, it is not necessary to enrol the provisional assignment. *Ex parte Martin*, 1 Mont. 84. A commission against a minor cannot be supported. *O'Brien* v. *Currie*, 3 C. & P. 383. It is not merely voidable, but void. *Bilson* v. *Hodges*, 9 Bing. 365. The party is described in the commission as a money-scrivener only; it was held the plaintiff, in an action to try its validity, is not precluded by the limited description in the commission from proving any species of trading. (Per Holroyd, J.) *Smith* v. *Sandilands*, 1 Gow, C. 171. Assignees under a second commission, the former one existing, and no certificate obtained, seized certain goods of the bankrupt; it was held that, to a replication stating the former bankruptcy, a rejoinder that the goods were in the order and disposition of the bankrupt by the permission of the first assignees, was bad, the second commission being void. *Nelson* v. *Cherrell*, 7 Bing. 603; see *Fowler* v. *Coster*, 10 B. & C. 427, and *Till* v. *Wilson*, 7 B. & C. 684. A commission issuing at the instance of the bankrupt, was held, notwithstanding the 6 Geo. 4, c. 16, to be supersedable. *Ex parte Gane*, 1 Mont. & M. 401; overruling the former judgment by the Vice-Chancellor, 2 Gl. & J. 319. A joint commission issued against two, describing them as coal-merchants, of, &c.; it appeared they had dissolved partnership three years before, and had since been engaged on separate farms; and it was held that the description was insufficient. *Ex parte Day*, 1 Mont. & M. 208. Where a joint fiat was taken out against two, one an infant, the Court allowed it be to annulled, either as to him only, or generally. *Watson, ex parte*, 3 Mont. & A. 682; 3 Deac. 277.

(*h*) The stat. 6 G. 4, c. 16, s. 95, enacts, that all things done pursuant to the Act passed in the 5th G. 2, be confirmed, and that the Lord Chancellor shall have power to appoint a proper person, who shall by himself or his deputy enter of record *all matters* relating to commissions, and have the custody of the entries thereof. Sec. 96 enacts, that no *commission of bankruptcy*, *adjudication* of bankruptcy, or *assignment* of the personal estate of the bankrupt, or *certificate* of conformity, shall be received as evidence, unless the same shall have been entered of record (in the registry appointed by the Act, sec. 95).

Flat.

It has been held that assignees under separate commissions against *A.* and *B.*, who declare for goods sold and delivered by both the bankrupts, and also for goods sold and delivered by each, cannot recover in respect of the latter in addition to the former; for, suing in a representative capacity, they cannot, it was said, join rights of action in which those whom they represent could not have joined (*i*). And assignees under separate commissions against *A.* and *B.* cannot state themselves to be joint assignees (*k*); but the assignees under a joint commission against *A.* and *B.* may describe themselves as the assignees of either as well as of both, and in the same action they may recover joint as well as separate debts (*l*). But if they describe themselves as assignees of both, and state promises to both, they must prove the bankruptcy of both (*m*). Assignees under a joint commission against *A.* and *B.*, and also under a separate commission against *C.*, may recover a debt due to the three (*n*). If the plaintiffs sue in trover as the assignees of *A.* and *B.*, on the joint possession of both, they cannot recover separate property (*o*).

The appointment of a former assignee having been vacated by the Chancellor, and a new one appointed, the latter is assignee by relation, and may sue on a contract made by the former assignee (*p*).

Proof where no notice has been given under the statute.

The plaintiffs, according to the usual order of proof, next proceed to prove the several requisites of bankruptcy. But under the provisions of the late statute such proof is unnecessary, unless due notice has been given of the intention to dispute those facts, and even then they may be proved in some cases by means of the depositions taken under the commission.

The statute 6 G. 4, c. 16, s. 90, enacts (*q*), that in any action by or against any

The same section provides, that on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon purporting to be signed by the person appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record.—By the 97th section it is enacted, that in every action, suit, or issue, office-copies of any original instrument or writing filed in the office, or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively; and if any such original instrument or writing shall be produced on any trial, the costs of producing the same shall not be allowed on taxation, unless it appears that the production of such original instrument or other writing was necessary. —The same stat., s. 89, enacts, that in any commission against any one or more member or members of a firm, the Lord Chancellor may, upon petition, authorize the assignees to commence or prosecute any action at law, or suit in equity, in the names of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree, or order therein, as if such action or suit had been instituted with the consent of such partner or partners; and if such partner or partners shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void.

(*i*) *Hancock* v. *Haywood*, 3 T. R. 433; but see note (*l*).

(*k*) *Ray* v. *Davies*, 2 Moore, 3.

(*l*) *Graham* v. *Mulcaster*, 4 Bing. 115. *Scott* v. *Franklin*, 15 East, 428. *Smith* v. *Goddard*, 3 B. & P. 465. *Harvey* v. *Morgan*, 2 Starkie's C. 17. *Stonehouse* v. *De Silva*, 3 Camp. 399.

(*m*) *Hogg* v. *Bridges*, 2 Moore, 122. Note, that it was held in this case that the assignees of *A.* & *B.*, under a joint commission, could not sue for the separate property of either; but see the cases note (*l*). Vide tit. TROVER.

(*n*) *Streatfield* v. *Halliday*, 3 T. R. 779, n. that this was after verdict. In *Allen* v. *Hartley*, 3 T. R. 780, it was held, that a commission against two or three partners could not be supported. But now see the late stat. 6 G. 4, c. 16, s. 89.

(*o*) *Cock* v. *Turner*, London Sitt. after Hil. 41 G. 3, *cor.* Ld. Ken. Sel. N. P. 1204. Vid. tit. TROVER; and see 2 Saund. 47, n.

(*p*) *Alldriff* v. *Kettridge*, 1 Bing. 355.

(*q*) The statute is prospective only, and applies to such commissions only as are issued after the passing of that Act. *Key* v. *Cook*, 2 M. & P. 720. *Hay* v. *Goodwin*, 6 Bing. 576. Where a commission against *T.* issued upon the petition of the assignees of *K.*, who, after an action of

assignee (*r*), or in any action against any commissioner, or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, *no proof shall be required* at the trial of the *petitioning creditor's debt or debts*, or of the *trading or act or acts of bankruptcy respectively*, unless the other party in such action shall, *if defendant, at or before pleading* (*s*),

trover brought by them to recover the goods of *T.*, and a notice to dispute given, finding their debt as petitioning creditors insufficient, applied to the Lord Chancellor, under 6 Geo. 4, c. 16, s. 18, that upon satisfactory proof of an existing debt to *M.*, the commission might be proceeded in; upon which an order to that effect was made, and at the trial, in order to support the commission against *K.*, the plaintiffs merely produced the proceedings under his commission; it was held, first, that as the plaintiffs sued as assignees of *T.*, and not as assignees of *K.*, those proceedings were not admissible, the 91st and 92d sections being confined to actions brought by the bankrupt's own assignees, for a debt or demand for which he might have sued. Secondly, that the order of the Lord Chancellor, not having found the debt judicially insufficient, and having been obtained only on the consent of *M.* and the assignees on the one hand, and the petitioning creditor on the other, and without notice to the defendant, who therefore was not apprised that he was to meet the substituted debt, was not a valid order. *Muskett* v. *Drummond*, 10 B. & C. 153. See also as to the first point, *Shaife* v. *Howard*, 2 B. & C. 860. The depositions are made conclusive evidence in all actions in which the bankrupt might have sued, and evidence to the contrary is excluded. Evidence to show that the petitioning creditor's debt was a fraud and contrivance, is inadmissible. *Young* v. *Timmins*, 1 C. R. & J. 148, and 1 Tyr. 15. The same was held in the case of *Glover* v. *Harrison, cor.* Bayley and Littledale, Just. of the C. P., at Lancaster, January 1830. Where the defendant received goods from the bankrupt to keep until he wanted them, and he had never made any demand, but the assignees had, before bringing the action (of *detinue*), it was held to be immaterial whether the action were brought by the bankrupt or his assignees; and that the proceedings were conclusive of the trading, &c. under the 92d sect. of Geo. 4, c. 16. *Smith* v. *Woodward*, 4 C. & P. 541. The deposition of the petitioning creditor (on bills drawn and indorsed by the bankrupt), not showing that they were indorsed to the petitioning creditor before the act of bankruptcy, is insufficient; being now made conclusive evidence of the facts therein contained, the deposition in support of such debt must show evidence of the existence of the debt upon the face of it. *Key* v. *Cook*, 2 M. & P. 720. The depositions are conclusive where the bankrupt gives no notice, although the action was commenced before the time for the bankrupt giving notice had expired, if the time has expired before the trial. *Smith* v. *Schroeder*, 1 Mood. & M. C. 24. Where the bankrupt might have sued in trover for goods deposited with the defendant, although the conversion took place after the act of bankruptcy, the depositions are conclusive evidence. *Fox* v. *Mahoney*, 2 Cr. & J. 325. The depositions are conclusive if the bankrupt himself might have maintained the action, although the record does not show it; as where the action is brought to recover the value of goods sold for *cash* by the bankrupt to a creditor, who, as was alleged, intended to retain the amount in fraud of the contract, and where the plaintiffs declared on two counts in trover upon possession by the bankrupt, and conversions before and after the bankruptcy. *Kitchener* v. *Power*, 3 Ad. & Ell. 232; 4 N. & M. 710. Where depositions were used, and not objected to on the trial, and when additional evidence, if necessary, might have been adduced; held, that it was afterwards too late to object that they were insufficient to establish the act of bankruptcy. *Jacobs* v. *Latour*, 2 M. & P. 203.

(*r*) The statute extends to cases where other defendants besides the assignees are joined in the action. See *Gilman* v. *Cousins and others*, 2 Starkie's C. 282; *Smith* v. *Nicholson*, York Ass. *cor.* Richards, C. B. and afterwards by the Court of Exchequer.

(*s*) It seems that notice given with a plea *de novo* would be sufficient. *De Charme* v. *Lane*, 2 Camp. 324. If no notice has been given before the delivery of the plea, the Court will give the defendant leave to withdraw the plea, in order to plead again with notice. *Radmore* v. *Gould*, 1 Wightw. 80. *Poole* v. *Bell*, 1 Starkie's C. 328. A defendant who has delivered his plea without notice, cannot, even before the time for pleading is expired, re-deliver his plea with notice. *Ibid.* Notice is necessary in an action against the assignees, (as by the bankrupt to try the question of bankruptcy,) although the defendants are not described as assignees upon the record. *Simmonds* v. *Knight*, 3 Camp. 251. Where the plea was delivered by mistake without a notice to dispute the bankruptcy, and notice of disputing on the same day was tendered and refused, although before the time for pleading had expired, it was held to be insufficient; the defendant should have moved to withdraw the plea, in order to plead *ne novo*. *Lawrence* v. *Crowder*, 3 C. & P. 229; see also *Folkes* v. *Scudder*, 3 C. & P. 232.

and if *plaintiff before issue joined* (*t*), give notice in writing to such assignee (*u*), commissioner or other person, that he intends to dispute some, and which (*x*), of such matters; and in case such notice shall have been given (*y*), if such assignee, commissioner or other person shall prove the matter so disputed, or the other party admit the same, the Judge before whom the cause shall be tried (*z*), may (if he thinks fit) grant a certificate of such proof or admission; and such assignee, commissioner or other person, shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, if such assignee, commissioner or other person shall obtain a verdict, be added to the costs; and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner or other person. Proof by depositions.

The 92d section enacts, that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, *shall be conclusive evidence* (*a*) *of the matters therein respectively contained, in all actions at law or suits in equity*, brought by the assignees for any debt or demand for which the bankrupt might have sustained (*b*) an action or suit (*c*).

If *no notice* of the intention to dispute any of the ingredients of bankruptcy has been given, according to the 90th section, the facts stand admitted as regards the validity of the commission or fiat (*d*).

If due notice has been given under the 90th section, the plaintiffs must

(*t*) Notice by the plaintiff, served at the time when the issue is delivered with notice of trial, would, it seems, be too late. *Richmond* v. *Heapy*, 4 Camp. 207.

(*u*) Service of notice on a maid-servant at the dwelling-house of the assignee, was held to be insufficient, under the stat. 49 G. 3, c. 121, s. 10. *Howard* v. *Ramsbottom*, 3 Taunt. 526. Service by delivery to a clerk, at the defendant's counting-house, before issue joined, was held to be sufficient, without proof that it came into the defendant's hands. *Widger* v. *Browning*, M. & M. 27. Service on the attorney is sufficient. *Howard* v. *Ramsbottom*, 3 Taunt. 526. The notice must be specific; it is insufficient to give general notice of intention to dispute the bankruptcy. *Trimley* v. *Unwin*, 6 B. & C. 587. A plea that *F.* was not duly declared a bankrupt does not operate as notice. *Raphael* v. *Moon*, 7 C. & P. 115.

(*x*) Notice having been given to dispute the act of bankruptcy only, and the depositions having been read to prove the trading and petitioning creditor's debt, the residue of the proceedings is not considered to be in evidence, and the counsel of the party contesting the cause has no right to inspect them. *Bluck* v. *Thorne*, 4 Camp. 191. *Stafford* v. *Clarke*, 1 C. & P. 26.

(*y*) Notice is no part of the defendant's evidence in the cause, but may be proved at the outset, and will put the plaintiff on strict proof. *Ducharme* v. *Lane*, 2 Camp. 323.

(*z*) The Judge, on a reference of the cause before trial, cannot certify. *Barthorp* v. *Anderson*, 8 Bing. 268.

(*a*) *Earith* v. *Schroder*, M. & M. 26; Eden, 370.

(*b*) Where part of the claim for which the bankrupt might have sustained an action, could not have been recovered by the bankrupt, the proceedings, after notice, are not sufficient proof of the trading, &c.; and if there be no other proof, the plaintiffs must elect to go only for such part of the claim as the bankrupt might have recovered. They must, in such case, abandon counts on their own possession as assignees. *Gibson* v. *Oldfield*, 4 C. & P. 313. *Jones* v. *Fort*, 1 M. & M. 196. Notice left at the counting-house of the party in London with his clerk is sufficient. *Widger* v. *Browning*, 1 M. & M. 27. Proof that the party is an uncertificated bankrupt under a former commission still in force, is admissible without notice. *Phillips* v. *Hopwood*, 1 B. & Ad. 619.

(*c*) An action of ejectment is within these words; per Lord Tenterden, C. J. sitt. after Easter T. 1827.

(*d*) In an action by assignees against the sheriff, for the proceeds of a levy under a *fi. fa.*, after an act of bankruptcy, no

Proof by depositions.

prove the different steps of bankruptcy. But the depositions will be admissible evidence, and conclusive as to the matters contained in them, in all cases which fall within the scope of the 92d section; unless the defendant prove that the bankrupt has given notice of his intention to dispute the commission within the time, and has proceeded therein with due diligence. In such cases the depositions should be proved, either by the production of the documents themselves from the proper custody, *i. e.* of the solicitor under the commission (*e*), or proof of the handwriting of the commissioners, or by office-copies, according to the late Act (*f*).

The statute makes such depositions *conclusive* as to the matters *therein contained*; and therefore if the evidence supplied by the depositions taken as admitted be insufficient to prove any of the essentials to bankruptcy, the defect should, it seems, be supplied by extrinsic evidence (*g*).

The 1 & 2 W. 4, c. 56, s. 17, authorises the bankrupt to dispute the adjudication by petitions to the Court of Review, which may grant an issue for trying the validity of the adjudication; and if the verdict or adjudication shall not be set aside, such verdict or adjudication shall, as against the bankrupt, the petitioning creditor, and any assignee, and all persons claiming under the assignee, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was, or was not, a bankrupt at the date of such adjudication.

Trading.

Next, as to proof of the *requisites of bankruptcy* (*h*); and first, of the *trading*. The trading (*i*) essential to bankruptcy is matter of positive statutory definition and of legal consideration; but it is a question of fact, whether the party has done such acts as constitute him a trader in point of law; and also when the acts are of a dubious nature, whether they have been done with an *intention* to carry on trade (*k*).

The statute 6 Geo. 4, c. 16, s. 2, enacts (*l*), that "all bankers (*m*),

notice having been given by the defendant to dispute the bankruptcy, it was held (Tenterden, L. C. J. and Parke, J., *contrà*, Bayley and Littledale, Js.) that, by the omission to give notice, the defendant admitted everything necessary to support the commission, and that the plaintiffs were not bound to prove that a good petitioning creditor's debt existed at the time of the act of bankruptcy relied on. *Norman* v. *Booth*, 10 B. & C. 703.

(*e*) *Collinson* v. *Hillear*, 3 Camp. 30. The bankrupt himself, having obtained his certificate and released his sureties, is a competent witness for this purpose. *Morgan* v. *Pryor*, 2 B. & C. 13.

(*f*) 6 G. 4, c. 16, s. 97; *supra*, 122.

(*g*) *Lawson* v. *Robinson*, 1 Starkie's C. 456. *Cooper* v. *Machin*, 1 Bing. 426. *Marsh* v. *Meager*, 1 Starkie's C. 353. In *Mackbeath* v. *Coates*, 4 Bing. 34, it was held that the petitioning creditor's debt had been sufficiently established, although the deposition which was read was defective on that point; and Best, C. J. intimated that the 92d section virtually *excluded* all other proof. In that case, however, *no notice* had been given, and therefore *no proof* of the debt was necessary. But see the report of this case, 12 B. Moore, 122; and *Bevan* v. *Lewis*, 1 Sim. 376.

(*h*) Where the assignees *unnecessarily* went into evidence of trading after notice to dispute, and failing were nonsuited, the Court refused to set aside the nonsuit. *Johnson* v. *Piper*, 2 N. & M. 672.

(*i*) An illegal trading will support a commission. *Cobb* v. *Symonds*, 5 B. & A. 516. But see *Milliken* v. *Brandon*, 1 C. & P. 387.

(*k*) *Wright* v. *Bird*, 1 Price, 20. *Bartholomew* v. *Davis*, 1 T. R. 573. In *Patman* v. *Vaughan*, 1 T. R. 573, Buller, J. stated to the jury, that if the party endeavoured to make a profit of trading, and was ready to sell to any applicant, and not as a matter of favour, they ought to find him to be a trader.

(*l*) It was held that proof of trading, after the new Act came in force, was essential; and that a commission issued since the 1st September 1825, could not be supported on a trading previously to that time. *Ex parte Batten*, 1 Mont. & M. 287. *Surtees* v. *Ellison*, 9 B. & C. 750. And see *Hewson* v. *Heard*; *Palmer* v. *Moore*; ib. But acts of buying before the late statute came into operation, are evidence to explain the quality of the subsequent acts. *Worth and another* v. *Budd*, 2 B. & A. 172.

(*m*) Where the bankrupt was not merely a shareholder, but an active manager of

brokers (*n*), and persons (*o*) using the trade or profession of a scrivener (*p*), receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matter, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels (*q*) or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others (*r*), seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities (*s*), shall be deemed traders liable to become bankrupt: provided that no farmer (*t*), grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies, established by charter or Act of Parliament, shall be deemed, as such, a trader liable by virtue of this Act (*u*) to become bankrupt." Trading. What persons not liable.

The intention to trade may be inferred from a single act of buying and selling.

the business of a joint-stock banking company, it was held to be a sufficient trading. *Hall, ex parte*, 3 Deac. 405.

(*n*) A shipbroker is a trader liable to become bankrupt within the 6 Geo. 4, c. 16. *Pott* v. *Turner*, 6 Bing. 702. So is a pawnbroker. *Rawlinson* v. *Pearson*, 5 B. & A. 124. *Qu.* as to an insurance broker. *Ex parte Stevens*, 4 Madd. 256.

(*o*) The wife of a felon sentenced to transportation, if she becomes a trader, is liable to the bankrupt laws, although he in fact remains in this country. *Ex parte Franks*, 7 Bing. 762.

(*p*) An attorney who is a depositary of money to be laid out in securities at his own discretion, and receives a compensation distinct from his fees for drawing the conveyance, is a scrivener. *Hutchinson* v. *Gascoigne*, Holt's C. 507. To make a man a *money* scrivener, it must be an occupation to which he resorts in order to gain his living. He must receive other men's monies into his hands for custody. He must carry on the business of being trusted with other people's monies, to lay out for them as occasion offers. Per Gibbs, L. C. J.; *Adams* v. *Malkin*, 3 Camp. 534. *Ex parte Paterson*, 1 Rose, 400.

(*q*) One who keeps a private lodging-house, and buys provisions for the lodgers, charging a profit, is within the Act. *Smith* v. *Scott*, 9 Bing. 14.

(*r*) So an executor carrying on trade for the benefit of the testator's children. 3 Esp. C. 88; 10 Ves. 110.

(*s*) Where the party, by the terms of an agreement of purchase, was in the situation of the owner in fee of the soil, from which he made bricks for sale; it was held that he was not, within 6 Geo. 4, c. 16, s. 2, "a person seeking his living by buying and selling, or seeking his living by the workmanship of goods and commodities," which latter clause seems intended to meet the case of persons who make for others. *Heane* v. *Rogers*, 9 B. & C. 577; see *Ex parte Burgess*, 2 Gl. & J. 182.

(*t*) A farmer who buys and sells for profit, horses not used in the farming business, to the amount of five or six in two years, was held to be a trader. 1 T. R. 573; 2 N. R. 78. So if he buy more horses than he wants for use, with a view to a re-sale. *Newland* v. *Bell*, Holt's C. 221. Where a farmer was in the habit of purchasing more sheep than required to stock his farm, and selling immediately the excess without shearing, or any pasturing on his farm; held to amount to a trading as a sheep-salesman within the bankrupt law. *Newall, ex parte*, 3 Deac. 339.

Where, prior to the 6 Geo. 4, c. 16, the bankrupt, a farmer and grazier, had bought cattle, not for the purpose of his farm, but of sale, and after the passing of the Act had in some few instances bought and sold cattle in like manner, it was held that the previous acts were admissible in evidence to explain the nature of the subsequent acts. *Worth* v. *Budd*, 2 B. & Ad. 172.

(*u*) The following, it has been held, previous to the statute 6 G. 4, are not within the scope of the bankrupt laws:—An attorney who receives and places out the monies of his clients in the usual course of business, and charges in respect of the deeds or securities, and not as commission, on the monies in his hands (*Hurd* v. *Brydges*, Holt's C. 654); a schoolmaster who buys books and shoes, and retails them to his pupils (*Valentine* v. *Vaughan*, Peake, 76); one who erects public baths on land granted to him for the purpose (*Williams* v. *Stevens*, 2 Camp. 300); who builds a theatre to be held in shares, for which he is to be paid according to measure and value, he being

Proof of trading.

The purchase of a single lot of timber, if made with intent to trade, will make a man a trader (*y*).

After proof that he has once traded, it is not necessary to prove continued acts of trading up to the very time of the bankruptcy; it is sufficient to prove acts from which it can be inferred that he *intended* to continue the trade (*z*). Thus the soliciting orders for business is evidence of the party's intention to continue the trade, although he has not actually transacted business for some time previous to the bankruptcy (*a*).

Where a fisherman has occasionally bought and sold fish, it is to be presumed that whilst he remains a fisherman he carries on business in the same way (*b*).

a shareholder (Ibid.); who buys timber which he uses for building of houses which he sells (*Clark* v. *Wilson*, 5 Esp. C. 273); one who keeping hounds buys dead horses, and sells the skin and bones (*Summersett* v. *James*, 3 B. & B. 2); or buying more of an article than he wants, sells the surplus (*Newland* v. *Bell*, Holt's C. 222); a livery-stable keeper who buys provender, and sells it to his customers and others (*Cannon* v. *Denew*, 10 Bing. 292); a cowkeeper who sells cows unfit for use (*Carter* v. *Drew*, 1 Swanst. 64); a farmer who buys and sells articles incidental to the occupation of his farm, as where he buys pigs, feeds them on his stubbles, and resells them from time to time (*Patten* v. *Brown*, 7 Taunt. 409.) (But where a farmer bought horses, which were not fit for farming, and sold them again, avowing his intention to become a horsedealer, the facts were held to be evidence of trading. *Wright* v. *Bird*, 1 Price, 20.) So although where brick-making is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law, whether he be a termor, or entitled in fee; it is otherwise where the business is carried on independently and substantively as a trade. *Sutton* v. *Weeley*, 7 East, 442. *Ex parte Gullimore*, 2 Rose, 424; Eden, 4.) The owner of land who uses the clay for making bricks, and buys chalk for the more convenient burning of the bricks, is not a trader. (*Paul* v. *Dowling*, M. & M. 268. *Ex parte Burgess*, 2 G. & J. 183. *Heane* v. *Rogers*, 9 B. & C. 577.) An executor disposing of his testator's stock is not a trader, although he purchase other articles to make it marketable; *secus*, if he increase the stock, and continue to sell. (*Ex parte Nutt*, 1 Atk. 102. *Ex parte Garland*, 10 Ves. 120.) Where a testator directs the trade to be carried on after his death with part of his property, that part only will be liable in case of bankruptcy. (*Thompson* v. *Andrews*, 1 Mylne & K. 116.) Buying and selling *land* does not constitute a trading. (*Port* v. *Turton*, 2 Wils. 169.) The following persons also were liable:—A clerk in a custom-house, employed by merchants to receive money on debentures, with which he discounts bills on his own account (2 Esp. C. 555); a person who occasionally buys and sells hay, corn and horses, with a view to profit, but without making them the means of seeking his living (*Stewart* v. *Ball*, 2 N. R. 78. *Bolton* v. *Sowerby*, 11 East, 274); a colonel of a regiment, who occasionally sells horses at Tattersall's, *Ex parte Blackmore*, 6 Ves. 3); receivers of taxes (5 Geo. 2, c. 30, s. 40); graziers (ibid.); drovers (ibid.); farmers (ibid.); contractors for victualling the navy (1 Vent. 270); innkeepers (2 Burr. 2064); one who draws bills for the purpose of improving his estate, and borrows accommodation bills, in lieu of which he gives his own (*Hankey* v. *Jones*, Cowp. 745.) (*Secus*, if there be a continuation with a view to gain profit by the exchange, ibid. *Richardson* v. *Bradshaw*, 1 Atk. 128); a builder who buys timber for building houses, and sells the houses (5 Esp. C. 147. *Secus*, *Dyer* v. *Hudson*, *cor.* Abbott, L. C. J. sittings after T. T. 1825); holders of stock in different trading companies by various statutes (3 Esp. C. 88; 10 Ves. 110.)

(*y*) *Holroyd* v. *Gwynne*, 2 Taunt. 176. See also *Newland* v. *Bell*, Holt's C. 221; *Stewart* v. *Ball*, 2 N. R. 79. Where it appeared that a party had ordered goods for the purpose, as he stated, of sending them abroad, saying, that he would give other goods in exchange for them; Abbott, C. J., on the objection being taken that there was no evidence of selling, said, "I cannot say that if a man buys, and represents himself as a dealer, and offers goods in exchange, he does not buy to sell again; at least I must leave it to the jury, I cannot nonsuit upon it." The quantum of trading is immaterial. *Newland* v. *Bell*, Holt's C. 221. *Gale* v. *Halfknight*, 3 Starkie's C. 56. *Patmore* v. *Vaughan*, 1 T. R. 572.

(*z*) 5 Esp. C. 235.

(*a*) *Wharam* v. *Routledge*, 5 Esp. C. 235. Whether a trader who has ceased to buy, but is selling off his stock, is liable to a commission depends upon the existence of intention to exercise or resume the trading, and this is a question for the jury. *Ex parte Paterson*, 1 Rose, 402.

(*b*) *Heanny* v. *Birch*, 3 Camp. 233; *Paul* v. *Dowling*, M. & M. 268.

And where business had been carried on by the party in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the Court, that the trading continued (*c*).

It is a question for the jury whether there has been an entire cessation of trading, or merely an interruption, with intent to resume it, should an opportunity offer (*d*). An admission of a party that he is in partnership with a trader, is evidence of his being a trader, without proof of actual trading (*e*). Although the trader be described as a money-scrivener, and the general words dealer and chapman, be omitted, it is sufficient, *semble*, to prove any species of trading (*f*).

Any species of trading is admissible in evidence to satisfy the general averment that the bankrupt got his living by buying and selling (*g*).

Thirdly. The several acts which constitute bankruptcy are matter of positive statutory definition; and whether a particular act, when proved, falls within the definition, is a question of law; but whether the act itself has been committed, and particularly whether it has been done with that *intention* which in the particular instance is essential to bankruptcy, is usually pure matter of fact for the consideration of the jury. Act of bankruptcy.

By the stat. several of the acts of bankruptcy there specified (*h*) must be

(*c*) *The Executors of Backhouse* v. *Tarleton, cor.* Ld. Ellenborough, Guildhall, on an issue from the Lord Chancellor to try the fact.

(*d*) Per Ld. Eldon, *Exparte Patterson*, 1 Rose, 402. *Heanny* v. *Birch*, 1 Rose, 350.

(*e*) *Parker* v. *Barker*, 1 B. & B. 9. But such declarations are not generally evidence in actions by assignees against third persons. *Bromley* v. *King*, R. & M. 228. Declarations, however, made at the time of purchasing goods are evidence to show the intention of the trader as to the mode in which he intended to dispose of them. *Gale* v. *Halfknight*, 3 Starkie's C. 56.

(*f*) *Smith* v. *Sandilands*, Gloster Summ. Ass. 1819, 1 Gow.; and per Wood, B., Winch. Sp. Ass. 1820, Mann. Ind. 371. *Hale* v. *Small*, 2 B. & B. 25.

(*g*) *Hale* v. *Small*, 2 B. & B. 25. The bankrupts being described as bankers, being traders according to the statute, it was held that the word bankers might be considered merely as a *designatio personarum*. *Bernasconi* v. *Farebrother*, 10 B. & C. 549.

(*h*) The stat. 6 G. 4, c. 16, s. 3, enacts, that if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, *with intent* to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

The 4th sect. enacts, that where any such trader shall execute any conveyance or assignment by deed to a trustee or trustees, of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader: provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader and by every such trustee be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within 40 miles thereof, in the London

Act of bankruptcy.

done with intent to defeat or delay creditors. Under these words it is sufficient to prove an intention to defeat or delay creditors, without proof of

Gazette, and also in two London daily newspapers; and in case such trader does not reside within 40 miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

Previous to this statute it was held that an assignment for the benefit of creditors was not an act of bankruptcy, if *all* (*Eckhardt* v. *Wilson*, 8 T. R. 140) or the generality assented. *Inglis* v. *Grant*, 5 T. R. 530.

The 5th sect. enacts, that if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison for 21 days, or having been arrested or committed to prison for any other cause, shall lie in prison for 21 days after any detainer for debt lodged against him and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: provided, that if any such trader shall be in prison at the time of the commencement of this Act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months.

By the 6th sect., a declaration of insolvency filed by the trader, and afterwards advertised in the London Gazette (according to the provisions of the statute), shall be an act of bankruptcy from the time of the advertisement; but no commission shall issue unless it be sued out within two calendar months from the time of insertion of such advertisement, and unless the advertisement be inserted within eight days after the filing of the declaration with the secretary of bankrupts; and no docket shall be struck on such act of bankruptcy before the expiration of four days next after the insertion of such advertisement, where the commission is to be executed in London, or before the expiration of eight days where it is to be executed in the country; and the Gazette containing such declaration shall be evidence of such declaration having been filed.

The 7th sect. enacts, that an adjudication founded on such an act of bankruptcy shall be valid, although concerted between the trader and any other person.

By the 8th sect., if any such trader shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security *shall be an act of bankruptcy*; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt.

By sect. 10, if a trader, having privilege of parliament, shall not, within one calendar month after personal service of a copy of a summons sued out by his creditor, pay, secure or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any Judge of the court out of which the summons issued shall approve of, to pay such sum as shall be recovered, together with costs, and within one calendar month next after personal service of such summons cause an appearance to be entered to such action in the proper court, every such trader shall be deemed a bankrupt from the time of the service of such summons.

By sect. 11, if such trader, having privilege, &c. neglect, after personal service of the order, to pay money ordered to be paid by any Court of Equity, on a peremptory day fixed by that Court for such payment, he shall be deemed to have committed an act of bankruptcy from that day. An act of bankruptcy was committed on the 6th of March, prior to 5 Geo. 4, c. 98, coming into force, by which all former Bankrupt Acts were repealed, but which was itself repealed by the 6 Geo. 4, c. 16, after which the commission issued; held, that it was to be considered as if the 5 Geo. 4 had never existed, and that the commission was well supported by that act of bankruptcy. *Phillips* v. *Hopwood*, 10 B. & C. 30.

any actual delay of a creditor (*i*). And it is not sufficient to prove delay, if the intention be wanting (*k*).

Intention.

It seems to have been held under the stat. 21 J. 1, c. 15, s. 2, that the departing the realm would constitute an act of bankruptcy, provided it was proved that a creditor was in consequence delayed, independently of any proof of an *intention* on the part of the bankrupt to do so; that is, the latter branch of the clause was considered to be entirely independent of the intent mentioned in the former part: the effect was to render the mere delaying of the creditor, provided it was the consequence of one of the acts specified, an act of bankruptcy. As in *Woodier's Case*, who departed the realm because he had killed his wife (*l*); and in that of *Raikes* v. *Pereau* (*m*), where the primary reason for the bankrupt's going abroad was, that a young woman had refused to live with him as his mistress unless he took her abroad. In both these cases creditors were delayed, and for that reason the question of intention was considered to be immaterial.

In the subsequent case of *Robertson* v. *Liddell* (*n*), this stat. (21 J. 1) was much discussed, and it was held that the words were to be read, "to the *intent* his creditors *shall*, or *that thereby* they may be defeated;" making the *intent* to govern the whole clause. Still those cases might probably have been decided as they were, consistently with the latter construction; since, although the primary object of the bankrupt in going abroad might not be to delay his creditors, yet if the delaying his creditors was the immediate and necessary consequence of his act, it might be considered as *evidence* of such an intention (*o*). And it seems to be probable that under the present statute (6 Geo. 4, c. 16), which makes the intention to delay essential to the act of bankruptcy, it would be held that where the delaying of creditors was the natural, immediate and necessary consequence of the trader's act, the very act itself would supply strong evidence of intention; for in law as well as morals, every one must be considered to contemplate the natural and immediate consequence of his act (*p*).

Declarations.

In order to prove the intention of the bankrupt to delay a creditor, declarations made by him, which were cotemporary with the act itself, are admissible. Accordingly, what the party said on requesting his servant or clerk to deny him to creditors (*q*), or when he departed from his dwelling-house, or even upon his return home again, is evidence to show with what intention he secluded or withdrew himself from his creditors (*r*).

(*i*) It was so held under the now repealed stat. 1 J. 1, c. 15, s. 9, where the words were "to the intent or whereby creditors may be defeated or delayed." *Robertson* v. *Liddell*, 9 East, 487, in which the case of *Fowler* v. *Padgett*, 7 T. R. 509, was overruled, where it had been held that the word *or* in the statute meant *and*. See *Hammond* v. *Hicks*, 5 Esp. 139; 1 Taunt. 273. 370; 3 Smith, 347. *Wilson* v. *Normark*, 1 Esp. C. 334; *Holroyd* v. *Gwynn*, 2 Taunt. 176; *Ramsbottom* v. *Lewis*, 1 Camp. 279; *Holroyd* v. *Whitehead*, 3 Camp. 530; *infra*, 132–3.

(*k*) *Windham* v. *Paterson*, 1 Starkie's C. 145. *Warner* v. *Barber*, Holt's C. 175.

(*l*) B. N. P. 39.

(*m*) Co. B. L. 5th edit. 73; and see *Vernon* v. *Hankey*, Co. B.L., where Buller, J. approved of the decision in *Woodier's Case*, and said that it had always been considered and acted upon as good law.

(*n*) 9 East, 487. *Holroyd* v. *Gwynn*, 2 Taunt. 176.

(*o*) See the observations of Lawrence, J. in *Fowler* v. *Padgett*, 7 T. R. 516.

(*p*) See tit. INTENTION — MALICE; and see the observations of Abbott, L. C. J. in *Pulling* v. *Tucker*, 4 B. & A. 385. *Ramsbottom* v. *Lewis*, 1 Camp. 280. Where the bankrupt, on going abroad, left with his clerk a power to act, but without making any provision for bills becoming due, and the inevitable consequences must be to delay his creditors, it was held to be an act of bankruptcy. *Kilner, ex parte*, 3 Mont. & Ayr. 722.

(*q*) *Jamieson* v. *Eamer*, 1 Esp. C. 381.

(*r*) *Bateman* v. *Bailey*, 5 T. R. 512; B. N. P. 41. *Ambrose* v. *Clendon*, Ca.

Intent to delay creditors.

The bankrupt was arrested and taken twelve miles from home on the 5th, was discharged at one o'clock in the afternoon of the 6th, and returned home at ten o'clock on the night of the 7th; it was held, that what he said to a witness (who inquired where he had been), as to the reason of his absence, was admissible, in explanation of his act (*s*). So what the bankrupt said on removing his books is evidence (*t*). Where, in trespass for taking goods, the question was as to the bankruptcy of the plaintiff, it was held that letters found in his possession after the bankruptcy, with post-marks of a date previous thereto, must be taken to show that he received them before, and were evidence to show, in explanation of his conduct, that he had received intimation of the facts mentioned in the letters having taken place, although they were not evidence that the facts stated really did so happen (*u*). But declarations or admissions by the bankrupt, which are subsequent to the act are not admissible (*x*).

Where the proceedings were read in evidence (under the stat. 49 G. 3, c. 121), a deposition stated that the bankrupt had absented himself, and that he had admitted that he had absented himself for the purpose of avoiding his creditors, but did not specify the time of such admission, and it was held that there was not even *primâ facie* evidence to prove the act of bankruptcy (*y*).

Departing the realm. Intention.

Where the act to be proved, is the departing the realm with *intent* to delay creditors, the *intention* of the party is a question of fact for the determination of the jury; to be collected either from the contemporary declarations of the trader, or to be presumed from circumstances, considering the mode and reason of the departure, the state of his affairs at the time, and other circumstances likely to operate as motives. The case is subject to the general presumption of law, that a man contemplates that result which is the natural and obvious consequence of his act, although he may have had another primary and immediate object in view (*z*). A letter written by the trader during his absence is evidence to explain its nature (*a*); for the departing the realm is a continuing act (*b*).

T. H. 267; 4 Esp. C. 233. *Wilson* v. *Norman*, 1 Esp. C. 334. *Robertson* v. *Liddell*, 9 East, 487. *Holroyd* v. *Gwynne*, 2 Taunt. 176. Declarations made by the bankrupt at the time of his return, that he had quitted to avoid the service of a writ against him, are admissible and sufficient evidence of an act of bankruptcy, without further proof of the existence of the writ or of the debt, or of there being any creditor. *Newman* v. *Stretch*, 1 M. & M. 338. A creditor called at the house of the bankrupt by appointment for payment of his debt, and saw the bankrupt, who shortly after left the room, and did not return; the wife afterwards informed the creditor he was gone out; it is for the jury to say, whether he left his house to avoid or delay a creditor, and the wife's answer is admissible as part of the *res gestæ*. *Charrington* v. *Brown*, 11 Moore, 341. The admissibility of such declarations cannot be decided by any positive rule as to time, but must depend on the nature and strength of their connexion with the disputed act. Where the question was, whether giving a security by the trader to *G.* on the 25th of October, amounted to an act of bankruptcy, it was held that a conversation which the trader had with *L.*, to whom he had on the 25th of October promised to give a security on the following day, and in which he falsely professed a total ignorance of the security, was admissible evidence to show the real nature of the transaction. *Ridley* v. *Gyde*, 9 Bing. 349. See also *Rawson* v. *Haigh*, 2 Bing. 104.

(*s*) *Bateman* v. *Bailey*, 5 T. R. 512.

(*t*) *Ambrose* v. *Clendon*, Ca. T. H. 267.

(*u*) *Cotton* v. *James*, 1 M. & M. 276, and 3 C. & P. 505.

(*x*) *Robson* v. *Kemp*, 4 Esp. C. 233.

(*y*) *Marsh* v. *Meager*, 1 Starkie's C. 353.

(*z*) Vide *supra*, 131.

(*a*) *Windham* v. *Paterson*, 1 Starkie's C. 146.

(*b*) *Rawson* v. *Haigh*, 2 Bing. 99. *Lees* v. *Marton*, 2 Mo. & R. 211. *Maylin* v. *Eyloe*, 2 Str. 809.

If the delay of creditors be the necessary consequence of the departure, the intention to delay may be inferred, although the party had another and more immediate object in departing; as on account of domestic dissensions (*c*), to avoid a prosecution for felony (*d*), or in order to live with a mistress (*e*); and so in other cases where the purpose of departure is *aliene* from that of trade, for the party must be supposed to contemplate and intend that which is the immediate and necessary consequence of his act (*f*).

But it is not enough to show that the party left England and proceeded to Ireland, where he also carried on trade, without leaving funds behind him for the payment of his debts, for *non constat* that he did not go for the very purpose of providing funds; and this case differs essentially from that of *Holroyd* v. *Whitehead*, since there the intention of the departure was *aliene* from that of trade (*g*).

If a subject, domiciled in Ireland, leave his family there and come to England to settle his affairs, and return to Ireland abruptly to avoid an arrest, he commits an act of bankruptcy (*h*).

Departure from the dwelling-house.

To prove an act of bankruptcy by *a departure* from the dwelling-house, the act of departing must be proved; and secondly, the *intent* to delay creditors, &c. (*i*); and on the other hand, any facts are admissible which tend to disprove the intention, and to show that the trader departed without any intention to delay his creditors (*k*). The intention of the trader in a doubtful case, is one of fact for the jury (*l*).

(*c*) *Holroyd* v. *Whitehead*, 3 Camp. 530.

(*d*) *Woodier's Case*, B. N. P. 39.

(*e*) *Raikes* v. *Pereau*, Co. B. L. 73.

(*f*) See Mr. J. Lawrence's observations in *Fowler* v. *Padgett*, 7 T. R. 516. In the case of *Holroyd* v. *Whitehead*, (3 Camp. 530, subsequently approved of by Lord Ellenborough, *Windham* v. *Paterson*, 1 Starkie's C. 146,) the bankrupt left his dwelling-house on account of domestic dissensions with his wife, and left a letter stating that there would be 20*s.* in the pound for creditors, but that, be it less or more, he had done with trade, desiring that no one should be allowed to take goods out of the warehouse in preference, and giving no directions for the continuance of his business; during his absence a creditor called for money, who went away unsatisfied. And it was left to the jury, whether, under the circumstances, the party had not left his house with an intention to delay his creditors, and whether a creditor had not been delayed; and the jury found both these facts. See also *Ramsbottom* v. *Lewis*, 1 Camp. 279.

(*g*) *Windham* v. *Paterson*, 1 Starkie's C. 144. See *Warner* v. *Barber*, Holt's C. 175.

(*h*) *Williams* v. *Nunn*, 1 Camp. 152, *cor.* Chambre, J. 1 Taunt. 270; where it is stated that the family resided in England, and the Court adverted to that circumstance.

(*i*) See the cases above cited, p. 132–3; also *Wilson* v. *Norman*, 1 Esp. C. 334; *Robertson* v. *Liddell*, 9 East, 487. As has already been seen, proof of actual delay is unnecessary, although the contrary was once held. *Barnard* v. *Vaughan*, 8 T. R. 149. Where the trader departed under the false notion that the officer who had called had a writ for him, it was held to be an act of bankruptcy. See also *Ex parte*, *Bamford*, 15 Ves. 449. *Aldridge* v. *Ireland*, 1 Taunt. 273; *Holroyd* v. *Whitehead*, 3 Camp. 530; *Williams* v. *Nunn*, 1 Taunt. 273; *Hammond* v. *Hickes*, 5 Esp. C. 139. Under the words of the stat. 21 J. 1, "Whereby the creditors may be defeated or delayed for the recovery of their just and true *debts*," it was held, that an absconding to avoid an attachment for the non-delivery of goods pursuant to an award, being a mere *duty* and not a debt, was not within the statute. *Lingwood* v. *Eade*, 1 Atk. 196.

(*k*) See Ld. Mansfield's observations in *Worseley* v. *Demattos*, 1 Burr. 467. *A.*, a publican, leaves his dwelling-house at seven in the morning, intending to complete a sale of his stock in the public-house, and having received the money, to abscond to Ireland; he completes the contract, and receives the purchase-money at another house in Manchester, and immediately proceeds to Ireland without returning to his house. Lord Abinger held, that if the purchase and payment of the money were *bonâ fide*, it was no act of bankruptcy, from the original departure to affect the subsequent sale the same morning. *Bardsley* v. *Harrison*, Liverpool Summer Assizes, 1835.

(*l*) *Deffle* v. *Desanges*, 8 Taunt. 671; *Aldridge* v. *Ireland*, cited, 1 Taunt. 273.

What the trader said on quitting his dwelling-house is admissible evidence to show his intent (*m*).

Such declaration to be admissible must be made at the time of the act, or so near to it as to form part of the same transaction, either whilst the trader is absenting himself or immediately after his return (*n*).

A trader who has no settled house or counting-house, but takes up his residence at a public-house in the place to which his business carries him, may commit an act of bankruptcy by a departure from that house (*o*).

A trader on absenting himself stated that writs were out against him; it was held to be unnecessary to prove that fact (*p*), for the intention is the same, whether the assertion was true or false.

Absenting himself.

Otherwise absent himself.—It is sufficient to prove an absenting of himself by the trader from his usual place of business; as from a counting-house, where he has a dwelling-house in the country, with intent to delay his creditors (*q*); and in general, any absence from his dwelling-house, for however short a period, is sufficient. As where a trader, on being called upon by several creditors for money, leaves his house under pretence of getting money for them, and spends the evening at a billiard-table, or at a tavern (*r*). So where a trader apprehending an arrest concealed himself in a back room in another person's house, until a sheriff's officer, who he was informed was going towards his house, had left the street (*s*), and then returned home. So where being arrested he fled from the officer to the house of another person (*t*).

(*m*) See the general principle, Vol. I. p. 351, *Ambrose* v. *Clendon*, C. T. H. 267.

(*n*) A deposition, stating an admission by the trader of an absenting to avoid creditors, but not stating the *time* of such admission, is not receivable. *Marsh* v. *Meager*, 1 Starkie's C. 353. The authorities somewhat differ as to the admitting of declarations made after a return. See the cases of *Bateman* v. *Bayley*, 5 T. R. 512, where such evidence was held to be admissible; and *Newman* v. *Stretch*, M. & M. 338, where such evidence was admitted by Parke, B; but the correct rule seems to have been laid down by that learned judge in *Lees* v. *Marton*, 1 Mo. & R. 211, that such a declaration is inadmissible, unless it be made by the trader whilst he is absenting himself, or immediately after his return. See further, 2 Evans's Pothier, 285; *Maylin* v. *Eyloe*, 2 Str. 809; *Rawson* v. *Haigh*, 2 Bing. 99; *Ridley* v. *Gyde*, 9 Bing. 349; *Ex parte*, Palmer, 1 D. & C. 373; *Smallcombe* v. *Bruges*, M'Cleland, 45. In the case of *Smith* v. *Cramer*, 1 Bing. N. C. 585, the trader having absented himself on the 16th of February, two letters written by him on the 16th of January, in which he asked for time upon two bills of exchange, were admitted to show the motives of his absence. Here, however, the letters showed that the trader was in difficulties not long before his departure, and they were admissible to prove that fact, as acts done in the management of his affairs, and therefore tending to show the state of those affairs.

(*o*) *Holroyd* v. *Gwynne*, 2 Taunt. 176. See Com. Dig. BANKRUPT [C.] 1.

(*p*) *Wilson* v. *Norman*, 1 Esp. C. 334. See *Robertson* v. *Liddell*, 9 East, 487; *Holroyd* v. *Gwynne*, 2 Taunt. 176; M. & M. 338.

(*q*) *Judine* v. *Da Cossen*, 1 N. R. 234, where the trader quitted his counting-house in town, taking his books with him, without the *animus revertendi*, and went to his dwelling-house in the country, where he slept a few nights, and then finally quitted it. If one who has no constant dwelling absent himself from his usual place of abode, with intent, &c. it is an act of bankruptcy. Com. Dig. BANKRUPT, [C.] 1. The bankrupt, on being applied to for a debt, said, he could not pay then, but promised to meet the creditor at an inn in the evening, but failed to do so; it is for the jury to say, whether he broke such appointment with any other than the intent to delay the creditor with whom he made it. *Widger* v. *Browning*, 9 D. & R 306. The absenting, to constitute an act of bankruptcy, must be from a place of business where, from the ordinary course of his life and business, he would be expected to be present. *Bernasconi* v. *Fairbrother*, 10 B. & C. 549.

(*r*) *Bigg* v. *Spooner*, 2 Esp. C. 651.

(*s*) *Vincent* v. *Prater*, 4 Taunt. 603. *Chenoweth* v. *Hay*, 1 M. & S. 676. See also *Bayly* v. *Schofield*, 1 M. & S. 338.

(*t*) *Bayly* v. *Schofield*, 1 M. & S. 338; and see *Wilson* v. *Norman*, 1 Esp. C. 334. So where one of two partners lived in London, the other in Manchester, and the

So the riding out of town in order to avoid a writ, and get the term of the plaintiff (*u*), is an act of bankruptcy. So where a debtor in the habit of frequenting the Royal Exchange appointed a creditor to meet him there, and directed a friend, in case the creditor inquired for him, to say that he was not there (*x*).

Where one of three bankers who resided at the place where the business was carried on, the other two living at a distance, shut up the house and stopped payment, it was held that this was not evidence of a joint bankruptcy by the three (*y*).

It is not essential to prove that any creditor was actually delayed (*z*).

The question of intention in this, as in other cases, is usually for the jury; and if evidence be offered in explanation of the absence, and in order to rebut the presumption to delay creditors, as that he did it to avoid irritation and harsh language, the case is for their consideration (*a*). If a person who has no settled dwelling absent himself from his usual abode with intent to delay creditors, it is an act of bankruptcy (*b*). Intention.

Beginning to keep house.—This act of bankruptcy must be evidenced by some act by which the party secludes himself (*c*) from the solicitation of his creditors, with the *intention* of doing so. The most usual proof consists of an actual denial to a creditor, by a clerk or servant authorized to do so by Beginning to keep house.

London partner having left his house with intent to delay his creditors, and having been a few days at Manchester, both of them left their country house there to avoid an arrest, carrying with them their books of accounts. *Spencer* v. *Billing*, 3 Camp. 312. Where a trader abstained from going to a place to make inquiry as to an execution against him, to which he would have gone but for fear of an arrest, it was held to be an absenting himself. *Robson* v. *Rolls*, 9 Bing. 648.

(*u*) *Maylin* v. *Eyloe*, Stra. 809. *Qu.* whether if a trader leave the realm without any intention to delay his creditors, but whilst absent he deliberately forms that intention, and announces it, he commits an act of bankruptcy. See *Windkam* v. *Paterson*, 1 Starkie's C. 144; and 1 Christian's B. L. 178.

(*x*) *Gimmingham* v. *Laing*, 6 Taunt. 532. Gibbs, C. J., in that case intimated that the words "otherwise absenting himself," meant from creditors, and not from any particular place. And see *Robson* v. *Rolls*, 9 Bing. 648; and *Robinson* v. *Carrington*, 1 Mont. & A. 12, where the Master of the Rolls held that a mere failure to keep an appointment with a creditor was a sufficient absenting. But in *Bernasconi* v. *Fairbrother*, 10 B. & C. 556, the Court held that an absenting (according to the decisions) was to be confined to an absenting himself from his own particular place of business at which a man might be expected to be; or from one or more particular creditors at some other place; and per Parke, B., in *Lees* v. *Marton*, 1 M. & R. 212; no case has gone the length of deciding, that where the appointment is to meet the creditor at his (the creditor's) place of residence, and the debtor breaks that appointment, such conduct amounts to an act of bankruptcy; and where a trader, who, on being arrested, had obtained his liberty on a promise to attend and execute a bail bond, but did not attend, it was held to be no act of bankruptcy. *Schooling* v. *Lee*, 3 Starkie's C. 149; and in the case of *Tucker* v. *Jones*, 2 Bing. 2, the Court of Common Pleas held that the failure to keep an appointment with a creditor was not an absenting within the statute. Where the trader, upon the advice of the attorney of the petitioning creditor, went into his office in order to avoid a public arrest at the suit of the petitioning creditor, it was held to be no act of bankruptcy. *Mills* v. *Elton*, 3 Price, 142.

(*y*) *Mills* v. *Bennett*, 2 M. & S. 566.

(*z*) *Hammond* v. *Hickes*, 5 Esp. C. 139, *Robertson* v. *Liddell*, 9 East, 487. *Supra*, 130.

(*a*) *Vincent* v. *Prater*, 4 Taunt. 603. A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money and would not pay him that day, and would go out of the way and not return home till dinner-time; and it was held that it was for the jury to consider whether he absented himself in order to delay the creditor, and that they were warranted in finding that he did not.

(*b*) Com. Dig. BANKRUPT, [C.] 1.

(*c*) It is sufficient if the trader secrete himself in the house of a friend where he is lodging, and where persons are in the habit of calling upon him. *Curteis* v. *Willis*, 1 R. & M. 58.

Beginning to keep house.

the trader, who is in the house. But although this is the usual medium of proof, it is not the only one; for if a trader seclude himself in a private part of the house, in order to avoid his creditors, who are by this means deprived of access to him, he begins to keep house, and commits an act of bankruptcy (*d*). As where a trader removes from a part of the house where his creditors usually have free access to him, to a more retired part of it, by means of which his creditors are prevented from importuning him (*e*).

Denial.

Under the stat. 21 J. 1, c. 15, where the evidence of the act of bankruptcy consisted in the denial to a creditor by order of the trader (*f*), it was necessary to prove an actual denial (*g*) to a creditor (*h*); and it was held to be insufficient to prove a denial to an agent of the creditor (*i*), without proof that the trader knew him to be such agent, having a present demand against the trader (*k*): or that the trader gave orders to be denied to the creditor; but if he gave a general order to be denied to all, and was denied to a creditor, it was sufficient, although he wished to avoid a different creditor (*l*). Proof that the trader was in distressed circumstances, and that he was by his own order denied to several persons, some of whom called more than once, was held to be evidence to go to a jury of a denial to a creditor (*m*).

(*d*) 1 Camp. 271; Com. Dig. BANKRUPT, [C.] 1. *Dickinson* v. *Foord*, Barnes, 160; *Robertson* v. *Liddell*, 9 East, 487.

(*e*) *Dudley* v. *Vaughan*, 1 Camp. 271. See also *Chenoweth* v. *Hay*, 1 M. & S. 677; 1 Taunt. 270. 479. *R.* v. *Bebb*, cited 1 M. & S. 354. *Key* v. *Shaw*, 8 Bing. 321. Partners reside in the place in which they carry on business as bankers, and close the windows and shutters of the bank; this is a beginning to keep house. *Cumming* v. *Bayley*, 6 Bing. 363. But is no act of bankruptcy by a partner who does not reside there. *Mills* v. *Bennett*, 2 M. & S. 550. *Hawkins* v. *Whitten*, 10 B. & C. 217. *Ex parte Manor*, 19 Ves. 543. An order to be denied to creditors is but *evidence* of an intention to delay. *Lazarus* v. *Waithman*, 5 Moore, 513. A general order to deny with that intent, or a general order to admit no one whom the servants did not know, for fear of a second arrest, followed up by their admitting no person, without its being ascertained from the window who he was, is sufficient. *Harvey* v. *Ramsbottom*, 1 B. & C. 55. Or a general order to deny, and a beginning to keep house, is sufficient. *Lloyd* v. *Heathcote*, 2 B. & B. 388. Note, in the latter case there was a denial to the collector of church and highway-rates. See *Gimmingham* v. *Laing*, 6 Taunt. 532; and see *Bayley* v. *Schofield*, 1 M. & S. 338.

(*f*) *Dudley* v. *Vaughan*, 1 Camp. 271. *Ex parte Foster*, 17 Ves. 416.

(*g*) *Garrett* v. *Moule*, 5 T. R. 575. *Hawker* v. *Saunders*, Co. B. L. 79. *Dudley* v. *Vaughan*, 1 Camp. 271.

(*h*) Per Lee, C. J., B. N. P. 40. A denial to a tax-gatherer is sufficient. *Jeffs* v. *Smith*, 2 Taunt. 401.

(*i*) B. N. P. 39, 40; 1 Montague, 87; *Barrow* v. *Foster*, Green, 44. A denial to the clerk of a holder of a bill is sufficient. 2 T. R. 59.

(*k*) 7 Vin. Abr. 61, pl. 14, *Ex parte Levi*; but a denial to the holder of a bill on the morning of the day when it becomes due is sufficient. *Colkett* v. *Freeman*, 2 T. R. 59.

(*l*) *Mucklow* v. *May*, 1 Taunt. 479; and see *Colkett* v. *Freeman*, 2 T. R. 59.

(*m*) *Jamieson* v. *Eamer*, 1 Esp. 381. But in the case of *Garrett* v. *Moule*, (5 T. R. 595), the trader, being in expectation that several bills would be presented to him for payment, was advised by his friends to keep out of the way of his creditors, and he accordingly gave orders to his clerk to be denied to every person; he retired up-stairs with his account books, where he remained several days, and was denied to several persons, but it did not appear that they were creditors. A creditor on two bills of exchange to the amount of 100 *l.* called, but did not ask for the bankrupt, understanding he was from home. The Court of K. B. held, that these circumstances did not constitute an act of bankruptcy; and Lord Kenyon observed, that the question on trials of that kind had always been asked, whether or not the debtor was denied to the creditor, which showed in what light the statute had been considered. See also *Hawkes* v. *Saunders*, Co. B. L. 79; B. N. P. 40. Notwithstanding this authority, it is probable that such a case would have met with a different decision even before the late statute. For, according to the principle established in *Robertson* v. *Liddell*, (9 East, 487), it is not material whether the intention was carried into effect by an actual delay of any creditor. A denial is the mere medium of proof. A trader may have no servant or agent to deny him; and then this medium of proof becomes inap-

Denial.

But under the late statute the actual delaying of a creditor seems to be immaterial, except as a mean of proving the *intent* to delay, provided he be actually denied or conceal himself, or do some other act which evidences the beginning to keep house. A mere direction to be denied, without more, is insufficient(*n*). But if a trader in his own house hear himself denied to a creditor, and, with intent to delay his creditors, does not come forward, it is an act of bankruptcy, although he gave no direction to be denied (*o*).

A concerted denial is not evidence of bankruptcy, except as against one who was privy to the concert (*p*).

Intention.

The presumption of an intention to delay a creditor, arising from denial, may be rebutted by any evidence which proves the denial to have proceeded from a different motive. As by evidence that the trader was sick at the time, or engaged in company, or that it was at a house where he does not transact business, and that he referred the creditor to his shop (*q*). So a refusal to see a creditor because it was the trader's dinner hour, is not an act of bankruptcy (*r*), or on a Sunday (*s*). As the bankruptcy consists in the act of seclusion by the trader with intent to delay his creditors, the intention with which the *creditors* call is immaterial (*t*).

Yield himself to prison.

If a person upon being arrested choose rather (*u*) to go to prison than pay the debt, although he has money sufficient, declaring that he does it in order to force his creditors to come to a composition, this is evidence of an act of bankruptcy, under the clause, *or yield himself to prison* (*x*).

plicable. The fact of intention is perfectly independent of any actual delay. The beginning to keep house must no doubt be manifested by some overt act of seclusion on the part of the trader, and although he does not at all remove from the room or part of the house which he usually occupies, a denial to a creditor, through a servant, is as much an act of seclusion as if he had barred or nailed up the door; and a denial in such case seems to be almost the only act by which the beginning to keep house can be manifested; but where the trader actually removes from a more public part of his house, which he usually occupies, to a more private one, and there secludes himself with the intention to delay his creditors, the act of bankruptcy seems to be as complete without proof of actual delay, as in the case of a departure from the dwelling-house or realm with that intent; and it was so held in the case of *Dickenson* v. *Foord*, Barnes, 160. And see *Bayly* v. *Schofield*, 1 M. & S. 338; *Bignold* v. *Waterhouse*, Ibid. 255; *Dudley* v. *Vaughan*, 1 Camp. 271; *Harvey* v. *Ramsbottom*, 1 B. & C. 55; *Lloyd* v. *Heathcote*, 2 B. & B. 388; *Lazarus* v. *Waithman*, 5 Moore, 313. Where the fact to be established was a mere denial of the defendant being at home when the officers came to his house, it was held, that it being made by the wife did not prevent its being received, the answer being part of the *res gestæ*. *Att.-gen.* v. *Goode*, 1 M. & Y. 286.

(*n*) *Fisher* v. *Boucher*, 10 B. & B. 705. See *Lloyd* v. *Heathcote*, 2 B. & B. 388.

(*o*) *Smith* v. *Moon*, M. & M. 458.

(*p*) B. N. P. 39, 40. *Cawley* v. *Hopkins*, Co. B. L. 81. And see Lord Mansfield's observations in *Hooper* v. *Smith*, 1 Bl. R. 442, and *Bamford* v. *Baron*, 2 T. R. 595, n. In an action by assignees for money had and received in respect of parcels of bills and cash handed over by the bankrupts in contemplation of bankruptcy, and by way of undue preference, it is no objection to the act of bankruptcy (the execution of a conveyance of all their effects to trustees for the benefit of their creditors) that it was made for the very purpose. *Simpson* v. *Symes*, 6 M. & S. 295. Note, that the trustees were not privy to the transfer.

(*q*) Per Ld. Mansfield, *Round* v. *Hope*, Co. B. L. 94, 5th edit. *Field* v. *Bellamy*, B. N. P. 39. But where the trader *being ill* directed his servant to say that he was not at home, it was held that it was a question for the jury whether it was an act of bankruptcy. *Lazarus* v. *Waithman*, 5 Moore, 313.

(*r*) *Smith* v. *Currie*, 3 Camp. 349; B. N. P. 39. And see *Shew* v. *Thompson*, Holt's C. 159, where the direction was to deny the trader to any one who called whilst he was at dinner or engaged in business. See also *Loyd* v. *Heathcote*, 2 B. & B. 392.

(*s*) *Ex parte Preston*, 2 V & B. 312.

(*t*) *Ex parte White*, 3 V. & B. 129.

(*u*) This must be for debt in order to constitute an act of bankruptcy. *Ex parte Bowes*, 16 Ves. 168; and see 7 Price, 616.

(*x*) *Ex parte Barton*, 7 Vin. Ab. tit. CREDITOR AND BANKRUPT, 61, 62, pl. 15.

Fraudulent preference.

In order to prove an act of bankruptcy under the words of the late statute, "make or cause to be made any fraudulent grant, or conveyance of any of his lands, tenements, goods or chattels, or any fraudulent surrender of his copyhold, &c., or make any fraudulent gift, delivery (*y*), or transfer (*z*) of any (*a*) of his goods or chattels," (*b*) it is necessary, in the first place, to prove an actual conveyance, gift, or delivery; and 2dly, to prove that such conveyance or gift or delivery was fraudulent, and with intent to defeat or delay creditors.

Proof of the conveyance.

1st. A conveyance, when it is by *deed* or other *instrument*, must be proved (*c*) in the regular way by means of the subscribing witnesses. But as against a defendant, in an action for the value of goods attempted to be conveyed, his admission of the execution of the deed, on his examination before the commissioners, supersedes the necessity of proving the deed in the usual way by the subscribing witness (*d*). The deed or other instrument must be properly stamped (*e*). The conveyance will enure as an act of bankruptcy, although it is void through fraud; as where an insolvent trader conveys to an infant son (*f*).

That the conveyance, &c. was fraudulent.

2dly. That the conveyance, gift or delivery was fraudulent, and made with intent to defeat or delay creditors. It is fraudulent in point of law where the *necessary effect* is to prevent a fair distribution amongst creditors, contrary to the spirit of the bankrupt laws (*g*). As where the trader transfers the whole of his effects to particular creditors (*h*), to the exclusion of

(*y*) The word "delivery," connected with the words "gift or transfer," is to be confined in meaning to transactions of the same nature; where therefore goods were removed with intent to delay a creditor, and delivered to a party having no claim over them, held that it was not an act of bankruptcy; and at all events, a delivery of the goods by the party's agent generally conducting his business cannot be so: a man cannot commit an act of bankruptcy by the conduct of his agent. *Cotton* v. *James*, 1 Mood. & M. C. 277.

(*z*) A warrant of attorney given for the purpose of entering up judgment in four days, and seizing the property of an insolvent party, to the detriment of his general creditors, was held to be a charge, or a transfer of it, within the 7 Geo. 4, c. 57, s. 32, and void. *Cumming* v. *Bailey*, 6 Bing. 363. *Sharpe* v. *Thomas*, 6 Bing. 416. And see *Doe* v. *Carter*, 8 T. R. 300.

(*a*) It was sufficient even under the stat. of 21 Jac. 1, c. 15, that *part* was conveyed. See *Ex parte Foord*, cited 1 Burr. 477; B. N. P. 40; *Linton* v. *Bartlet*, 3 Wils. 47; *Morgan* v. *Horseman*, 3 Taunt. 243. But it was necessary to prove a conveyance by *deed*.

(*b*) The fraudulent transfer of a bill of exchange to a creditor is a fraudulent transfer of a *chattel* within the meaning of the 3d section of 6 Geo. 4, c. 16, and an act of bankruptcy. *Sharpe* v. *Thomas*, 6 Bing. 416. A sale of goods may be a fraudulent transfer within section 3 of 4 G. 4, c. 16, but the jury must be satisfied that the purchaser must have known that under the circumstances of the sale it was done with intent to obtain the price in order to defraud his creditors. *Cook* v. *Caldecott*, 1 C. & P. C. 315.

(*c*) See *Rust* v. *Cooper*, Cowp. 635, per Ld. Mansfield, C. J.; and Aston, J. in *Martin* v. *Pewtress*, 4 Burr. 2478; 1 Esp. C. 68. Where *A.* and *B.* are partners, a fraudulent assignment by *A.* to *B.* is not an act of bankruptcy by *B.* For proof of the deed, see Ind. tit. DEED.

(*d*) *Bowles* v. *Langworthy*, 5 T. R. 366.

(*e*) *Whitwell* v. *Dimsdale*, Peake's C. 168.

(*f*) *Whitwell* v. *Thomson*, 1 Esp. C. 68.

(*g*) Per Le Blanc, J. in *Newton* v. *Chantler*, 7 East, 145. See *Linton* v. *Bartlett*, 3 Wils. 47. *Wilson* v. *Day*, 2 Burr. 827. *Compton* v. *Bedford*, 1 Bl. R. 362; 1 Burr. 484. See Lord Eldon's observations in *Dutton* v. *Morrison*, 17 Ves. 199; and see *Ex parte Foord*, Burr. 477; *Hooper* v. *Smith*, 1 Blacks. 441; *Kettle* v. *Hammond*, Cooke, 86; *Harman* v. *Fisher*, Cowp. 617. 629; *Kaye* v. *Bolton*, 6 T. R. 134. So also is a conveyance of all, with the exception of a small part. *Ibid.*

(*h*) *Newton* v. *Chantler*, 7 East, 145. Note, that the trader, when he gave the bill of sale was under arrest at the suit of the creditor to whom the bill of sale was given; but the Court held that this made no difference, and that the case was not distinguishable from that of *Butcher* v. *Easto*, Doug. 294. But the Court held that the case of a *partial* transfer might be open to a very different consideration. In *Thornton* v.

any other (*i*), although the transfer be on trust for the benefit of all his creditors (*k*). Fraudulent conveyance.

So if it be of such part as when actually transferred would disable him from trading (*l*).

Hargreaves, 7 East, 549, Lawrence, J. observed, "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditor." And see *Worseley* v. *Demattos*, 1 Burr. 467. The transfer of all the bankrupt's property to one of his creditors is an act of bankruptcy, although the deed be executed by the bankrupt only, and not proved to have been acted on. *Botcherby* v. *Lancaster*, 1 Ad. & Ell. 77. *Siebert* v. *Spooner*, 1 M. & W. 714. See *Pulling* v. *Tucker*, 4 B. & A. 382. An assignment, *bonâ fide*, and for value, so far as the vendee is concerned, is not an act of bankruptcy, although the trader meditated an absconding to defraud his creditors. *Baxter* v. *Pritchard*, 1 Ad. & El. 456. The sale of the whole of a trader's property is not of itself an act of bankruptcy, and some fact must be shown from which fraud may be inferred. An assignment for benefit of creditors is not an act of bankruptcy, except in cases within the 4th section. See *Rose* v. *Haycock*, 1 Ad. & El. 461, Lord Tenterden's judgment. An assignment of part of the trader's property in trust to sell and dispose of the proceeds as he shall direct, is not of itself an act of bankruptcy. *Robinson* v. *Carrington*, 1 Mont. & Ayr. 1. And see *Carr* v. *Burdiss*, 1 C. M. & R. 443; *Abbott* v. *Burbage*, 2 Bing. N. C. 444; *Greenwood* v. *Churchill*, 1 M. & K. 546; *Belcher* v. *Prittie*, 10 Bing. 408.

(*i*) It is an act of bankruptcy if all the creditors do not concur. *Eckhardt* v. *Wilson*, 8 T. R. 140, vide *infra*, note (*l*). And if one only be excluded. *Ex parte Foord*, 1 Burr. 477.

(*k*) *Dutton* v. *Morrison*, 17 Ves. 199. And such an assignment is an act of bankruptcy, although none of the creditors have executed it, and though it has never been acted on, or out of the trader's possession. *Botcherby* v. *Lancaster*, 1 Ad. & Ell. 77; 3 N. & M. 383, S. C.

(*l*) In *Hooper* v. *Smith*, 1 Bl. 441, Lord Mansfield says, "If a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent; it would be, as I said in *Compton* v. *Bedford* (1 Blacks. 362), an assignment of his solvency." In *Hussell* v. *Simpson*, 2 Montague's B. L. 253; Doug. 88, Ld. Mansfield observed, "A man may be insolvent without being a bankrupt, and a man may become a bankrupt and yet be able to pay 25*s.* in the pound: the reason why a man becomes a bankrupt who conveys away all his property is, that he thereby *becomes incapable of trading*." Where the trader transferred one-third part of all his effects in consideration of a loan of 120*l.*, and being in insolvent circumstances, absconded two days after, it was held to be an act of bankruptcy. *Linton* v. *Bartlett*, 3 Wils. 47; and see *Devon* v. *Watts*, 1 Noy, 86. It must be of so much of his property as to incapacitate him from carrying on business by the insolvency which would ensue. *Wedge* v. *Newlyn*, 4 B. & Ad. 831. And *semble*, even the transfer of property essential to the carrying on the business is not sufficient, without showing incapacity to replace the property. *Ib.* A transfer to bankers of a trader's leasehold property, with all his stock in trade, and also a policy of insurance, as a security for monies advanced and to be advanced, with a power of sale, and a proviso that the trader should retain possession till default, but not including all the trader's property, being made *bonâ fide*, is not an act of bankruptcy. *Carr* v. *Burdiss*, 1 C. M. & R. 443. In the case of *Balme* v. *Hutton*, 2 Y. & J. 101; 1 C. M. & R. 448, an assignment of machinery to a creditor, the trader having other property besides that assigned, does not on the face of it amount to an act of bankruptcy, and is not an act of bankruptcy, although the parties would, if possession had been taken, have been unable to carry on their trade. But in the case of *Balme* v. *Jewison*, K. B. Nov. 21, 1829, the same deed was held to be an act of bankruptcy, it being conceded on the trial that the question which the jury had before decided in reference to that deed, was not again to be submitted to the consideration of the jury, but that if the Court should be of opinion that on the face of it the deed was not an act of bankruptcy, the counsel for the defendant should be at liberty to move, it being admitted that if the deed was to operate immediately, so as to put the property in the possession of the person in whose favour that deed was made, it would be impossible to carry on the business, and would therefore be an act of bankruptcy. The counsel for the defendant accordingly moved, but the Court was of opinion that the deed operated immediately, and that as its effect would be, that on possession taken, it would be impossible to carry on the business, it was an act of bankruptcy; and that it was an act of bankruptcy by the party executing, although the other partner did not execute, there being no

Fraudulent preference.

In such case it makes no difference whether the transfer resulted from the threats and importunity of the creditor, or was voluntary (*m*). But in such cases it is necessary to prove that the assignment will have the effect of preventing the trader from carrying on his business; as by evidence of the general state of his affairs at the time. It is not sufficient to show that under pecuniary pressure he parted with articles essential to his business (*n*). Where the transfer to a creditor is *partial*, the question is whether it was voluntary on the part of the trader, and made with intent to give him a preference over the other creditors. If it was made voluntarily, and in contemplation of bankruptcy, it necessarily follows that it was intended to give a fraudulent preference, and therefore constitutes an act of bankruptcy (*o*).

The question, however, in such cases of partial transfer is, whether the trader did in fact intend to give a preference to particular persons, to the prejudice of his general creditors (*p*), and in contemplation of bankruptcy.

provisio, as in the case 17 Ves., for being void in case the other party did not execute. But an assignment for the general benefit of creditors, assented to by all or by the generality (*Inglis* v. *Grant*, 5 T. R. 530) is not an act of bankruptcy. So where one of two partners conveyed all his freehold and copyhold estates in trust to raise money to facilitate a settlement with his creditors, the pecuniary assets of the firm not being sufficient to liquidate the debts of the firm. *Berney* v. *Davidson*, 1 B. & B. 408. *Berney* v. *Vyner*, Ibid. 482.

(*m*) *Newton* v. *Chantler*, 7 East, 145. *Thorton* v. *Hargreaves*, Ibid. 544. *Butcher* v. *Easto*, Doug. 294. *Stewart* v. *Moody*, 1 C. M. & R. 777.

(*n*) *Wedge* v. *Newlyn*, 4 B. & Ad. 381. As that a miller transferred his waggons and horses to a creditor, who arrested him. *Ib.* A mere colourable exception has of course no operation. *Ex parte Foord*, cited 1 Burr. 477. *Compton* v. *Bedford*, 1 W. Bl. 362. *Low* v. *Skinner*, 2 W. Bl. 996. *Berney* v. *Davidson*, 1 B. & B. 408. *Berney* v. *Vyner*, Ib. 482.

(*o*) Ibid. And see *Thornton* v. *Hargreaves*, 7 East, 544. In that case the trader being pressed by a creditor for payment, or for a security, executed a bill of sale of goods, apparently the whole of his stock, and immediately left off business and became a bankrupt; and it was held that as the bankrupt did not by the execution of the bill of sale redeem himself from any present difficulty, the presumption was, that he acted not under the pressure of a threat of process, but with intent to give a fraudulent preference. See also *Fidgeon* v. *Sharpe*, 5 Taunt. 539; *Smith* v. *Payne*, 6 T. R. 152; *Harman* v. *Fisher*, Cowp. 117. And a voluntary payment under circumstances which might reasonably lead the trader to suppose bankruptcy to be probable, though not inevitable, is fraudulent. *Poland* v. *Glynn*, 2 D. & R. 310.

(*p*) *Pulling* v. *Tucker*, 4 B. & A. 382. It is always a question of *quo animo*: Did he transfer to obtain relief or to favour the particular creditor? Did he contemplate bankruptcy? Did he yield to pressure? Was the act capable of affording present relief? The bankrupts (country bankers) having suspended payments, and being in failing circumstances, the delivery of cash and notes by one of the partners to the town agent, with the view of reducing the balance, although no undue preference be intended by such partner, is to be taken as such, the insolvency of the house being necessarily consequent; and cash delivered over by the other partners to the agent, in the expectation and on condition of receiving support, which is not rendered, cannot be retained by the defendant. See Mont. B. L.—The bankrupt, in the habit of advancing sums to his son, the defendant, for maintenance and discharge of his bills, gives him a sum of money on the day when he stops payment, knowing himself at the time insolvent, but not expecting to become bankrupt; the question is whether it was paid in the ordinary course in which he maintained him, in which case the assignees cannot recover it back, or whether it was for the purpose of securing him an advantage over, and to give him a benefit at the expense of the creditors. *Abell* v. *Daniell*, 1 Mood. & M. C. 370. The cases, observes Lord Kenyon (*Whitwell* v. *Thompson*, 1 Esp. C. 78), where the assignment by a trader of his property has been deemed fraudulent and an act of bankruptcy, have been where it has been made for a by-gone and before contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who could assist him in his difficulties, as a security for advances. The bankrupt before any act of bankruptcy, having a large order to execute for the East India Company, obtained from the defendants advances to enable him to exe-

A fraudulent intention, in the ordinary sense of the word, is not essential to a fraudulent preference; neither is any privity on the part of the creditor necessary (*q*). Fraudulent preference.

It has been held that, although the fact that the trader at the time of the transfer contemplated bankruptcy be strong, if not absolutely conclusive evidence of fraudulent preference, it is not essential to such proof. Where a trader conveyed an equity of redemption, to which he was entitled, to particular persons, and it was found by the jury that the conveyance was fraudulent, and made with intent to give a preference to those persons to the prejudice of the general creditors, it was held to be an act of bankruptcy, although the trader continued to carry on his trade, and no commission issued till three years after (*r*).

But according to later authorities, it seems that in case of a partial transfer, it is necessary to show, not only that the preference was voluntary, but that it was given in contemplation of bankruptcy (*s*).

cute it, upon an agreement that they should receive the amount of the order from the Company and repay themselves, which they accordingly did; held that it amounted to an equitable assignment of that particular fund, and was not a fraudulent preference, to which there must be both an insolvency in the trader, and a voluntary payment or transfer by him. *Hunt* v. *Mortimer*, 10 B. & C. 42. And it seems that a payment made in pursuance of a previous contract, cannot be deemed the result of a preference. *Vacher* v. *Cocks*, 1 B. & Ad. 145. A sale by a trader of goods for ready money, under circumstances which ought to have led the buyer as a man of business to entertain suspicions of an intention to defraud creditors, is an act of bankruptcy, if the jury so find it. *Cook* v. *Caldecott*, 1 Mood. & M. C. 522.

(*q*) Per Bayley J. *Poland* v. *Glynn*, 2 D. & R. 310. *Harman* v. *Fisher*, Cowp. 117. If a man's circumstances be such as to fairly lead him to believe bankruptcy inevitable, and he voluntarily makes a payment to one creditor to the exclusion of the rest, it is a fraud within the statute. Per Gibbs, C. J., *Fidgeon* v. *Sharp*, 5 Taunt. 539. The *bonâ fide* payment of a just debt fraudulently and in contemplation of bankruptcy, is an act of bankruptcy. *Bevan* v. *Nunn*, 9 Bing. 107. Although the transaction took place four months before the commission issued. *Ibid.*

(*r*) *Pulling* v. *Tucker*, 4 B. & A. 382. In *Smith* v. *Payne*, 6 T. R. Ld. Kenyon, C. J. laid great stress on the circumstance that the trader did not contemplate bankruptcy at the time. In *Pulling* v. *Tucker*, the deed recited that three persons mentioned, had agreed to advance to the trader specified sums of money, payment of which was admitted to have been made at the time of the execution of the deed, a receipt being indorsed on the back, signed by the trader (the defendant) and witnessed by his clerks. It was proved that no money passed when the deed was executed, that two of the parties stated to have advanced the money were the defendant's brothers, and the third proved that he knew nothing of the transaction. The Court held that the question, as above stated, had been properly left to the jury, on the authority of *Morgan* v. *Horseman*, 3 Taunt. 241. In that case, it was held that a deed whereby a debtor being pressed conveyed estates in trust to sell, and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference, was an act of bankruptcy. "In that case (Abbott, L. C. J. observes), it was, it is true, expressly stated that the deed was executed in contemplation of bankruptcy; but Mansfield, C. J. lays no stress on that conveyance, for he expressly says, a conveyance either of all or of part of a man's property in favour of fewer than all his creditors is an act of bankruptcy, because it is the means whereby the creditors may be defeated or delayed." Abbott, C. J. further observed, that if it were material that the deed should have been executed in contemplation of bankruptcy, there was strong evidence of the fact. For the bankrupt being in insolvent circumstances, conveys his real estate to certain persons as a security for debts then due, or any other debts which might become due. Such a deed given under such circumstances would make bankruptcy inevitable, and a man must be supposed to contemplate the consequence of his own act.

(*s*) *Morgan* v. *Brundrett*, 5 B. & Ad. 289. *Gibbins* v. *Phillips*, 7 B. & C. 529. *Poland* v. *Glyn*, 4 Bing. 22. And this is a question of fact under all the circumstances of the case. *Poland* v. *Glyn*, 4 Bing. 22. *Flocke* v. *Jones*, 4 Bing. 20; Doug. 85. *Atkinson* v. *Brindall*, 2 Bing. N. C. 25. See *Devon* v. *Watts*, Doug. 85. An assignment by an insolvent is void if made with the intention of petitioning the Court for his discharge, although it be made more than three months before the commencement of his imprisonment. *Becke* v. *Smith*, 2 M. & W. 191.

Fraudulent preference.

In such instances, however, that is where the transfer is partial, it is usually a question to be decided by the aid of extrinsic evidence, under all the circumstances, whether it was done in order to give a fraudulent preference to the individual to the prejudice of the creditors in general, and in contemplation of bankruptcy. And for this purpose it may be material to show the situation of the trader and his affairs at the time, that he was insolvent at the time, and knew that he was so (*t*); it is necessary to show that he contemplated bankruptcy. So it is material to prove circumstances which show a motive for undue preference; such as the relationship of the trader to the transferee, or acts or declarations of the trader at the time of the transfer, manifesting an intention to show favour; suspicious circumstances attending the transfer itself; that it was made on the proposal of the trader (*u*), at an unseasonable hour (*x*); that it was executed in secret (*y*); that the conveyance, &c. is falsely dated (*z*); that its terms are general, where in an ordinary case they are usually specific (*a*); that it was made to secure a sum not due (*b*), or a larger sum than was due (*c*); that the trader suppressed evidence by which the real nature of the transaction might be elucidated (*d*); that the property conveyed constituted the whole or a considerable part of the trader's effects (*e*); that the bankrupt soon afterwards ceased to trade, or absconded.

Evidence in answer to a case of voluntary or fraudulent preference, where the facts are not conclusive, consists of circumstances tending to show that the transaction was not voluntary on the part of the trader, but was the result of importunity or compulsion (*f*). It is not voluntary if it be made

(*t*) *Newton* v. *Chantler*, 7 East, 138. The question, as regards contemplation of bankruptcy, is not what was the real state of the trader's affairs, but what was the state of his affairs in his own judgment. *Belcher* v. *Prittie*, 10 Bing. 408.

(*u*) See *Crosby* v. *Crouch*, 11 East, 256. *Smith* v. *Payne*, 6 T. R. 152; *Myleton* v. *Butler*, 2 B. & P. 283; *infra*, note (*z*). It is not necessary to show that the bankrupt took the first step. *Morgan* v. *Brundrett*, 5 B. & Ad. 289. It has been held, that it is not sufficient to show an intent to favour third persons. *Abbott* v. *Pomfret*, 1 Bing. N. C. 462; but *qu.*

(*x*) *Compton* v. *Bedford*, 1 Blacks. 362, where the assignment was at midnight. *Harman* v. *Fisher*, Cowp. 117, where the transfer was at five in the morning, after sitting up all night. *Hartshorn* v. *Sloddon*, 1 B. & P. 582. See below, note (*f*).

(*y*) *Wilson* v. *Day*, 2 Burr. 827. *Jacob* v. *Shepherd*, Burr. 478; and see *Twine's Case*, 3 Co. 8.

(*z*) *Ingleton* v. *Buller*, 2 B. & P. 283. The acceptor of a bill of exchange, two days before the bill became due, called on the indorser and stated that he was insolvent; the indorsee insisting on payment, the acceptor paid it, and four days afterwards became bankrupt; the bill had been altered so as to fall due before the transaction, but without the indorser's (the defendant's) knowledge; the jury were directed that there was strong ground to infer fraud, and that the inference as far as related to the bankrupt, was strengthened by the alteration. Lord Eldon, C. J. distinguished the case from that of *Smith* v. *Payne*, 6 T. R. 152, on the ground that there the creditor came to the debtor, and the security was taken for a debt actually due.

(*a*) The generality of the gift, without any exception, was one of the *indicia* in *Twine's Case*; 3 Co. 81; the maxim being *dolus versatur in generalibus*. In *Jacob* v. *Shepherd*, Burr. 478, Ld. Mansfield, C. J. in assigning reasons for the validity of the instrument, observes that the deed was of specific goods. See also *Wilson* v. *Day*, 2 Burr. 827; *Alderson* v. *Temple*, 4 Burr. 2235; and see also Montague's B. L. vol. i. p. 66; Deacon, B. L. vol. i. p. 442.

(*b*) See note (*z*); and *Pulling* v. *Tucker*, 4 B. & A. 382.

(*c*) *Wilson* v. *Day*, 2 Burr. 827.

(*d*) *Alderson* v. *Temple*, 4 Burr. 2235. *Worsely* v. *Demattos*, Burr. 467. *Devon* v. *Watts*, Doug. 86.

(*e*) *Thornton* v. *Hargreaves*, 7 East, 549.

(*f*) Either a demand of payment of a debt due, or a demand of further security, repels the presumption of voluntary preference. See Ld. Ellenborough's observations in *Crosby* v. *Crouch*, 11 East, 256. And secrecy in the mode of delivery will not make it fraudulent where it is not otherwise fraudulent; as where a creditor demands a security for a running debt. See Lord Ellenborough's observations, 11 East, 261.

Fraudulent preference.

under the apprehension that a degree of force, civil or criminal, is about to be applied (*g*). It is not necessary to show that any threat was used; it is sufficient if the act be the result of *pressure* and *importunity* on the part of the creditor (*h*). If *urgency* be used it rebuts the presumption of voluntary preference (*i*). *A.* having in September discounted three bills for *B.*, afterwards suspecting his credit, required a security to be put into his hands, and *B.* accordingly, at different times between November and February, deposited books to the amount of 300 *l.* with him, to be sold by him for his own benefit, in case the bills should not be paid by the acceptors; the books were chiefly brought by *B.* in a hackney-coach, in the evening; *B.* committed an act of bankruptcy in March, and *A.* had then the bills unpaid in his hands. Upon an action brought by the assignees, they were nonsuited on the ground that there was no voluntary preference, since the bankrupt parted with the books upon the defendant's importunity; and although the bills were not due, the defendant was liable upon them, and had a right to a further security (*k*).

Where *B.* had property to a large amount at the Custom-house, which stood in his own name, but which he had purchased with *A.*'s money, and there was evidence to show that he had been induced to transfer the whole to *A.*, under the apprehension that *A.* would prosecute him for the forgery of a bill which he had deposited with *A.* as a security, it was left to the jury to say whether the transfer was voluntary, or was made under the apprehension that a degree of force, civil or criminal, was about to be applied; and Lord Ellenborough informed them, that every thing which might overcome the free-will of the party was sufficient to exclude a voluntary preference (*l*). So payment to an obligee, who importunes for payment before the forfeiture of the bond, is good (*m*).

Where a trader, in contemplation of bankruptcy, voluntarily sent his clerk to pay the amount, but before the payment the creditor applied for payment, it was held to be good (*n*). This was on the principle that the preference intended was not communicated; but the authority of this case has been questioned (*o*).

Where the holder of a bill promised the acceptor, whom he knew to be insolvent, that if the bill was paid he would effect a composition with his creditors, the preference was held to be fraudulent (*p*).

(*g*) *De Tastet* v. *Carroll*, 1 Starkie's C. 88; and see *Atkins* v. *Seward, cor.* Holroyd, J. Winchester Spring Ass. 1819, Manning's Index, 2d edit. 63. The bankrupt stated that he paid the money after a threat of arrest, partly with a view of relieving his father from liability; it is for the jury to consider the motives and intention of the bankrupt, in order to ascertain whether the payment was in fact made in consequence of the threats. *Cook* v. *Rogers*, 7 Bing. 438. *Harman* v. *Fisher*, Cowp. 117; but see *Bayley* v. *Ballard*, 1 Camp. 416.

(*h*) See *Smith* v. *Payne*, 6 T. R. 152.

(*i*) Per Ld. Ellenborough, in *Crosby* v. *Crouch*, 2 Camp. C. 166; 11 East, 256. In *Hartshorn* v. *Slodden*, 2 B. & P. 582, Ld. Alvanley was of opinion, that if the creditor pressed for payment, the intention of the bankrupt was not material. See *Belcher* v. *Prittie*, 10 Bing. 407.

(*k*) *Crosby* v. *Crouch*, 2 Camp. C. 166; 11 East, 226.

(*l*) *De Tastet* v. *Carroll*, 1 Starkie's C. 88.

(*m*) *Hartshorn and others* v. *Slodden*, 4 Esp. C. 60; 2 B. & P. 582. *Thompson* v. *Freeman*, 1 T. R. 155. *Thornton* v. *Hargreaves*, 7 East, 544. *Crosby* v. *Crouch*, 11 East, 256. *Belcher* v. *Jones*, 2 M. & W. 258.

(*n*) *Bayley* v. *Ballard*, 1 Camp. C. 416.

(*o*) *Singleton* v. *Butler*, 2 B. & P. 286. And see *Cooke* v. *Rogers*, 7 Bing. 446. The real question seems to be as to the ultimate motive of the trader; whether he yielded to the demand, or availed himself of the opportunity offered to give a fraudulent preference.

(*p*) *Singleton* v. *Butler*, 3 Esp. C. 215; 2 B. & P. 283. *Smith* v. *Payne*, 6 T. R. 152.

Where a trader purchased goods on the 8th of October, for the purpose of exportation, but finding that he must stop payment, and that he could not export them, returned them on the 16th of October to *B.*, the vendor, and stopt payment on the 17th; and his creditors refusing him time, he became a bankrupt on the 24 of November: it was held that the jury were warranted in finding that the delivery of the goods to *B.* was not in contemplation of bankruptcy (*q*).

Where a creditor obtained a preference not fraudulent, with a view to an intended composition with creditors, but without any view to a bankruptcy, and the composition never took place, but the trader afterwards became bankrupt, it was held that the creditor was entitled to retain his securities (*r*).

Where a sale has been completed by the actual delivery of goods to a trader, before payment, he cannot give the vendor a preference by rescinding the contract and returning the goods (*s*). But where goods *in transitu* are given up by the trader, it is a question for the jury whether they were given up *bonâ fide*, and without any motive of undue and voluntary preference, although the trader was on the verge of bankruptcy (*t*).

Goods were sent to a trader in February, with an option, according to the course of trade, of returning them; he having done no act to determine his option, on the 4th and 5th of March returned the goods, requesting a written approbation of this act, being then insolvent; such approbation was not given till after the bankruptcy, and it was held that the property passed to the assignees (*u*).

Continuance of possession.

The fact that the property conveyed remained after the transfer in the possession of the trader, is strong, and being unanswered, is conclusive evidence of fraud (*x*). For the trader thereby obtains false credit to the deception or prejudice of his creditors (*y*). But this fact is not *conclusive* evidence of fraud; it may be explained by circumstances (*z*) which show that such possession was given as the nature of the case will admit of.

The engineer of a canal company borrowed money from the company, in order to pay his creditors, and executed a bill of sale of timber, and other articles of his property, deposited on the premises of the company, (which he had bought with money advanced by them,) and delivered them to the company by the delivery of a copper halfpenny; and the court held that since such possession had been delivered to the company at the time of executing the deed, as the case admitted of, the deed was not fraudulent (*a*).

Proof of privity to a fraudulent deed.

In general, one privy to a fraudulent deed, cannot set it up as an act of bankruptcy (*b*); and it would be a fatal objection to show that the petitioning

(*q*) *Fidgeon* v. *Sharp*, 1 Marsh 196. And see *Moore* v. *Barthrop*, 1 B. & C. 5.

(*r*) *Wheelwright* v. *Jackson*, 5 Taunt. 109.

(*s*) *Barnes* v. *Freeland*, 6 T. R. 80. See *Hasgell* v. *Hunt*, 5 T. R. 321; *Neate* v. *Ball*, 2 East, 117.

(*t*) *Dixon* v. *Baldwin*, 5 East, 175.

(*u*) *Neate* v. *Ball*, 2 East, 117; *infra*, 111, note (*y*).

(*x*) A conveyance of goods without deed is fraudulent, unless possession be given; if it be by deed, it is fraudulent, and an act of bankruptcy. Per Ld. Kenyon, C. J. in *Manton* v. *Moore*, 7 T. R. 71.

(*y*) *Manton* v. *Moore*, 7 T. R. 67. *Worseley* v. *Demattos*, 1 Burr. 467. A trader being in distressed circumstances, assigns *all* his estate to a creditor as a security for an unliquidated sum, without delivering any kind of possession, except by giving a letter of attorney to his own clerk to collect debts. The assignment was held to be fraudulent, on the ground of undue preference, and because there had been no alteration of possession. *Wilson* v. *Day*, 2 Burr. 827.

(*z*) Per Ld. Mansfield, 1 Burr. 484.

(*a*) *Manton* v. *Moore*, 7 T. R. 67; and see below, REPUTED OWNERSHIP.

(*b*) *Jackson* v. *Irwin*, 2 Camp. 49. *Bamford* v. *Baron*, 2 T. R. 594, n. *Tappenden* v. *Burgess*, 4 East, 230. *Tope* v. *Hockin*, 7 B. & C. 101. *Barbe* v. *Gooch*, Holt's C. 13.

creditor was a party, or privy to the fraudulent deed; but if he was not privy, it is no objection that the co-plaintiffs being co-assignees with him, were privy (*c*); and it is no objection that the petitioning creditor was party to a deed of trust, by which the bankrupt assigned certain property for the benefit of his creditors, in consideration of which they released their debts, it having been afterwards discovered by the petitioning creditor that the bankrupt had previously committed a secret act of bankruptcy (*d*).

Lying in prison, &c.

Or having been arrested or committed to prison for debt, &c. (*e*) shall on such arrest, or on any detention for debt, lie in prison for twenty-one days, &c.

To establish an act of bankruptcy by lying in prison (*f*), it must be shown that the trader lay in prison twenty-one days before the issuing the commission; a subsequent lying in prison will not give effect to a previous commission (*g*).

It was held under the stat. 21 J. 1, c. 1, that a commission issued fifty-six days *inclusively* after the arrest was good (*h*).

A trader being arrested on the 4th, was at large till the 8th, when he returned into custody; on the 10th he was removed by *habeas corpus* into the King's Bench, where he remained more than two months; and it was held that the act of bankruptcy related to the 8th (*i*), since there must be a *continuous imprisonment* of two *lunar* months.

A trader being arrested put in bail, and afterwards surrendered in discharge of his bail; it was held that the imprisonment was to be computed from the surrender, and not from the arrest (*k*). But where a trader was sick at the time of the arrest, and could not be removed, but continued in the custody of a follower, the imprisonment was reckoned from the arrest (*l*); so where he has had the benefit of the rules during the period (*m*); and so it was where mere formal bail were put in before a Judge, to get the trader turned over to the prison of the court, upon which he was surrendered, and sent there, for there was an entire continuous imprisonment from the time of the arrest (*n*).

A commission issuing before the time has expired cannot be supported, but it is otherwise as to a commission which issues after the docket is struck (*o*).

Escape.

Or having been arrested, shall escape, &c.

A prisoner having been arrested in Kent, and brought up by *habeas corpus* to be bailed, was permitted by the sheriff to call at a house in London, and it was held that the passing through another county, by the permission of the sheriff, did not amount to an act of bankruptcy (*p*).

The arrest or detention for debt in these cases should be proved by an

(*c*) *Tappenden* v. *Burgess*, 4 East, 230. *Dutton* v. *Morrison*, 14 Ves. 193

(*d*) *Doe* v. *Anderson*, 1 Starkie's C. 262.

(*e*) A penalty due to the Crown for smuggling is within this statute. *Cobb* v. *Symonds*, 5 B. & A. 516.

(*f*) *Supra.*

(*g*) *Moses* v. *Newman*, 6 Bing. 556. See *Higgins* v. *M'Adam*, 3 Y. & J. 1. The trading must be before the imprisonment. *Ex parte Lynch*, 1 Mont. & Bl. 453. *Glassington* v. *Rawlins*, 3 East, 407; 4 Esp. 221. *Gordon* v. *Wilkinson*, 8 T. R. 507. But see 2 Show. 512; 14 Ves. 80. 83. *Wydown's Case*, Ibid.

(*h*) 3 East, 407. See Com. Dig. tit. TEMPS. *Lacon* v. *Hooper*, 6 T. R. 224

(*i*) *Barnard* v. *Palmer*, 1 Camp. 509.

(*k*) *Tribe* v. *Webber*, Willes, 464; 1 Burr. 438.

(*l*) *Stevens* v. *Jackson*, 4 Camp. 164.

(*m*) *Soames* v. *Watts*, 1 C. & P. 400.

(*n*) *Rose* v. *Green*, 1 Burr. 437.

(*o*) *Gordon* v. *Wilkinson*, 8 T. R. 507. *Ex parte Dufresne*, 1 V. & B. 51.

(*p*) *Rose* v. *Green*, Burr. 437.

examined copy of the writ (if returned), and return of *cepi corpus*, the warrant, and arrest, or by the *habeas corpus* and commitment (*q*); and the fact of lying in prison twenty-one days, may be proved either by any person acquainted with the fact, or by the books of the prison (*r*).

The act of bankruptcy has relation to the time of the arrest or going to prison (*s*), and the property vests in the assignees from that time.

By the Insolvent Act, 7 G. 4, c. 57, the filing a petition to take the benefit of the Insolvent Act is, in some cases, an act of bankruptcy, provided the party be declared bankrupt before the time advertised in the Gazette for hearing the petition, or within two calendar months from the filing of it. An office copy of the petition is made evidence of the act. The filing is not complete till it reaches its destination in the proper office (*t*).

In order to establish an act of bankruptcy against a Member of Parliament, for not paying or securing his creditor a debt of 100*l.*, after the suing out the writ of summons, &c., under the stat. 4 G. 4, c. 33, it is not absolutely necessary that such creditor should be called (*u*).

The assignees may rely on *any* act of bankruptcy previous to the issuing of the commission, and are not limited to that on which the commission was founded (*x*).

Where the sheriff took possession under an execution, and afterwards on the same day the bankrupt surrendered, it was held that the assignees were not entitled to recover against the execution creditor (*y*). The property vests in the assignees by relation only from the moment of the surrender or arrest (*z*).

Petitioning creditor's debt.

Fourthly. It is necessary to prove that the petitioning creditor's debt (*a*)

(*q*) *Salte* v. *Thomas*, 3 B. & P. 188. The prison books are not evidence of the cause of commitment.

(*r*) *Salte* v. *Thomas*, 3 B. & P. 188.

(*s*) *King* v. *Leith*, 2 T. R. 141. And see the provision of the stat. 6 G. 4, c. 16, *supra*, 130.

(*t*) *Garlick* v. *Sangster*, 9 Bing. 46.

(*u*) *Burton* v. *Green*, 3 Car. & P. C. 306.

(*x*) *Reed* v. *James*, 1 Starkie's C. 134. *Hopper* v. *Richmond*, Ibid. 507.

(*y*) *Thomas* v. *Desanges*, 2 B. & A. 586. See also *Sadler* v. *Leigh*, 4 Camp. 197. And see tit. TIME; and the stat. 6 G. 4, c. 16, s. 108.

(*z*) Ibid. And *Gordon* v. *Wilkinson*, 8 T. R. 507. *King* v. *Leith*, 2 T. R. 141.

(*a*) By the stat. 6 G. 4, c. 16, s. 15, no commission shall be issued unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to 100 *l.* or upwards, or unless the debt of two creditors so petitioning shall amount to 150 *l.*, &c. or unless the debt of three or more creditors so petitioning shall amount to 200 *l.*, &c. And that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum or not. A commission on the petition of *four* creditors is good, although it does not appear on the face of the affidavit that the debts amounted to 200*l.*; proof being given at the trial that they amounted to that sum. *Hill* v. *Heale*, 2 N. R. 196. 100*l.* in notes bought at 10*s.* each is sufficient. *Ex parte Lee*, 1 P. W. 782. The 7 Geo. 4, c. 46, s. 9, and 1 & 2 Vict. c. 96, are to be taken together; and held that the public officer thereby authorized to sue any member of a joint-stock banking company may sue out a *fiat* in bankruptcy against such member. *Hall, ex parte*, 3 Deac. (B. C.) 405. The debt must be a legal one—a promissory note made in violation of a statute cannot be proved, and consequently cannot form a good petitioning creditor's debt, *Ex parte Randleson*, Mo. & M. 86. See further as to the petitioning creditor's debt, *Ex parte Buck*, 4 B. & C. 880; *Bleasby* v. *Crossly*, 3 Bing. 434; *Flack* v. *Jones*, 4 Bing. 20; *Shaw* v. *Hervey*, 1 M. & M. 526. Sect. 8 provides that payment to the petitioning creditor after the docket struck shall be an act of bankruptcy. See *Rose* v. *Maine*, 1 Bing. N. C. 357. *Ex parte Vernon*, 2 Cox, 61. *Ex parte Paxton*, 15 Ves. 463.

existed at the time of the act of bankruptcy (*b*), and also that it existed whilst the party was a trader (*c*).

Petitioning creditor's debt.

(*b*) *Moss* v. *Smith*, 1 Camp. 489; 46 G. 3, c. 135; 14 Ves. 80–3. And where the proceedings under the commission merely showed that the debt existed at the date of the commission, and not that it existed at the time of the act of bankruptcy, it was held to be insufficient (*Clarke* v. *Askew*, 1 Starkie's C. 458; 14 East, 197; *infra*, 149). In *Wright* v. *Lainson*, 2 M. & W. 739, it was held that an I. O. U. bearing date before the bankruptcy was insufficient without proof that it was in existence before the bankruptcy. See the observations of Lord Abinger and Alderson, B on this case, in *Goodtitle* v. *Milburn*, Ib. 859, 860. But if the note be proved to be in existence before the docket struck, the date previous to the bankruptcy is evidence of its previous existence. *Obbard* v. *Bethune*, M. & M. 486. And its continued existence up to the time of the act will be presumed. *Jackson* v. *Irwin*, 2 Camp. 50; unless other transactions have intervened. *Gresly* v. *Price*, 2 C. & P. 48. Such previous existence may be evidenced by circumstances; as if it can be shown that about the date of the bill, goods were sold of corresponding amount. *Cowie* v. *Harris*, M. & M. 141. As to the effect of an act of bankruptcy prior to the petitioning creditor's debt, vide *infra*.

(*c*) *Dawe* v. *Holdsworth*, Peake, S. C. 64; *Meggott* v. *Mills*, 12 Mod. 157; 1 Ld. Raym. 286; 1 Montague's B. L. 33. *Butcher* v. *Easto*, Doug. 282; *Heanney* v. *Birch*, 3 Camp. 234. Where the party before he became a trader became indebted to the petitioning creditor in a sum exceeding 100 *l.*, and afterwards became a trader, but ceased to be such at the time of committing an act of bankruptcy, it was held, that the commission might be supported upon such debt and act of bankruptcy. *Bailie* v. *Grant*, 9 Bing. 121. Where there existed at the time of the act of bankruptcy a sufficient debt on which a commission might have issued, and also at the time of its issuing, and the balance throughout continuing sufficient for that purpose, it is not material that payments had in the interim been made more than sufficient to discharge the balance due at the time of the act of bankruptcy, *Shaw* v. *Harvey*, 1 M. & M. 526. Taxed costs upon a judgment, as in case of nonsuit, being only recoverable by attachment, do not constitute a sufficient petitioning creditor's debt. *Ex parte Stevenson*, 1 M. & M. 262. Where the petitioning creditor had sworn to a debt for *money advanced*, it being only part of the amount of purchase money of premises which were surrendered to him by way of mortgage, held, that it being only an equitable debt, it would not support a commission. *Ex parte Hawthorne*, 1 Mont. 132. Notes of the bankrupts given for a pre-existing debt, payable at *S.* on demand, are a sufficient debt to support the commission, although no demand has been previously made at *S.* 6 M. & S. 295. A trader by deed conveyed all his personal estate to four persons, in trust to pay and discharge his debts, &c., containing a proviso that the said parties, trustees and creditors, should, on or before ——— next, make such proof (of debts) if required, and *execute these presents*, with a covenant not to sue, operating as a release by the creditors signing it; two only of the said trustees executed the deed, and not the others; held, that the effect of the words of such proviso was not to avoid the deed if the parties therein named should not execute it, but merely to take away from such parties the right to recover a dividend; the debt therefore of a party executing it was extinguished, and would not constitute a petitioning creditor's debt to found a commission. *Small* v. *Marwood*, 9 B. & C. 300. Where the debt was for money lent on a mortgage, payable after six months' notice, but not to expire before a day stated, it was held sufficient to support a commission sued out before that day. *Hill* v. *Harris*, 1 M. & M. 448. Partners, upon being appointed treasurers to a company, executed a joint and several bond, conditioned amongst other things, when thereunto required, to pay over balances, &c.; held, that upon their bankruptcy before any request made to pay, &c., it was not a sufficient breach to constitute an existing debt, provable against their separate estates. *Ex parte Lancaster Can. Co.*, 1 Mont. 27. Held also, that it could not be considered a contingent debt, within the 6 Geo. 4, c. 16, s. 56, to give a right of proof, under which there must be an actual debt dependent on a contingency. *Ib.* Three parties jointly indebted, covenanted jointly and severally on *demand* to pay; and the deed also contained a stipulation that any debt existing previous to such demand should remain a debt, in like manner as if no covenant had been entered into, it being intended only as an additional security; held, that until actual demand the debt remained joint only, and was proveable against the joint estate only, and not against the separate estates. *Ex parte Fairlie*, 1 Mont. 17. Upon a petition on a bill of exchange accepted by the defendant, which, after examination by the commissioners, has been lost, such loss may be proved in an action by the assignees on notice to dispute the debt; for though the legal remedy may be gone, the debt remains. *Pooley* v. *Millard*, 1 Cr. & J. 411; 1 Tyr. 331. Where the act of bankruptcy consists of lying in prison, the

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The debt is insufficient if one of the petitioning creditors be an infant (*d*); but the husband alone may sue out a commission on a promissory note to the wife before coverture (*e*). A debt due *from* a partnership will support a separate commission (*f*); but where a debt is due *to* a partnership, all must concur in the petition (*g*). Where, in the case of a partnership, an account has been rendered and a balance struck, it will support a commission (*h*). An executor may sue out a commission before probate, provided he obtain probate previous to the adjudication (*i*); though the probate be not properly stamped till after the adjudication (*k*). A debt due to an attorney for costs is sufficient, although he has not delivered a bill according to the statute (*l*).

The late statute provides that a debt shall be sufficient to support a commission, although the time of credit had not elapsed at the time of the act of bankruptcy (*m*).

A creditor who receives a sum of money after notice of the act of bankruptcy, sufficient, if taken in payment, to reduce his debt below the sum of 100*l.*, may still sue out a commission (*n*); and it is no objection that the debt has since merged in a security of a higher nature (*o*), or that the debtor has become insolvent, and included the debt in his schedule (*p*). But where a bankrupt contracts a further debt, after he leaves off trade, and pays money without directing the application, the payment will be set against the old debt, and consequently if it reduce the old debt to less than 100*l.* it will not support a commission (*q*). A creditor who has taken in

trading must be before the imprisonment. *Ex parte Lynch*, 1 Mont. & B. 453; 6 M. & S. 295; *Higgin* v. *Macadam*, 3 Y. & J. 1.

(*d*) *Ex parte Morton*, Buck. 42.

(*e*) *Ex parte Barber*, 1 G. & J. 1. *M'Neilage* v. *Holloway*, 1 B. & A. 218.

(*f*) *Ex parte Crisp*, 1 Atk. 134.

(*g*) *Buckland* v. *Newsam*, 1 Taunt. 477.

(*h*) *Ex parte Nosey*, 1 Mont. & A. 46.

(*i*) *Ex parte Puddy*, Buck. 235; 3 Madd. 241.

(*k*) *Rogers* v. *James*, 7 Taunt. 147.

(*l*) *Ex parte Sutton*, 11 Ves. 164. *Ex parte Howell*, 1 Rose, 112.

(*m*) Stat. 6 G. 4, c. 16, s. *supra*, note (*a*). A bill of exchange or promissory note operates as a debt from the date, and therefore an indorsee may petition on a bill or note *dated* before the act of bankruptcy, though not due till after. *Bingley* v. *Maddison*, 1 Co. B. L. 20. *Glaister* v. *Hewer*, 7 T. R. 498. *Brett* v. *Levett*, 13 East, 213. *Ex parte Thomas*, 1 Atk. 73. *Macarty* v. *Barrow*, 2 Str. 949; Eden, 47; 2 Wils. 135. But it must appear that the indorsement to the petitioner was previous to the commission. *Rose* v. *Rowcroft*, 4 Camp. 245. *Ex parte Botter*, 1 Mont. & B. 412. And where a bill was drawn by the bankrupt in favour of a creditor, and he became bankrupt before the bill became due or was presented, it was held to be a good debt, although *after* the suing out of the commission the amount was paid by the acceptor. *Ex parte Douthat*, 4 B. & A. 67. See *Macarty* v. *Barrow*, Str. 949. *Chilton* v. *Wiffin*, 3 Wils. 17 *Stacy* v. *Barns*, 7 East, 435. *Abraham* v. *George*, 11 Price, 423. Where the bill drawn by the bankrupt has become due before the bankruptcy, proof must be given of presentment and notice of dishonour. *Cooper* v. *Machin*, 1 Bing. 426. If two exchange acceptances, and one before the bills become due commits an act of bankruptcy, the other cannot sue out a commission. *Sarratt* v. *Austin*, 4 Taunt. 200; and see *Bleasby* v *Crossley*, 3 Bing. 438. Neither can the acceptor of a bill for the accommodation of the bankrupt who does not pay it till after the bankruptcy, for till payment he is a mere surety. *Ex parte Holding*, 1 G. & J. 97. Interest, where it is not expressed in the body of the bill, cannot be added to make up the amount. *Ex parte Burgess*, 2 Moore, 745; *Cameron* v. *Smith*, 2 B. & A. 305; and see *Brett* v. *Levett*, 13 East, 213.

(*n*) *Mann* v. *Shepherd*, 6 T. R. 79. Buck. 283.

(*o*) *Ambrose* v. *Clendon*, Ca. T. H. 267; 2 Str. 1042. Or that the creditor has obtained judgment for it. *Bryant* v. *Withers*, 2 M. & S. 123.

(*p*) *Jellis* v. *Mountford*, 4 B. & A. 256; *Ex parte Shuttleworth*, 2 G. & J. 68.

(*q*) *Meggott* v. *Mills*, Ld. Raym. 286; Comb. 463.

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part payment the bill of the trader on a drawee, who had no effects of the trader's in his hands, may petition although he gave no notice of the dishonour of the bill (*r*). A judgment-creditor who has taken his debtor in execution cannot afterwards sue out a commission of bankrupt (*s*) on the same debt. Damages for breach of promise of marriage, the verdict being before, but the judgment after an act of bankruptcy, will not support a commission (*t*).

It has been decided, that a debt barred by the Statute of Limitations is insufficient (*u*), even though it has been kept alive by the suing out of process, and entering of continuances (*x*).

A warrant of attorney given as a security against running acceptances is a *debitum in præsenti*, which will support a commission (*y*).

The evidence to prove the debt is the same as if the action had been brought against the bankrupt (*z*). Therefore an admission of the debt by the bankrupt *before his bankruptcy* is evidence (*a*). So are entries in the bankrupt's books (*b*), or declarations of the bankrupt before the bankruptcy; declarations by the bankrupt as to the debt, made after the act of bankruptcy, but before the commission, have been received in evidence (*c*). But it has since been decided, after a consideration of all the authorities, that an admission made by the bankrupt after an act of bankruptcy, though before the commission, is not admissible to establish the petitioning creditor's debt (*d*). An acknowledgment by a trader of a debt by bond does not supersede the necessity of proving it by the attesting witness (*e*).

The date upon a promissory note is not even *primâ facie* evidence to show that it had existence prior to the act of bankruptcy (*f*). If the creditor petition as the indorsee of a bill, the time of indorsement must be proved (*g*.)

Proof that the bankrupt and petitioning creditor attended before the commissioners, and discussed the amount of the debt, and that the commissioners

(*r*) *Bickerdike* v. *Bollman*, 1 T. R. 405.

(*s*) *Cohen* v. *Cunningham*, 8 T. R. 123.

(*t*) *Ex parte Charles*, 14 East, 197.

(*u*) *Gregory* v. *Hurrill*, Eden's B. L. 46, 2d edit. 5 B. & C. 341; 1 Bing. 24; reversing the judgment of the Court of C. P. 3 B. & B. 212. But note that the writs were not returned, nor were the continuances entered until after the issuing the commission. See *Taylor* v. *Hipkins*, 5 B. & A. 489. *Ex parte Raffey*, 2 Rose, 245. Where the debt arose on a joint note made in 1825, with a party who, in 1835, executed an assignment for the benefit of his creditors, under which a dividend was afterwards received in respect of the note and interest; held, that such payment by a co-contractor did not revive the debt against the bankrupt so as to make it proveable. *Woodward ex parte*, 3 Mont. & Ayr. 609; and 3 Deac. 290. 294; *Jackson* v. *Fairbank*, 2 H. Bl. 340.

(*x*) See the last note.

(*y*) *Miles* v. *Rayclyns*, 4 Esp. C. 194.

(*z*) B. N. P. 37. *Abbott* v. *Plumbe*, Doug. 216. *Koopes* v. *Chapman*, Peake, 19.

(*a*) *Brett* v. *Levett*, 13 East, 213; 2 H. B. 279, *Dowton* v. *Cross*, 1 Esp. C. 168. *Hoare* v. *Coryton*, 4 Taunt. 560. *Robson* v. *Kemp*, 4 Esp. C. 234.

(*b*) *Jackson* v. *Irwin*, 2 Camp. 50. *Watts* v. *Thorpe*, 1 Camp. 376.

(*c*) *Brett* v. *Levett*, 13 East, 213 where the declaration of a bankrupt made after the act of bankruptcy, but before the commission, was admitted, in order to supply proof of notice to him of the dishonour of the bill of exchange; and see *Dowton* v. *Cross*, 1 Esp. C. 168. But see *Watts* v. *Thorpe*, 1 Camp. 376; 2 Camp. 49; *Hoare* v. *Coryton*, 4 Taunt. 560; *Robson* v. *Kemp*, 4 Esp. C. 233.

(*d*) *Smallcombe* v. *Burges*, 13 Price, 136; *Sanderson* v. *Laforest*, 1 C. & P. 46.

(*e*) *Abbott* v. *Plumbe*, Doug. 216.

(*f*) The contrary was held in *Taylor* v. *Kinloch*, 1 Starkie's C. 175, upon a mistaken report of a case (cited from memory) which had been tried on the northern circuit. This case was mentioned by Bayley, J.; and it appears that further evidence was held to be necessary to prove the existence previous to the bankruptcy.

(*g*) *Rose* v. *Rowcroft*, 2 Camp. 245.

struck off items objected to, and struck a balance in favour of the petitioning creditor, is presumptive evidence, from the conduct and demeanor of the bankrupt (the plaintiff in the action), of a balance to that amount; but it is not evidence in the nature of an adjudication or award (*h*). Where the creditor petitions as the assignee of a bankrupt, it is necessary to prove all the steps of the former bankruptcy (*i*). But parties to the record may prove title as assignees, by means of depositions under the statute, although they be not described as such on the record (*k*).

Where a new petitioning creditor's debt has been substituted, under the statute 6 Geo. 4, c. 10, s. 18, it is sufficient to prove the petition to the Chancellor for the substitution, the Chancellor's order referring the sufficiency of the debt to the commissioner, and the finding of the commissioner thereon; it is not necessary to produce the Chancellor's order confirming such finding (*l*).

By the statute 2 & 3 Will. 4, c. 114, provision is made as to proof of the ingredients of bankruptcy in case of the death of any witness.

Superseding evidence.

Where a defendant, whether the bankrupt himself, or any other person, has done any act by which he acknowledges the bankruptcy, the proof of that act, as against that person, supersedes the necessity of the regular detailed proof (*m*). Where an auctioneer, in a catalogue of goods for sale, describes them to be "the property of the bankrupt" (*n*), it is *primâ facie* evidence of the fact. So where a debtor to the bankrupt, for goods sold by the latter, stated an account to the plaintiff as assignee, and paid him part (*o*). But a trader declared to be a bankrupt does not, by surrendering under it, preclude himself from disputing the legality of the commission, for he is bound by law to surrender himself (*p*); neither is a creditor who has received part of the debt before the commission, and proves the rest under it, estopped from disputing it in an action brought by the assignees to recover the first payment (*q*). The proving a debt under a commission

(*h*) *Jarrett* v. *Leonard*, 2 M. & S. 265.

(*i*) *Doe* v. *Liston*, 4 Taunt. 741. See *Antram* v. *Chace*, 15 East, 209. Previous to the stat. 6 G. 4, c. 16.

(*k*) *Doe* v. *Liston*, 4 Taunt. 741; *Simmons* v. *Knight*, 3 Camp. 251; *Newport* v. *Hollings*, 3 C. & P. 223; *Rowe* v. *Lant*, Gow. 24.

(*l*) *Bachelor* v. *Vyse*, 1 M. & R. 331.

(*m*) Trover by the assignees of a bankrupt; amongst other admissions, one was by the defendant's attorney, that a commission had issued against the party under which he was duly declared bankrupt, and the plaintiffs chosen assignees; such admission dispenses with the necessity of producing the proceedings, and no notice having been given to dispute any of the proceedings, the commission is conclusive. *Perring* v. *Tucker*, 3 M. & P. 557; *Pole* v. *March*, 1 B. & Ad. 558. In an action by an assignee the defendant consented, provided the plaintiff would waive holding him to bail, to admit every fact except as to merits, as the only question he wished to try was, whether he was liable on a certain agreement, and a common appearance was accordingly entered; having received the benefit, he cannot afterwards recede, and insist upon proof of the bankruptcy and title of the assignees. *Davis* v. *Burton*, 4 C. & P. 166. The defendant, on being applied to by the assignees, said he would call and pay the money, held to be sufficient. *Pope* v. *Monk*, 2 C. & P. 112. An affidavit, that a party is indebted to the deponent in the sum of 100 *l.*, and has become bankrupt, is conclusive evidence of the bankruptcy. *Ledbetter* v. *Salt*, 4 Bing. 623; 1 M. & P. 597. Proof by an admission is sufficient, although title is expressly denied by the plea. *Inglis* v. *Spence*, 1 C. M. & R. 432. And see *Munke* v. *Clarke*, 2 Bing. N. C. 299, *supra*.

(*n*) *Maltby* v. *Christie*, 1 Esp. 340; 1 B. and A. 677; 16 East, 193.

(*o*) *Dickinson* v. *Coward*, 1 B. & A. 677. See *Pope* v. *Monk*, 2 C. & P. 112.

(*p*) 9 East, 21; Taunt. 80. 84. 96. *Ex parte Jones*, 11 Ves. 409. Nor do the formal words of the petition for enlarging the time of his surrender amount to such an admission.

(*q*) *Stewart* v. *Rickman*, 1 Esp. C. 108. *Hope* v. *Fletcher*, Sel. N. P. 238. *Col-*

is not even *primâ facie* evidence of the bankruptcy in an action by the assignees against the creditor (*r*).

Proof of the assignment.

An assignment under the statute 6 Geo. 4, c. 16, was proved by its production, bearing the registrar's certificate of its having been entered of record according to the statute (*s*), or by an office copy (*t*). It has been held that if the assignment be produced, it is (*u*) necessary to prove the execution by the commissioners.

And where the title of the assignees to the lands, tenements, and hereditaments of the bankrupt came in question, the assignees, in cases where an actual assignment under that statute is necessary, proved their title by the conveyance from the commissioners, that is, by deed indented and enrolled (*x*) in one of the courts of record at Westminster (*y*).

The deed had no relation to the bankruptcy, so as to vest such property in the assignees from that time, and therefore they could not recover for a trespass, or on a demise in ejectment anterior to the bargain and sale, although subsequent to the bankruptcy (*z*).

Where there had been a provisional assignment it was necessary that it should be proved in the manner already stated (*a*), and the assignment by the provisional assignee to the second assignee was also to be proved (*b*).

Under the late statute, 1 & 2 Will. 4, c. 56, it is sufficient to prove the appointment of the assignees under the seal of the Court of Bankruptcy (*c*).

lins v. *Forbes*, 3 T. R. 322. But see *Walker* v. *Burnell*, Doug. 305; where it was held that the assignees under a former commission, after proving a debt under the second commission, could not dispute it.

(*r*) *Rankin* v. *Horner*, 16 East, 191; *Watson* v. *Wace*, 5 B. & C. 153. Vide tit. ADMISSIONS.

(*s*) By the stat. 6 G. 4, c. 16, *supra*, 129.

(*t*) Ibid.

(*u*) *Gomersall* v. *Serle*, 2 Y. & J. 5. But Lord Tenterden in *Tucker* v. *Barrow*, sitt. after Mich. 1827, held the contrary; and see the 97th sect. which makes office copies evidence, and imposes a restraint on the production of the originals.

(*x*) The indorsement of enrolment, or an examined copy, is conclusive evidence of enrolment. See Vol. I. and Index, tit. BARGAIN AND SALE.—ENROLMENT. *R.* v. *Hopper*, 3 Price, 495; 1 Doug. 56.

(*y*) 6 Geo. 4, c. 16, s. 64. The clause excepts copyhold and customary land; it also directs the assignment and registration of colonial lands, and of all deeds, papers, and writings respecting the same.

(*z*) *Doe* v. *Mitchell*, 2 M. & S. 466. See *Elliott* v. *Danby*, 12 Mod. 3; *Perry* v. *Bowes*, 1 Ventr. 260.

(*a*) *Supra* 151. See 2 Christian's B. L. 448. If the action be brought by the provisional assignee, who sues out a *latitat*, it is no defence under the general issue that other assignees were appointed between the issuing the writ and the declaration. *Page* v. *Bauer*, 4 B. & A. 345. The assignment was directed to be made by the provisional assignees to the creditors' assignees, an assignment by the former to the commissioners, and by them to the creditors' assignees, was held to be insufficient. *Moult* v. *Massey*, 1 B. & Ad. 630.

(*b*) By the 45th section of the stat. 6 G. 4, c. 16, s. 45, provisional assignees may be removed at the meeting of creditors for the choice of assignees, if they think fit, and such assignees so appointed shall deliver up and assign all the estate of the bankrupt come to their possession; and all estate of the bankrupt so delivered up and assigned shall be as effectually and legally vested in the assignees so chosen, as if the first assignment had been made to them.

(*c*) By that stat., s. 25, when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignee or assignees for the time being, by virtue of their appointment, without any deed of assignment for that purpose. And as often as any such assignee shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignee, as the case may require.

By sec. 26, similar provision is made for the vesting of the real estate.

By sec. 27, where a conveyance of the property of a bankrupt would require to be registered, the certificate of the appointment of the assignee shall be registered.

Evidence by assignees in particular actions.

When the assignees have proved their title to sue in that character, they proceed to prove the cause by action. In some instances, the proof and grounds of defence are (*d*) just the same as if the action had been brought

By sec. 29, it is enacted that a certificate of the appointment of such assignees, purporting to be under the seal of the court of bankruptcy, shall be received in evidence without further proof. The stat. 6 G. 4, c. 16, s. 98, exempts all commissions, conveyances and instruments, relating to the estates of bankrupts, from stamp duty, from Sept. 1, 1825.

(*d*) The assignees of *A.* & *B.* cannot recover where *A.* & *B.*, by reason of the fraud of *A.*, could not have recovered had not the bankruptcy taken place. *Jones* v. *Yates*, 9 B. & C. 532; and see *Kymer* v. *Larkin*, 5 Bing. 71. An admission by a defendant before commissioners of bankrupt, that he had received a sum of money on account of the bankrupt, will not support a count on an account stated with the assignees, for he does not admit that the money remains in his hands. *Tucker* v. *Barrow*, 7 B. & C. 623. The petitioning creditor's debt accrued on the 4th April, previous to which, as well as subsequently, acts of bankruptcy had been committed, and goods had been sold in three parcels, two before the 4th of April, and the third on the 9th; held, in trover by the assignees, that they could only recover in cases where the bankrupt himself might impeach the transaction, unless the delivery were subsequent to the act of bankruptcy after the petitioning creditor's debt accrued, and that they were entitled only to recover in respect of the third parcel. *Ward* v. *Clarke*, 1 M. & M. 497. The defendant claiming a lien on the deeds of a bankrupt, had extorted a mortgage of other premises belonging to the bankrupt's brother, as a consideration for giving them up; held, that the assignees could not maintain any action against the defendant, as for a payment extorted from the bankrupt. *Noble* v. *Kersey*, 4 C. & P. 90. By the contract of sale of several pipes of wine lying in a bonded warehouse, the vendee was bound to pay the duty, and he was only entitled to receive them by the delivery order, on payment thereof; the obligees to the Crown were called upon to pay the duty, and were repaid by the vendors; held, that the assignees of the vendee were precluded from demanding the wine before they had repaid those sums, and that the fact of the bankrupt having been charged with the warehouse rent did not make the possession of the warehouseman the possession of the bankrupt. *Wines* v. *Hassall*, 9 B. & C. 372. A creditor, in order to relieve the goods of a party become bankrupt, taken in execution, paid the amount directed to be levied to the sheriff, with notice of a docket having been struck, directing him to retain the money in his hands; the assignees afterwards repaid him the amount, and sued the sheriff for money had and received; held, that as the assignees did not exist at the time, and as the money paid was not their money, they could not maintain the action. *Semble* the rule *omnis ratihabitio*, &c. cannot be carried so far as to give effect to acts done when the ratifying parties did not exist. *Bucker* v. *Booth*, 1 M. & M. 518. Where bankers were, by the terms agreed upon, to discount only such indorsed bills remitted to them as should be necessary to cover acceptances becoming due, held that they could not, after having dishonoured acceptances, discount a bill which had been so remitted, as they had no right to discount it without also executing the trust reposed in them, and that their assignees could not retain such bill against the petitioners. *Ex parte Frere*, 1 Mont. & M. 263. The defendant in April, upon an advance of money, received the title-deeds of an estate about to be purchased by the mortgagor, untainted with any usurious consideration, and previous to the conveyance of the estate insisted upon the mortgagor purchasing goods at a price above their value as a bonus, or otherwise he would not continue the mortgage; held, that the original possession of the title-deeds being good, gave him a right to the estate whenever it should be conveyed to the mortgagor, and that the assignees of the latter could not maintain trover, even for the latter conveyance. *Wood* v. *Grimwood*, 10 B. & C. 679. Assignees do not claim in strictness *under* the bankrupt, but adversely to him, and by operation of law. *Gould* v. *Shoyer*, 6 Bing. 738. See 8 B. & C. 448. App. Vol. II. tit. APPROPRIATION. Where the bankrupt became tenant to the defendant under an agreement for a lease, and was distrained on by the superior landlord in consequence of the defendant's neglect to satisfy the rent, held that the assignees were entitled to sue in an action on the case for damages sustained by the bankrupt in consequence of such distress, as upon a breach of an implied agreement for quiet enjoyment; and that they might sue in case or assumpsit. *Hancock* v. *Caffyn*, 8 Bing. 358. Where the bankrupt had borrowed of a third party a carriage, and lent it to the defendant, by whom it was broken and damaged, and the owner proved the amount of the damage under the bankruptcy, although no dividend was ever paid, held that the assignees were entitled to maintain the action for damages, but only to recover nominal damages. *Porter* v. *Varley*, 9 Bing. 93. Where one of the defendants, having become possessed of shares in a mining company, by the regulations of which it was necessary for him to sign

by the trader himself(*e*); and there is nothing in the evidence which is *peculiar* to bankruptcy, except, indeed, that the bankrupt himself, after having obtained his certificate and released the assignees, is a competent witness(*f*).

Trover.

Where trover is brought by the assignees on a conversion after the bankruptcy, though before the commission, it is unnecessary to prove an actual demand, since the property vests in the assignees by relation, so as to avoid all mesne acts(*g*).

But by the bankruptcy an immediate and premature end is put to all transactions between the bankrupt and those with whom he dealt, and a new interest arises on the part of the creditors, by which the rights of the parties are much varied.

Evidence peculiar to bankruptcy.

Evidence on the part of the assignees, peculiar to cases of bankruptcy, is frequently necessary.

1st. To show that the trader, at the time of the bankruptcy, was in possession, &c. as *reputed owner*.

2dly. That the right to particular property *vested* in the bankrupt by delivery, &c., so as to pass to his assignees.

3dly. To show the right of the assignees in *disaffirmance* of some act of disposition by the bankrupt.

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1. That the bankrupt, at the time of the bankruptcy, had the possession, &c. of the goods as *reputed owner*.

By the statute 6 Geo. 4, c. 16, s. 72, it is enacted, that if any bankrupt(*h*),

the deed of association and receive a certificate before a certain day; and he residing in the country, directed his son, the other defendant, to sign the deed in his own name and receive the certificate, which he accordingly did, and after his father's bankruptcy sold them and paid over the whole proceeds to his father, before any demand by the assignees; held, that as after the execution of the deed the father never had any legal property in the shares, and if the assignees had obtained possession of the certificate they could only have compelled an assignment by the son in equity, they could not maintain trover for the certificate. *Dawson* v. *Rishworth*, 1 B. & Ad. 574. The plaintiffs put up the bankrupt's goods to sale, and amongst them, some stereotype plates, which were at the time in the defendant's hands, the defendant claiming a lien thereon, were included by him in the sale, but the assignees refused to authorize it; they however afterwards signed the catalogue, to exempt them from the auction duty: held, that this was not to be deemed an adoption of the sale, so as to defeat their right to maintain trover against the defendant for the goods; held also, that in respect of a modern trade, like that of stereotype printing, there could be no general usage to support the claim of a general lien on the plates, not being manufactured by him, but only sent to print from. *Bleaden* v. *Hancock*, 1 M. & M. 465. Money had and received to the use of the assignees, where the proper form of action; see *Simpson* v. *Sykes*, 6 M. & S. 295. Assignees under the 6 Geo. 4, c. 16, may maintain an action for unliquidated damages which have accrued before the bankruptcy, by non-performance of a contract. *Wright* v. *Fairfield and others*, 2 B. & Ad. 727. Where bills were delivered to the defendant by a bankrupt, with the view of giving a fraudulent preference, and the amount was received after the bankruptcy, held that the assignees could not recover in trover without proving a previous demand and refusal; the receipt of the money was not in itself a conversion. *Jones* v. *Fort*, 9 B. & Cr. 764.

(*e*) They may adopt and rely upon a contract made by the bankrupt subsequently to his bankruptcy. *Butler* v. *Carver* and others, 2 Starkie's C. 434. The assignees may either enforce or reject such a contract at pleasure. If a bankrupt after his bankruptcy sell goods, the assignees may bring either *trover* or *assumpsit* for the value. *Hussey* v. *Feddall*, 3 Salk. 59; Holt, 95; 12 Mod. 324.

(*f*) Vide *infra*, 192.

(*g*) *Kiggill* v. *Player*, 1 Salk. 111; B. N. P. 41; 2 Starkie's C. 306. Before the late statute, where the assignees sought to impeach a delivery by the bankrupt, as made in contemplation of bankruptcy, it was necessary to prove an actual demand. *Nixon* v. *Jenkins*, 2 H. B. 135; but as such a delivery is now void, being an act of bankruptcy, a demand seems now to be unnecessary.

(*h*) The statute does not apply to property which comes into the bankrupt's possession after the act of bankruptcy. *Lyon* v. *Weldon*, 2 Bingh. 334.

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at the time (*i*) he becomes bankrupt, shall, by the consent and permission of the true owner (*j*) thereof, have in his possession (*k*), order, or disposition (*l*), any goods or chattels (*m*), whereof he was *reputed*

(*i*) Goods which have subsequently come into his possession are not within the statute. *Lyon* v. *Weldon*, 2 Bing. 334. So if taken out of the bankrupt's possession *before* the act of bankruptcy. *Jones* v. *Dyer*, 15 East. 21. *Arbouin* v. *Williams*, M. & M. 72. It has been held at Nisi Prius, that a removal on the same day with the act of bankruptcy would not take the case out of the statute. *Arbouin* v. *Williams*, 72, *sed. qu.* It has been held that a demand of the goods before bankruptcy was sufficient. *Smith* v. *Topping*, 5 B. & Ad. 674.

(*j*) The consent of a person who was permitted by the true owner to deal with the goods as his own is not sufficient. *Fraser* v. *Swansea Canal Company*, 1 Ad. & Ell. 355.

(*k*) On a loan, the dock tickets of tallow in the docks were deposited by the borrower; these had been taken originally not in his own name, but in that of another, as a trustee (for secresy in the trade), whose name was indorsed on the tickets without his knowledge or interference, and the goods remained in his name at the docks; held, upon his becoming bankrupt, that never having had possession of the tickets, without the production of which the tallow would not have been delivered to him or to his order, they were not in his reputed ownership within the statute. *Ridout* v. *Alder*, 1 Mont. 103. After the death of one partner, the survivors accepted, by way of a compromise, securities for a debt due to the original firm, and afterwards became bankrupt; held, that such securities were property in their order and disposition, within the 6 Geo. 4, c. 16, s. 72, for the benefit of the creditors of the surviving partners, but that goods purchased by the original firm jointly with other firms, and remaining in the possession of the latter, were not within the statute. So of goods shipped in the life-time of the partner, but returned after his death; and of a bill of lading sent to the holder of a bill not paid, and in his hands at the time of the bankruptcy. So goods sent by a debtor to the partnership after the death of the partner, and at the time of the bankruptcy in the possession of an agent of the partnership, who claimed a lien thereon for freight. So a plantation estate mortgaged to the partnership, but not conveyed until after the death of the partner, and at the time of the bankruptcy in the possession of the survivors; except as between the partners, the real estate of a partnership retains its original character. *Ex parte Taylor*, 1 Mont. 240. Upon a party being admitted as a dormant partner, it was agreed that the stock, debts, &c. should form the new partnership stock, that he should receive a certain per-centage on his capital, but should not interfere, and the firm was carried on as before; upon their bankruptcy, held that the creditors of the old firm were entitled to have the stock, &c. considered as within the *order and disposition* of the two original partners, to be administered as their separate estate, although some of the creditors had notice of the dormant partner. *Ex parte Jennings*, 1 Mont. 45.

(*l*) As to the effect of these words, see below.

(*m*) Under the statute 21 J. 1, c. 19, book-debts, bills of exchange, and choses in action, are within this description. 1 Wilson, 260. *Ryall* v. *Rolle*, 1 Ves. 348; 1 Atk. 165. *Hornblower* v. *Proud*, 5 B. & A. 327. The assignee of a simple contract debt is deemed to have the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. *Burke* v. *Lee*, 1 A. & E. 804. So a freight assigned, and notice having been given to the party who is to pay it, is no longer in the order and disposition of the assignor. *Douglas* v. *Russell*, 4 Sim. 524; 1 M. & K. 488. An Act made canal shares personal property, and transmissible according to printed forms in the form of a conveyance; held, per V. C. Shadwell, that they were not to be considered as goods and chattels generally, but merely for the purposes mentioned in the Act, viz. to representatives, and were not within the clause of reputed ownership. But the judgment was reversed on appeal. *Ex parte Lancaster Can. Co.*, 1 Mont. 116. And see *Vauxhall Br. Co.*, 1 Gl. & J. 101. *Nelson* v. *London Assurance Co.*, 2 S. & S. 282. Shares in a newspaper, *Longman* v. *Tripp*, 2 B. & R. 67. The bankrupt, previous to his bankruptcy, effected policies of insurance on his life, which he assigned, and delivered over the policies; the assignee gave no notice of the assignment to the office until after the bankruptcy; it was held, that the policies remained in the order and disposition of the bankrupt, and passed to his assignees. *Ex parte Colvill*, 1 Mont. 110.

The wife being possessed of gas shares, the bankrupt pledges the certificates as a security for advances; no notice having been given to the company until after the act of bankruptcy, the shares are within his order and disposition. *Spencer, ex parte*, 3 Mont. & Ayr. 697. The bankrupt had deposited with *A. B.* as a security for a loan, shares in a foreign mining company, accompanied with an agreement to complete the transaction when required, and he communicated such deposit to one

owner (*n*), or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission; provided, that

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of the directors, who communicated it to the board before the act of bankruptcy committed; *A. B.* afterwards sealed up the shares, and entrusted them to the bankrupt to keep in his iron safe for better custody, where they remained until three weeks before the bankruptcy, when they were delivered back; held, not to be within the order and disposition of the bankrupt at the time of his bankruptcy; *semble*, shares of a company, possessing lands abroad for the purposes of trade, are not to be deemed real property. *Ex parte Richardson*, 3 Deac. 496; and 1 Mont. & Ch. 43. Where railway shares were deposited by the bankrupt's partner with bankers, as security for acceptances by a third party, and for whom the bankers had discounted them, and who, being managing director of the company, was informed at the time of renewing the bill that the certificates of the shares had been so deposited; held, that as the bankrupt had parted with the possession of them, and that, as transfer could be made without the authority of the party for whose use they had been so deposited, the bankrupt was not to be deemed the reputed owner, and the shares were not in his order and disposition. *Ex parte Harrison*, 3 Deac. 185; and 3 Mont. & Ayr. 596. Where the same party was secretary to two offices, with one of which shares were deposited; held not sufficient notice of the transfer of the bankrupt's interest to prevent the claim of reputed ownership. *Bignold, ex parte*, 3 Deac. 151; and 3 Mont. & Ayr. 477. Where certificates of shares of a foreign bank were transmitted to the bankrupts on a contract for joint purchase of them, and clothed with a trust to apply the proceeds, when disposed of, to retire bills drawn for the purchase; held, that they were not within the order and disposition as the property of the bankrupt, and did not therefore pass to the assignees. *Brown, ex parte*, 3 Deac. 91; 3 Mont. & Ayr. 472. Where on a joint commission against *G.* and *L.*, the latter obtained his certificate, and in consideration of undertaking to pay his creditors in full within a certain time, obtained a deed poll to enable him to supersede, and they also executed a power of attorney to enable *F.* to receive the dividends for the use of *L.*, and do what was requisite to enable *L.* to supersede. The consideration was never performed, and afterwards a second commission issued against *L.*; held, that the creditors, and not *F.*, were entitled to receive the dividends, and that the reputed ownership and order and disposition of them was not in the bankrupt. *Smithers, ex parte*, 3 Mont. & Ayr. 693. So are mortgages and sales upon condition of goods and chattels as well as absolute sales. *Hornblower* v. *Proud*, 2 B. & A. 327. And so is a mortgage by one partner to another of his moiety of his stock in trade, if the partner so mortgaging remain in possession as the visible proprietor of the moiety. *Ibid.* *A.*, the owner of lease of house and fixtures, mortgages both and becomes bankrupt; the fixtures do not pass to assignees as goods and chattels. *Boydell* v. *M'Michael*, 1 C. M. & R. 77. All goods and chattels are within the statute. Ships *ex parte Burn*, 1 J. & W. 378. *Stephens* v. *Sale*, cited 1 Ves. 352. Although the decisions are not uniform on the subject, the general rule seems to be that fixtures are not within the words goods and chattels. In the cases of *Coombs* v. *Beaumont*, *Clarke* v. *Crownshaw*, 3 B. & Ad. 804, Parke, J. intimated that the distinction with respect to fixtures as between landlord and tenant, did not prevail under the statute. In *Trapps* v. *Harter*, the Court of Exchequer held that fixtures might pass to the assignees as personal property. This seems, however, to have been overruled by the case of *Boydell* v. *M'Michael*, 1 C. M. & R. 177, and is opposed to the current of authorities, in which it has been held that steam-engines, boilers (*Hubbard* v. *Bagshaw*, 4 Simons, 326), vats, stills, and utensils (*Horne* v. *Baker*, 9 East, 215; *Clarke* v. *Crownshaw*, 3 B. & Ad. 804), if fixed to the freehold, do not pass to the assignees. And see *ex parte Lloyd*, 1 Mont. & Ayr. 494. *Ex parte Belcher*, 2 Mont. & Ayr. 160. *Ex parte Wilson*, *Ibid*, 60. In *Hubbard* v. *Bagshaw*, the plate of a steam-engine (which formed no part of the working apparatus), was fixed to the freehold; every other part was secured by bolts and screws, and might be removed without injury to the building; but it was held that the steam-engine did not pass.

(*n*) As to reputed ownership, see the cases cited below. Where household furniture and stock, in pursuance of an agreement of sale of a house and furniture, were left in the possession of the seller three months after the sale, it was held that they did not pass to his assignees, the *sale being notorious* in the neighbourhood. *Muller* v. *Moss*, 1 M. & S. 335. Where on the contrary a house was let on a lease containing a covenant for its determination on the lessee's committing an act of bankruptcy, and by another deed the furniture was demised subject to a similar covenant, and the jury found that the lessee was the reputed owner of the furniture, it was held that it passed to his assignees. *Hickenbotham* v. *Groves*, 2 C. & P. 492.

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nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made *as a security* for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act of Parliament made in the fourth year of his present Majesty, intituled, *An Act for the Registering of Vessels* (*o*).

The obvious intention of this provision (*p*) is to prevent a trader from acquiring a false and delusive credit to the deception of others, by an *apparent* property in goods which do not belong to him.

Whether particular property was in the possession of the bankrupt at the time of his bankruptcy, as the *reputed owner*, is usually a question of fact under the particular circumstances of the case (*q*).

(*o*) See the stat. 4 Geo. 4, c. 41. If a vendee of a ship neglect to take possession after the arrival in an English port, and notice thereof, the property passes to the assignees. *Mair* v. *Glennie*, 4 M. & S. 240. *Richardson* v. *Campbell*, 5 B. & A. 196. An alteration in the register is no notice to the world. *Kirkley* v. *Hodgson*, 1 B. & C. 588. And it gives no validity to a transfer otherwise invalid. *Robinson* v. *Macdonnell*, 5 M. & S. 230; and *Monkhouse* v. *Hay*, 4 Moore, 549; and *Hay* v. *Fairbairn*, 2 B. & A. 193. But if a vendee of ship registered in his name take possession before an act of bankruptcy committed by the vendor, the property is in the vendee. *Robinson* v. *Macdonnell*, 2 B. & A. 134.

(*p*) The language is nearly the same with that of the stat. 21 Geo. 1, c. 19, s. 11.

(*q*) In *Walker* v. *Burnell*, Doug. 303, Lord Mansfield, C. J. left it as a question for the jury, whether *Biner*, the bankrupt, was in possession at the time of his bankruptcy. And per Buller, J. questions of this kind have more of fact in them than of law. The sort of possession, disposition, &c. are facts to be proved, and are for the consideration of the jury. *Ibid.* And Eyre, C. J. in *Lingham* v. *Biggs*, 1 B. & P. 82, approved of Mr. J. Buller's observation, and he added, that where once it is ascertained whether the bankrupt was the *reputed owner* or not, there is little difficulty in deciding. From that *reputed ownership* false credit arises, from that false credit arises the mischief, and to that mischief the remedy of the statute applies. But it may be a question of law. A tenant had the possession of machinery and implements for working a colliery, under a demise of the colliery, and had merely a qualified property in them, subject to the terms of the lease. And although the jury found that the tenant at the time of his bankruptcy was the reputed owner, and found for the plaintiffs (the assignees), the court directed a verdict to be entered for the defendant, on the ground that in point of law the tenant never had a possession, order, and disposition, &c. within the stat. 21 J. 1, c. 19. Note, that the implements and machinery were to be valued when the lessee yielded up the premises, and the difference between that and a former valuation to be paid by the landlord and tenant, according as the second valuation was greater or less than the first. The lease was determined by forfeitures, and it was held that the landlord was entitled to the whole without valuation. *Storer* v. *Hunter*, 3 B. & C. 468. Note, that this case was distinguished from those of *Lingard* v. *Messiter*, 1 B. & C. 308, and *Kirkley* v. *Hodgson*, 1 B. & C. 588; on the ground that in those cases the bankrupt had at one time been the owner of the property. In the above case of *Walker* v. *Burnell*, Buller, J. observes: possession of goods for sale in a shop may be within the statute, but the possession of furniture in a house is no more evidence of a right to that furniture than of a right to the house.—Where goods are sold, but remain in the possession of the vendor, they will pass to his assignees on his bankruptcy, unless something be done to render the change *notorious to the public at large*. In *Knowles* v. *Horsefall*, 5 B. & A. 134, where *A.*, a spirit-merchant, sold to *B.* several casks of brandy, some of which were in his own vaults, and others in the vaults of a regular warehouse-keeper, and the casks were to remain there till the vendee could conveniently remove them; and *A.* became bankrupt before any removal or notice to the warehouse-keeper; it was held that they passed to the assignees. Although it was notorious the parties carried on the wine trade at the place where the parties resided, that such sale had taken place, and although the purchaser had put a mark upon them; *secus*, where the goods were left in the possession of the bankrupt only till they could be conveniently shipped, 1 Atk. 185. In *Thackwaite* v. *Cock*, 3 Taunt. 487, it was held, that hops which were sold, but remained in the vendor's possession till his bankruptcy, the vendee paying rent, passed to the assignees, although it was according to the custom of the particular trade that they should so remain. But where wine sold by the bankrupt was, for the purchaser's convenience, bottled and deposited in the bankrupt's cellar, set apart in a particular bin marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the pur-

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Where the assignees bring the action to recover the amount of the goods which the defendant claims as his own property, either by virtue of a sale to him by the bankrupt, or as being originally his own, it is incumbent on the assignees to prove that the goods remained in the possession of the bankrupt, he being still a trader (*r*) up to the time of the bankruptcy (*s*), and that he was the *reputed owner*, and appeared to have the order and disposition of the goods. The mere possession of goods in a shop, in the ordinary course of business, at the time of the act of bankruptcy, is *primâ facie* evidence for the assignees under the statute (*t*). Where, according to the course and usage of dealing, in respect of a particular subject of occupation (*e. g.* a colliery), articles used may either be the property of the owner or lessee; mere possession is not, it seems, a sufficient foundation for presuming ownership in the occupier (*u*); in such a case, possession ought not to raise such an inference in the mind of any cautious person. And where the bankrupt has been once proved to be the owner of goods, and to be in possession at the time of the bankruptcy, the *onus* of proving a change of possession lies on the party who claims against the assignees (*x*).

Proof that the former owner of a ship had the possession, order, and disposition of the vessel, up to the time of his bankruptcy, was held to be sufficient to vest the property in the assignees, although he had assigned his interest, and the transfer had been duly registered, according to the register acts (*y*). So (before the late statute) in the case of a joint interest in a ship, mortgaged by the bankrupt, where he continued in the management of her, together with the part-owners, and acted as a visible part-owner till he became a bankrupt (*z*).

Where the property consists of household furniture, stock in trade, or utensils in trade, it is sufficient that the bankrupt remained in possession of the house, and carried on the trade as the apparent owner of the stock and utensils, up to the time of the bankruptcy. As, where a creditor took the household furniture, and the articles belonging to a coffee-house, under an execution against *B.*, and then let them to *B.*, who covenanted not to remove them without the owner's consent, and permitted *B.* to remain in

chaser, it was held not to be within the statute. *Ex parte Marrable*, 1 G. & J. 402. *Carruthers* v. *Payne*, 5 Bing. 270. Where goods in the possession of an agent or company are transferable by means of warrants, a transfer by delivery of the warrant usually amounts to a complete transfer of the possession. See *Lucas* v. *Dorrien*, 1 Moore, 29; and *infra*, tit. VENDOR AND VENDEE. So as to wines in the London Docks. *Ex parte Davenport*, M. & B. 165. As to machinery and utensils annexed to the freehold, see further *Trappes* v. *Harter*, 3 Tyr. 603. *Boydell* v. *M'Michael*, 1 C. M. & R. 77. Where a trader gave a creditor an order to receive money in the hands of *A.*, and directed *A.* to transmit it to the creditor, and whilst it was in the hands of the carrier the trader became bankrupt, Ld. Ellenborough held that the case was within the statute. *Hervey* v. *Liddiard*, 1 Starkie's C. 123. The possession of a pawnee is not the possession of a bankrupt pawner. *Greening* v. *Clarke*, 4 B. & C. 316.

(*r*) *Gordon* v. *East India Company*, 7 T. R. 228.

(*s*) 15 East, 21.

(*t*) See the observation of Buller, J. in *Walker* v. *Burnell*, Doug. 303, *secus*, (*semble*,) as to the possession of furniture in a house. *Ibid.*

(*u*) Per Abbott, C. J. in *Stone* v. *Hunter*, 3 B. & C. 376. And see *Thackwaite* v. *Cock*, 3 Taunt. 487.

(*x*) *Lingard* v. *Messiter*, 1 B. & C. 308. *Clark* v. *Crownshaw*, 3 B. & Ad. 804.

(*y*) *Hay* v. *Fairbairn*, 2 B. & A. 134. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*z*) *Hall* v. *Gurney*, Co. B. L. 5th edit. 342. See the stat. 6 Geo. 2, c. 5, s. 72. It seems to be now settled that the share of a dormant partner goes to the assignees. *Ex parte Enderby*, 2 B. & C. 389. And see *Ex parte Dyster*, 2 Rose, 256. *Contra*, *Coldwell* v. *Gregory*, 1 Price, 119. So a ship registered

Reputed ownership.

possession as before (*a*). After the seizure of *B.*'s stock in trade upon a *fi. fa.* by the trader's shopmen, under a warrant on a Saturday, they carried away the key, but opened the shop again on Monday morning, and although *B.* did not interfere, business was carried on, apparently, as usual, and in the evening of the Monday *B.* committed an act of bankruptcy; it was held that the goods passed to the assignees, notwithstanding the execution, since the possession of the servants was the possession of the master (*b*).

So where *B.* a brewer, being in partnership with *A.*, mortgaged a moiety of the stock in trade, utensils, debts, &c. to *C.* in trust for *A.*, but continued in possession, and acted as *A.*'s partner till he, *B.*, became bankrupt; for being in possession, and acting as partner, receiving debts, &c. *B.* was as much the reputed owner as *A.* (*c*). So where *A.* sold a dyer's plant to *B.*, and at the end of a year *B.* covenanted to deliver up the plant, in consideration of *A.*'s cancelling *B.*'s unpaid notes, which he had given to *A.* in payment for the plant; and it was stipulated that *A.* should let the plant to *B.* for a term, with a proviso that *B.* should deliver up the plant, and that *A.* might take possession of it upon the failure in payment of rent. There was a memorandum that *B.* had given possession to *A.* by the delivery of a single winch; *B.* remained in possession till his bankruptcy, and it was held that the property vested in the assignees (*d*).

A., a trader and an officer in the East India Company's service, assigned his privilege of shipping goods to England to *B.*, but (such an assignment being prohibited), the goods were shipped, entered, warehoused, and sold in *A.*'s name, and the proceeds were carried to his account; but before he received them from the company he became a bankrupt; it was held that the assignees were entitled to such proceeds (*e*). So where *A*, a distiller, leased to *B.* (his former partner,) and *C.* a distill-house, with the stills, vats and utensils, which had before been used by *A.* and *B.*, and after this *B.* and *C.* carried on business as partners, in possession of the premises and utensils, till they became bankrupt; the court were of opinion that the bankrupts had, at the time of the bankruptcy, acquired the reputed ownership of the vats and utensils (which were moveable), and had thereby acquired the real ownership for their creditors (*f*).

Where *A.* who kept a public-house, asserted that she was married to *P.*, and entered his name at the Excise Office, with a note in the margin

in the name of one owner, but suffered to be in the possession, order, and disposition of the partnership, passes to the assignees. *Ex parte Burn*, 1 J. & W. 378.

(*a*) *Lingham* v. *Biggs*, 1 B. & P. 82. Where a landlord distrained upon the goods of his tenant, which he took at the appraisement, and left the goods in the possession of the wife of the tenant, who shortly after became bankrupt, after which the landlord again distrained as for the former rent; held, that the goods were in the order and disposition of the bankrupt, and passed to the assignees, and that the rent having been satisfied, the goods could not be again distrained. *Ex parte Shuttleworth*, 1 D. & Ch. 223. And see *Toussaint* v. *Hartop*, Holt's C. 335. *Doker* v. *Hasler*, 4 Bing. 479. See *Longman* v. *Tripp*, 2 N. R. 67, as to the publisher's right to a newspaper.

(*b*) Per Ld. Ellenborough, C. J. *Jackson* v. *Irwin*, 2 Camp. 49. And see *Horne* v. *Baker*, 9 East, 215; *Thackwaite* v. *Cock*, 3 Taunt. 487. But see *Coldwell* v. *Gregory*, 1 Price, 119. So, in *Yates* v. *Powell*, *cor.* Abbott, L. C. J. sittings after T. T. 1823, the goods had been taken in execution twelve months before at the suit of the trader's brother; but the sheriff remained in possession one day only, and then the bankrupt's son took possession, and carried on the business, bought goods, &c.

(*c*) *Ryall* v. *Rolle*, 1 Ves. 248; 1 Wils. 260; 1 Atk. 165. *Toussaint* v. *Hartop*, Holt's C. 335.

(*d*) *Bryson* v. *Wylie*, 1 B. & P. 83, n.

(*e*) *Gordon* v. *The East India Company*, 7 T. R. 228.

(*f*) *Horne* v. *Baker*, 9 East, 215.

"married," and *P.* afterwards had the licence, and continued in possession of the house and goods till he became a bankrupt, the court held that *A.* could not, after asserting that *P.* was her husband, claim them as her sole property (*g*). So where the trustees for the wife of *B.* and her children by a former husband, permitted *B.* to remain in possession of the goods (on condition that he should pay to them certain sums for the use of the children,) until the evening before he committed an act of bankruptcy, the case was held to be within the statute (*h*). Reputed ownership.

Evidence of reputation is admissible to prove the defendant to be the *reputed* owner, where the reputation is supported by facts; but bare reputation, unsupported by facts, although perhaps *admissible*, is *insufficient* evidence to prove an apparent ownership under the statute (*i*).

The presumption arising from the bankrupt's *possession* of property at the time of the bankruptcy is frequently capable of being answered and explained away by evidence which shows that possession was given up by the bankrupt, as far as the nature of the case admitted; or that there was not such a permissive possession as is contemplated by the statute. For the *mere possession* of the property by the bankrupt is not in itself sufficient to entitle the assignees to claim it for the creditors. Proof in answer.

Where there is a possession, without any wilful permission on the part of the owner which may delude creditors, the case is not within the statute; as where, *first*, such possession is delivered as the circumstances of the case will permit; or, *secondly*, where the bankrupt has possession as executor (*k*) or administrator; or where the husband has possession of the separate property of the wife (*l*); or has a mere temporary custody of it; or has the possession for such a purpose as excludes the presumption of ownership, and consequently where no delusion can arise; as where the bankrupt has possession as factor (*m*), or as bailee, or as a banker for a specific purpose. *Thirdly*, the owner may show that in point of fact the bankrupt was not the *reputed owner*. *Lastly*, the defendant may show that the possession was adverse (*n*).

1st. Where a ship or cargo is sold whilst the ship is at sea, then, since actual possession cannot be taken before her return, it is sufficient if in the meantime the grand bill of sale and bill of lading be transferred, for there was no other way of delivering possession (*o*). So where a trader, as a security for money lent, assigned the bills of lading and policies of insurance of the cargo of a ship at sea, and the policies were indorsed to the lender, the trader became bankrupt, and Lord Hardwicke, C. held, that since every thing which could show a right to the cargo had been delivered over to the defendant, (against whom the assignees had filed a bill) the bankrupt could no longer be said to have the order and disposition of it (*p*). So where a trader, as a security for a debt due to the defendant, agreed to assign the cargo of a ship homeward bound, and to deposit the policy of insurance on the goods with the defendant, and to indorse and deliver the bills of lading That actual possession cannot be given.

(*g*) *Mace* v. *Cadell*, Cowp. 232.

(*h*) *Darby and others* v. *Smith*, 8 T. R. 82.

(*i*) *Oliver* v. *Bartlett*, 1 B. & B. 269. So evidence of a contrary reputation is evidence for the defendant. *Gurr* v. *Britton*, Holt's C. 327. And see *Muller* v. *Moss*, 1 M. & S 335; *Lingham* v. *Biggs*, 1 B. & P. 82; *Horne* v. *Baker*, 9 East, 215.

(*k*) *Ex parte Marsh*, 1 Atk. 159; 3 P. Wms. 187; 3 Burr. 1366.

(*l*) *Jarman* v. *Wooloton*, 3 T. R 618.

(*m*) *Ex parte Chion*, 3 P. Will. 187, n. Cullen's B. L. 225.

(*n*) *Smith* v. *Topping*, 5 B. & Ad. 674.

(*o*) *Brown* v. *Heathcote*, 1 Atk. 160. *Atkinson* v. *Maling*, 2 T. R. 462. *Lempriere* v. *Pasley*, 2 T. R. 485; *supra* 15 note (*s*), 156, note (*o*).

(*p*) *Brown* v. *Heathcote*, 1 Atk. 160.

to him as soon as they arrived; the policy and letters of advice were accordingly deposited with the defendant, and the bill of lading was indorsed to him as soon as it arrived, but after an act of bankruptcy committed by the trader. The defendant obtained possession of the cargo, and on trover brought by the assignees, the court held that the case of *Brown* v. *Heathcote* strongly applied; since, although in that case there was an assignment of the bill of lading, and in this, only an agreement to assign, this circumstance made no difference, since in both cases the title was merely an equitable one (*q*).

Where the ship was in an Irish port at the time when the owner mortgaged her, and delivered all the deeds, &c. to the mortgagee, and during the space of a month the mortgagee might have taken possession of her in the Irish port, it was held, that the delivery of the muniments constituted a sufficient possession, and that the mortgagee was not bound to take possession of her in a foreign port (*r*).

Where *A.*, a trader, deposited with *B.* a bill of sale, of a sixteenth part of a ship not at sea, and there was no evidence that the trader had acted as owner after the deposit, Lord Thurlow, C. held, that *B.* was entitled to the produce of the bill of sale against the assignees of *A.*, who had become bankrupt; since in the case of assignments of *shares* of ships this seemed to be the only way of delivering possession (*s*).

Possession as executor, &c.

2dly. It has been held, that where the bankrupt has possession of the goods as an executor or administrator, or under a trust (*t*), the case is not within the statute (*u*); so that where an executor becomes bankrupt, the commissioners cannot seize even money which belonged to the testator, if it can be specifically distinguished from the property of the bankrupt himself (*x*). Neither does it extend to a possession by the bankrupt as a trustee for another; as, where a trader bought South Sea stock for *I. S.* in his own name, but entered it in his book as bought for *I. S.*, after which he became bankrupt, it was held that *I. S.* was entitled to the stock (*y*). So where the husband has possession of the separate property of the wife, settled in

(*q*) *Lempriere* v. *Pasley*, 2 T. R. 485

(*r*) *Ex parte Batson*, 3 Bro. C. C. 362. See also *Atkinson* v. *Maling*, 2 T. R. 462.

(*s*) *Ex parte Stadgroom*, 1 Ves. jun. 163. See also *Manton* v. *Moore*, 7 T. R. 67.

(*t*) *Shaftesbury, Earl of*, v. *Russell*, 1 B & C. 666, where the Duke of Marlborough, as the owner of an estate, had the use of furniture which was settled in trustees in trust to permit the owner of the estate to use it, and it was held, that on the bankruptcy of the duke the furniture would not have passed to his assignees. So where a testator directed that, in case his son should carry on his trade, his house and furniture should not be sold, but that his trustees should permit his widow and children to reside in the dwelling-house, and have the use of the furniture, it was held that the furniture did not pass to the assignees of the mother and son. *Ex parte Martin*, 2 Rose, 331. Stock transferred by the accountant-general into the name of the mortgagee without the privity of the mortgagor, does not pass. *Ex parte Richardson*, Buck. 480. But by true owner is meant legal owner; and where a trustee sold, and let the purchaser into possession before payment, the property was held to pass. *Ex parte Dale*, Buck. 365. In general, property which the bankrupt holds as trustee only, does not pass to his assignees. *Winch* v. *Keeley*, 1 T. R. 619. *Taylor* v. *Plumer*, 3 M. & S. 576. *Smith* v. *Pickering*, Peake, 50. *Ex parte Watkins*, 1 Mont. & Ayr. 689.

(*u*) *Ex parte Ellis*, 1 Atk. 101; 4 T. R. 629. *Ex parte Marsh*, 1 Atk. 159. But if a person entitled to take out administration neglect to do so, and he becomes bankrupt, the goods pass to the assignees, although he takes out administration after the bankruptcy. *Fox* v. *Fisher*, 3 B & A. 135.

(*x*) Per Lord Mansfield, 3 Burr. 1366. 1 Atk. 101.

(*y*) By Lord Parker, C. *Ex parte Chion*, 3 P. Wms. 187. And see Lord Mansfield's observations in *Mace* v. *Cadell*, Cowp. 233.

trustees upon her before marriage (*z*). So where the bankrupt has possession as a mere factor or agent for sale (*a*). As where a carpenter receives timber to convert into a waggon (*b*); or a tailor cloth to work up into clothes (*c*). It was agreed between *F.* and *K.*, that *K.* should contract with the commissioners of the Victualling-office to do certain work in his own name; that he should have a guinea per week, and one-fourth of the clear profits, and that *F.* should supply timber for the purpose. Timber was accordingly supplied by *F.*, and was received by the King's officers in the yard where the work was to be done. *F.* was one of *K.*'s sureties, which, according to the practice as to government contracts, would not have been allowed, had it been known that he was concerned in the contract. *K.* became bankrupt, and *F.* took possession of the timber; and upon an action brought by the assignees of *K.*, it was held that the case did not fall within the statute, since there was never any sale of the timber to *K.*, nor any general delivery, so as to give him the absolute disposition of it; and the storekeepers would not have permitted *K.* himself to have sold the timber to any other person, since they considered it as delivered solely for the purpose of the contract (*d*). Possession as executor, &c.

(*z*) *Jarman* v. *Wooloton*, 3 T. R. 618. But if property be settled on the wife to enable her to carry on a separate trade, and the husband intermeddle, the property will be liable to his debts. *Ibid.* So if the bankrupt have the possession of goods which come to his wife as administratrix, where some of the next of kin are infants, they do not pass to his assignees (*Viner* v. *Cadell*, 3 Esp. C. 88); but if she takes a beneficial interest in the property, her own share passes to the assignees, who become tenants in common with her in her representative capacity. *Ibid.* The goods of a woman married to and living with an insolvent, and being ignorant that he had a former wife living, do not pass to the assignees. *Secus*, if she allow him to continue in possession after discovering the former marriage. *Miller* v. *Demetz*, 1 Mo. & R. 479. See also *Dean* v. *Brown*, 3 B & C. 336.

(*a*) Per Lord King, C. in *Godfrey* v. *Furzo*, 3 P. Wms. 186. Per Ld. Mansfield, in *Mace* v. *Cadell*, Cowp. 233. And see the observations of Lawrence, J. in *Horne* v. *Baker*, 9 East, 215. See *Atkins* v. *Barwick*, 1 Str. 165; Fort. 353; 10 Mod. 431. *Harman* v. *Fisher*, Cowp. 125. So if the factor takes notes in payment, or exchanges the goods for other goods, the notes or property do not pass to the assignees. *Whitcomb* v. *Jacob*, 1 Salk. 160. And see *Taylor* v. *Plumer*, 3 M. & S. 562. Otherwise, if the factor sells and receives the price before the bankruptcy, the principal must come in with the rest of the creditors. *Scott* v. *Surman*, Willes, 490. But if the price be not paid before the bankruptcy, but is afterwards received by the assignees, the principal may sue them. *Ib.* Goods sent on sale and return are within the statute, if the party retain them after a reasonable time for making his election has expired. *Livesay* v. *Hood*, 2 Camp. 83. *Gibson* v. *Bray*, 1 Moore, 519; 8 Taunt. 76. *Neate* v. *Ball*, 2 East, 117. *Aliter*, if a reasonable time has not elapsed, as if the goods were not received till the evening before the bankruptcy. 1 Moore, 519; 8 Taunt. 76. Where there was a custom that the purchaser of hops should leave them in the vendor's warehouse, for the purpose of sale, it was held that they passed to his assignee. *Thackwaite* v. *Cock*, 3 Taunt. 487. Where foreign merchants, through their agents, procured consignments and remitted bills to the consignees for the amount, and informed the consignors of having so done, but before payment the agents became bankrupt; held, that the latter were to be deemed agents through the whole transaction, and that, notwithstanding the claim of the agents or the consignees, the consignors were entitled to recover the bills from such agents. *In re Douglas*, 1 Mont. & Ch. (B.) 1. Where foreign merchants remitted bills to factors, who sold them and entered the amount of the price in their books to the credit of the principals, who had the right of drawing on them to the amount; held, that upon the bankruptcy of the factors the principals were entitled to the proceeds of the bills, and that the bankrupts having indorsed them in their own names, were not to be deemed the owners of them. *Ex parte Pauli*, 3 Deac. 169. And see *Scott* v. *Surman*, Willes, 405.

(*b*) *Collins* v. *Forbes*, 3 T. R. 316.

(*c*) *Ibid.*

(*d*) *Ibid.* See the observations of Lawrence, J. in *Gordon* v. *East India Company*, (7 T. R. 237), that the Court proceeded on the ground that the bankrupt had possession of the property for a *special purpose* only.

Possession as banker.

So the owner may show that a banker, at the time he became bankrupt, had possession of specific money or bills of his in his hands, not upon a general or running account between them, but for some specific purpose. The decision, however, of questions between the assignees of bankers at the time of the bankruptcy seldom, if ever, turns upon the question of reputed ownership: for it seems to be clear, that the mere possession of bills of exchange by a banker at the time of his bankruptcy, where the property and ownership remain in the customer, does not give the banker the order and disposition of them within the terms of the statute (*e*). So the mere custody by a bailee, for a specific purpose, is not within the statute (*f*).

Reputation and usage.

3dly. Notwithstanding the actual possession by the bankrupt at the time of the bankruptcy, since the fact of reputed ownership is usually a question for the jury (*g*), the defendant may show that the bankrupt was not in fact the *reputed owner*: as for instance, that there is a known usage in the bankrupt's trade to rent on hire the utensils and articles used in the trade, since there the possession and use of such utensils and articles would raise no presumption of ownership (*h*).

Where, by an agreement between the vendor and vendee of a house, it was agreed that formal possession should be given to the vendee, but that the vendor should remain in possession for three months, and the agreement was *notorious* in the neighbourhood, and formal possession was given, and the purchase-money paid, and during the three months whilst the vendor continued in the house he became bankrupt, the court held that the case was not within the statute; for during the three months the bankrupt was in of his own right as owner, and not by permission of the true owner; and because the transfer being notorious, no person was deceived; and that the fact of *reputed ownership* ought to have been found to raise the question (*i*). The defendant may also rebut the evidence to prove that the bankrupt was the reputed owner, by evidence of a contrary reputation of ownership in himself.

2dly. That the right to particular property vested in the bankrupt by delivery, &c., and passed to his assignees.

Stoppage in transitu.

The peculiar privilege which the law has conceded to the vendor of goods to a bankrupt, of stopping them in *transitu* before they come, in technical language, to the very touch of the consignee (*k*), frequently imposes upon the

(*e*) The mere custody of such bills, in order that the banker may receive money upon them when due, does not give him the order and disposition of them within the statute. See the observations of Holroyd, J. in *Thompson* v. *Giles*, 2 B. & C. 422.

(*f*) The plaintiff ordered a chariot and paid for it, and afterwards sent it back for alteration, which being delayed he sent for it six or seven times, and afterwards ordered it to be sold; whilst standing in the builder's warehouse, the latter became bankrupt; it was held, first, that it was not to be deemed within this clause of the Act, and that the assignees were not protected from an action of trover after three months from the conversion, by the stat. 6 G. 4, c. 16, s. 44; the words "any act done" not applying to the pecuniary arrangement or disposition of the bankrupt's property by the assignees, but to acts done for the purpose of taking possession thereof by the commissioners or others acting under their warrant. *Carruthers* v. *Payne*, 5 Bing. 270.

(*g*) See *Mullar* v. *Moss*, 1 M. & S. 335.

(*h*) See the observations in *Horne* v. *Baker*, 9 East, 215.

(*i*) *Mullar* v. *Moss*, 1 M. & S. 335. And see *Eastwood* v. *Brown*, 1 R. & M. 312; and *Latimer* v. *Batson*, 4 B. & C. 652; and *supra*.

(*k*) If a party contract for the purchase of goods on specific credit, and nothing be said as to the time of delivery, both right of property and possession vest in the vendee; but his right is not absolute, but liable to be defeated by his previous insolvency, before actual possession. *Bloxam* v. *Sanders*, 4 B. & C. 941. *Tooke* v. *Hollingsworth*, 5 T. R. 215; and this is on the ground of fraud upon the vendor; per Lord Kenyon. In such cases, therefore,

Stoppage in transitu.

assignees the necessity of proving, not only that there was such a delivery of the goods to an agent of the trader as would in ordinary cases vest the property in him absolutely, as by a delivery to a carrier; but also, that the *transitus* of the goods was actually completed.

Proof of title in the trader.

Whether the stoppage was in *transitu*, or was completely determined, is ordinarily a question of law (*l*). In order to raise that question, it is usually material to prove on whose risk and account the goods were sent; the character and situation of the agent in whose actual possession the goods were at the time of stoppage (*m*); by whom employed, and by whom to be paid; the possession, indorsement, &c. of the bill of lading (*n*); the place and object of destination (*o*), and the nature of the acts exercised upon them in their progress (*p*), with a view to take possession of them.

Termination of transitus.

In order to show a termination of the *transitus*, it is essential to prove either an actual or constructive delivery (*q*) to the vendee or his representative.

the assignees cannot maintain trover. *Qu.* Whether default in payment at the time when the credit expires destroys the right of possession. Per Bayley, J. 4 B. & C. 948. *Semble* not, for the payment in such case is not either a precedent or concurrent consideration.

(*l*) See *Feise* v. *Wray*, 3 East, 93; *Mills* v. *Ball*, 2 B. & P. 457: 3 B. & P. 119. 469; 5 East, 175; 14 East, 308; 2 H. B. 504. Part payment does not take away the right of stoppage. (*Hodgson* v. *Loy*, 7 T. R. 440. *Feise* v. *Wray*, 3 East, 93.) Nor does the usage of carriers to insist on a lien on goods for a general balance of account between them and the consignees, at all affect the right. *Oppenheim* v. *Russel*, 3 B. & P. 42.

(*m*) If he was the mere agent of the consignor, at whose risk the goods were sent, the delivery to him would not vest any property in the consignee; and the question, whether the property was divested by a stoppage in *transitu* would not arise. See *Coxe* v. *Harden*, 4 East, 211. *Walley* v. *Montgomery*, 3 East, 585. See, as to the delivery of plate by a silversmith to an engraver, who was to be paid by the vendor, to get the vendee's arms engraved thereon. *Owenson* v. *Morse*, 7 T. R. 64. As to goods delivered by the consignor on board a ship chartered by the consignee, see *Bohtlingk* v. *Inglis*, 3 East, 381; *Inglis* v. *Usherwood*, 1 East, 515; *Coxe* v. *Harden*, 4 East, 211. To a wharfinger, *Mills* v. *Ball*, 2 B. & P. 457.

(*n*) In general, the indorsement by the consignee of the bill of lading for a valuable consideration, will devest the right of stoppage. *Lickbarrow* v. *Mason*, 2 T. R. 63; 2 H. B. 211; 5 T. R. 367. *Feise* v. *Wray*, 3 East, 93. Otherwise, where there is no consideration. *Newsom* v. *Thornton*, 6 East, 17.

(*o*) *Dixon* v. *Baldwin*, 5 East, 175. *Leeds* v. *Wright*, 3 B. & P. 320. *Scott* v. *Pettit*, 3 B. & P. 469. The general rule seems to be, that if by appointment, as between the consignor and consignee, the goods are to be sent to a particular place where they are to wait the orders of the vendee as to any further destination, the *transitus* is completed when they arrive there. Vide *infra*, note (*q*).

(*p*) The putting a mark on the goods by the assignee of the consignee, at the inn whither they were sent for the latter, held to divest the consignor's right of stoppage in *transitu*. *Ellis* v. *Hunt*, 3 T. R. 464. And see *Coxe* v. *Harden*, 4 East, 211.

(*q*) As by the delivery of the key of the warehouse in which the goods are deposited. *Ellis* v. *Hunt*, 3 T. R. 464. *Copeland* v. *Stein*, 8 T. R. 199. By payment of rent for the warehouse. *Hurry* v. *Mangles*, 1 Camp. 452; *Harman* v. *Anderson*, 2 Camp. 243. The lodgment of a delivery-note with the wharfinger. (*Ibid.*) By a part delivery, where there is no intention to separate part from the rest (*Slubey* v. *Heyward*, 2 H. B. 505; *Hammond* v. *Anderson*, 1 N. R. 69; *Ex parte Gwynne*, 12 Ves. jun. 379; *Stoveld* v. *Hughes*, 14 East, 308); by delivery at the warehouse of the vendee's agent, where no ulterior or more complete delivery is contemplated. *Leeds* v. *Wright*, 3 B. & P. 320. And see 3 B. & P. 127; *Scott* v. *Pettit*, 3 B. & P. 469. As where they are sent to an agent who, under general orders from the vendor, sends them to a packer (*Ibid*); or by an act of ownership, exercised by the vendee whilst the goods are in the hands of his agent, although they have not reached the place of ultimate destination (*Wright* v. *Lawes*, 4 Esp. C. 282); by delivery on board a ship chartered and fitted out by the vendee (*Fowler* v. *Kymer*, cited 7 T. R. 442; 1 East, 552; 3 East, 396); by reaching an expeditor, who holds them till he receives orders for their further destination (*Dixon* v. *Baldwin*, 5 East, 175); by being sent by the vendor to the ultimate place of destination, mentioned by the vendee. *Rowe* v. *Pickford*, 1 Moore, 526. The vendee usually allowed

Property in banker.

Another class in which proof of the bankrupt's title, by a change of property, belongs to the assignees, consists of cases which arise between the assignees of a banker and his customers. For the ordinary rule is, that bills and securities sent to a banker are deposited for a specific purpose, in which case they do not pass to the assignees, and consequently it lies on the assignees to prove a change of property. The general principle of law as between the banker and a customer is, that the banker stands in the situation of a *factor*; that he holds the bills of a customer transmitted before they are due, as the agent of such customer, for the purpose of obtaining payment, and with a right of lien for advances made on the credit of such bills (*r*); consequently, if a customer send bills to a banker, and they remain in specie in the hands of such banker till the bankruptcy, they continue to be the property of the customer, notwithstanding the bankruptcy (*s*).

goods brought by the defendant, a carrier, to remain at his warehouse until distributed by his orders to his customers, and the jury found that the warehouse was the final destination, held that the *transitus* was at an end, and that the vendor's right of stoppage was also gone. *Allan* v. *Gripper*, 2 C. & J. 218. The plaintiff being previously indebted to the defendants, purchased a butt of sherry of the defendants, which was to remain in the docks undelivered and upon becoming embarrassed he had offered the defendants to take it back, which was refused, and an arrangement for a composition was afterwards entered into with the creditors, the defendants being parties, and a sum set opposite their names including the sherry, and they received the first and largest instalment, but upon demand refused to deliver the wine, or sign the release, although they admitted it to have been included in the composition; held, that having obtained by the agreement security for the whole of their debt, the right of stoppage in *transitu* was gone. *Nichols* v. *Hart*, 5 C. & P. 179.

But such a delivery as would be sufficient in the absence of insolvency to vest the property in the vendee, is frequently insufficient to divest the right of stoppage in *transitu*. It seems to be a general rule, that so long as the goods are in the possession of one who is a mere agent, to forward them, in order to give a more complete possession to the vendee, the *transitus* continues: as where they are delivered to a wharfinger, to be forwarded to the vendee (*Hodgson* v. *Loy*, 7 T. R. 440; *Mills* v. *Ball*, 2 B. & P. 457; *Smith* v. *Goss*, 1 Camp. 282); although the wharfinger be employed by the vendee (*Smith* v. *Goss*, 1 Camp 282; *Oppenheim* v. *Russel*, 3 B. & P. 42; and see *Snee* v. *Prescott*, 1 Atk. 245; *Lickbarrow* v. *Mason*, 1 H. B. 364; *Hunt* v. *Ward*, cited 3 T. R. 467; *Feise* v. *Wray*, 3 East, 93); or to an agent who purchases for a principal abroad, and informs the vendor, at the time of the purchase, that the goods are to be sent abroad (to Lisbon). (*Coates* v. *Railton*, 6 B. & C. 422); or to a packer, by order of the vendee (*Hunt* v. *Ward*, 3 T. R. 467); provided the vendee does not use the wharfinger's or packer's warehouse as his own, and that he contemplates an ulterior place of delivery (*Wright* v. *Lawes*, 4 Esp. C. 82; per Chambre, J. *Richardson* v. *Goss*, 3 B. & P. 127.) So a delivery of plate to an engraver employed by the vendor (*Owenson* v. *Morse*, 7 T. R. 64); of goods to a common carrier (*Stokes* v. *La Riviere*, cited 3 T. R. 466; *Hunter* v. *Beal*, Ibid), so long as the lien of the carrier remains (*Crawshaw* v. *Eades*, 1 B. & C. 181); or on board a general ship (*Ibid.* and 3 East, 397; 7 T. R. 440; *Mills* v. *Ball*, 2 B. & P. 457); though at the risk and expense, and in the name and by the appointment of the vendee, will not divest the right of stoppage in *transitu*. And see *Ruck* v. *Hatfield*, 5 B. & A. 632.

(*r*) *Giles* v. *Perkins*, 9 East, 12. A customer paid bills, not due, into his bankers in the country, whose custom it was to credit their customers with the amount of such bills if approved in cash, charging interest: it was held that the customer was entitled to recover back those bills in specie from the assignees of the bankers, on their bankruptcy; and per Lord Ellenborough, C. J., every man who pays bills, not then due, into the hands of his banker, places them there as in the hands of his agent, to obtain money for them when due. If the banker discount the bill, or advance money on the credit of it, that alters the case; he then acquires the entire property in it, or has a lien *pro tanto* for his advance. The only difference between the practice stated as to London and country bankers in this respect, is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; the country banker, who always takes the bill indorsed, has not only a lien on it if his account be overdrawn, but also a legal remedy upon the bill by the indorsement.

(*s*) *Scott* v. *Surman*, Willes, 400. *Bolton* v. *Puller*, 1 B. & P. 539. *Thompson*

Property in banker.

And though a customer who pays bills into a banker's hands has a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the property in the bills is not altered (*t*).

Such being the general rule, it follows that if it be contended that the banker was more than a mere depositary, with a right of lien, it lies on the assignees to prove it (*u*).

Evidence on the part of the assignees, in such cases, consists in any facts which show that the owner of the bills parted with the property by a sale or discount to the bankers, or that they were the depositaries, subject to a lien (*x*).

It is not sufficient to show that the bankers had a limited authority to discount to a certain amount, or that they had authority to discount to an uncertain amount, where the object is a special one; as to honour the drafts or bills of the customer, or to reduce the cash balance when the bankers should be in advance (*y*).

The best and most direct evidence on this head, consists in the authority or directions given by the customer, especially if they be in writing (*z*).

Proof that the bills were in the hands of the banker, *indorsed* by the customer, is *primâ facie* evidence of a discount, but not conclusive; for they may have been indorsed merely to enable the banker the more effectually to receive payment on behalf of the customer from other parties (*a*).

The mode in which the bills were entered in the bankers books will not affect the question, without proof of assent on the part of the owner (*b*).

v. *Giles*, 2 B. & C. 422. *Ex parte Hippings*, 2 Gl. & J. 93. Where a customer was in the habit of paying in bills on account, which, if approved of, were carried to his account, but entered as bills to his credit to the full amount, and he was then at liberty to draw to that amount by cheques on the bank; it was held that in the absence of proof of any agreement that the bills when they reached the bankers should become their property, the bills remaining in specie in the hands of the bankers at the time of the bankruptcy might be recovered by the customer, the cash balance being in his favour. *Thompson* v. *Giles*, 2 B. & C. 422. And see *Ex parte Armistead*, 2 G. & J. 371; M. & M. 108. The decision of questions between the assignees of bankers and customers, in respect of bills of exchange which remain in possession of the bankers at the time of the bankruptcy, seldom if ever turns upon the clause of the stat. 21 J. 1 (now 6 G. 4, c. 16, s. 72), but upon the question whether the property has passed; or if not, whether the bankers were entitled to a lien.

(*t*) *Ib.* & per Holroyd, J. 2 B. & C. 431.

(*u*) Per Lord Eldon, C. *Ex parte Sargeant*, 1 Rose, 153.

(*x*) Although the customer, when he has deposited bills as a collateral security for the bankrupt's acceptance, has a right to have them returned, on exonerating the estate, yet the holders of those acceptances have no such right; for being strangers to the contract between the banker and his customer, they can claim no lien. If the *customer* in such case also become bankrupt, as the banker's estate cannot be exonerated without discharging such bills, it seems that the Lord Chancellor will order such an arrangement as will make such bills available. *Ex parte Waring* and *Ex parte Inglis*, 2 Rose, 282. Yet *qu.* whether in principle the owners of the bills ought to receive more from such securities, in proportion to their debt, than the other creditors receive from the banker's estate? had the customer remained solvent, the banker's assignees could not, it seems, have claimed more on the securities than they paid to those creditors rateably with the rest; the holders of the bills would have been entitled to have resorted to the customer (being the drawer, &c.) for the remainder of the debt, and he having become bankrupt, they ought not, as it seems, on that account, to receive more from the banker's estate, but to be paid their proportion of the remainder rateably with the customer's creditors.

(*y*) *Ex parte Wakefield Bank*, 1 Rose, 243. *Ex parte Leeds Bank*, Ib. 254. *Qu.* Whether a general authority be sufficient, &c. Lord Eldon, C., in the cases arising on *Boldero's* bankruptcy, seems to have been of opinion that it would.

(*z*) *Ex parte Dumas*, 1 Atk. 232.

(*a*) *Ex parte Towgood*, 19 Ves. 229. *Thompson* v. *Giles*, 2 B. & C. 422.

(*b*) Bills not due and entered *short* in the banker's books, are considered the property of the customer. "The fact that bills were not written short, amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred

Property in banker.

On the other hand, the writing the bills short is merely evidence of the nature of the remittance. If it be accompanied by a letter which directs its application, that cannot be got rid of by the unauthorized act of the banker (*c*).

Where the bills are entered short, if it appears from the habits of dealing between the parties that they were considered as cash, they will pass to the assignees (*d*).

In general, where bills have been deposited by the plaintiff to answer a specific purpose, which has not been answered, and they remain in the hands of the assignees after the bankruptcy, the owner is entitled to recover them from the assignees (*e*), or to hold them against the assignees.

from the habits of dealing between the parties that they were to be considered *as cash*. If they were there, with the owner's knowledge, *as cash*, and he draws, or is entitled to draw on them, as having that credit in cash, he is precluded from recurring to them specifically, but it lies on the assignees to prove that to be the case: the owner is entitled unless the bills have been carried to his credit with his knowledge or consent. Per Lord Eldon, in *Ex parte Sargeant*, 1 Rose, 153. Bills of exchange having been paid by a customer to his account with a banker, were entered as cash, with a distinct interest account; the customer had credit to the amount of the bills so entered, but did not overdraw the account; there was a custom in the country to circulate short bills, but no express authority was given to circulate the bills in question. The Ld. Chancellor, reversing the decree of the Vice-Chancellor, held that the bills did not pass to the assignees. *Ex parte Benson*, 1 Mont. & Bligh, 120.

(*c*) See *Ex parte Damas*, 1 Atk. 232, 1 Rose, 243.

(*d*) *Ex parte Thompson*, Mo. & M. 102.

(*e*) As where *A.* remitted bills to *B.*, a banker, for the express purpose of answering other bills drawn by *A.* on the banker, on a particular account, which latter bills had been dishonoured by the banker, and paid by *A.* before the bankruptcy of *B.* Lord Eldon, C. observed, it is clearly settled, that where bills are remitted on a general account, and there is no evidence to the contrary, they cannot be followed in case of bankruptcy; if remitted for a particular purpose, they may. *Ex parte Pease*, 1 Rose, 241. Where *A.* and *B.* had a general running account, consisting of bills drawn by *B.* on *C.* in favour of *A.*, and of bills and other securities deposited by *A.* with *B.*, and upon the failure of *B.* and *C.*, *A.* was obliged to take up the bills received by him from *B.*, whereby the balance of accounts was in favour of *A.*, it was held that he could not maintain trover for the bills deposited with *B.* unless they had been specifically appropriated to answer *B.*'s drafts on *C.* in favour of *A.*, and deposited for that purpose expressly. *Bent* v. *Puller*, 5 T. R. 494. Where *A.* sent certain bills of long dates to *B.*, a banker, requesting permission to draw bills of shorter dates without renewals, and sent the long bills indorsed to *B.* in the letter of request, and *B.* answered, that agreeable to *A.*'s request he had discounted the bills, and then specified the amount to be drawn for; it was held that the transaction did not amount to a sale or exchange of bills upon discount, but to a deposit of the long bills, on condition of being allowed to draw shorter bills, and therefore, that *B.* having become bankrupt, whereby *A.*'s bills were dishonoured, the long bills which remained in *B.*'s possession at the time of the bankruptcy did not pass to the assignees. *Parke* v. *Eliason*, 1 East, 544. *Collins* v. *Martin*, 1 B. & P. 649. So where *A.* had transmitted to *B.* his banker, bills to answer outstanding acceptances by *B.* on account of *A.*, upon an agreement by *A.* to make remittances to answer such acceptances when due; and the acceptances were not paid by *B.*, but by *A.* after the bankruptcy of *B.*; it was held, that the bills remitted for the purpose of answering these acceptances were in the nature of goods in the possession of a factor, and that they belonged to *A.*, subject to *B.*'s lien for the balance due at the time of the bankruptcy; and that having been deposited by *B.* with another banker, who had set them short in the bankrupt's book, they were the same as if still in possession of the bankrupt. *Zincke* v. *Walker*, Bl. R. 1154. *A.* and *B.* agreed that *A.* should sell to *B.* light guineas from time to time, and that *A.* should draw upon *B.* from time to time for the money due upon such sales; and that *B.* should accept other bills drawn by *A.* for his own convenience, for which *A.* was to remit value. *B.* being under acceptances to a large amount became bankrupt, and *A.* being ignorant of the bankruptcy, sent light gold and bills to enable *B.* to discharge such acceptances; and it was held, that *A.*, who had since paid *B.*'s acceptances, was entitled to the gold and bills so sent against the assignees. *Tooke* v. *Hollingworth*, 5 T. R. 215, affirmed in the Excheq. Cham. 2 H. B. 501. *A. B. C.* & *D.* being partners as brokers at Liverpool, and *C.* & *D.* being partners as merchants at London, *J. S.* having

Property in banker.

Where bills are not remitted for a particular purpose, but to be discounted, and are discounted (*f*), or by one trader to another on a running account (*g*), or on an exchange of bills for bills, they pass to the assignees (*h*).

Where it was agreed between four partners as bankers, and a customer, that the latter should indorse bills, and take the notes of the bankers in exchange, and this was done after three of the four had become bankrupt, it was held after the fourth also became bankrupt, that as the consideration for indorsing the bills had failed, the assignees could not retain them (*i*).

Disaffirmance of bankrupt's acts.

3dly. So evidence may be necessary to show the right of the assignees in disaffirmance of some disposition of the property by the bankrupt. As to show that a conveyance in favour of his children was fraudulent (*k*).

The general effect of bankruptcy is to avoid all acts of the bankrupt subsequent to the bankruptcy, by making the right of the assignees to relate to the act of bankruptcy; and therefore the assignees may usually avoid and disaffirm such a transaction by the bankrupt by evidence of a previous act of bankruptcy and petitioning creditor's debt. The very purchasing of goods from a trader, after such an act of bankruptcy, is a conversion (*l*).

Dispositions by process of law stand on the same footing with dispositions by the bankrupt; to be valid, they must be complete before the bankruptcy (*m*).

If a sheriff seize and sell goods under an execution, after an act of bankruptcy, even without notice, and before the commission, he is liable in trover (*n*), and the assignees are not bound to prove any demand, since the execution was tortious (*o*). Or the assignees may treat the

accepted bills payable at the house of *C.* & *D.*, employed *A. B. C.* & *D.* to get them paid, and agreed to deposit good bills with them, indorsed by him, to enable them so to do. *A. B. C.* & *D.* debited *J. S.* in account for his acceptances, and credited him with all the bills which he had deposited; some of the bills so deposited were remitted by *A. B. C.* & *D.*, to *C.* & *D.*, upon the general account between the two houses; and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay all his acceptances; and it was held, that the assignees of *C.* & *D.* were entitled to retain against *J. S.* all the bills which had been remitted by *A. B. C.* & *D.*; also, that it made no difference that one of the bills remitted did not arrive till after the bankruptcy of *C.* & *D.* *Bolton* v. *Puller*, 1 B. & P. 539. And see *Collins* v. *Martin*, 1 B. & P. 648.

(*f*) *Carstairs* v. *Bates*, 3 Camp. C. 301; 2 B. & C. 432.

(*g*) *Burt* v. *Puller*, 5 T. R. 494.

(*h*) *Hornblower* v. *Proud*, 2 B. & A. 327; and vide *supra*, *Clarke* v. *Eliason*, 1 East, 554.

(*i*) *Ex parte M'Gae*, 2 Rose, 376.

(*k*) Where the only evidence of insolvency at the time of a bankrupt's executing a voluntary deed in favour of his children, was that he had given two bills which had never been paid, except by renewals, and which, at the time of his bankruptcy, four years after, were still unsatisfied, held to be insufficient to establish a case of insolvency at the time of executing the deed, within the 6 Geo. 4, c. 16, s. 73. Notice of a difficulty to meet particular demands is not notice of insolvency, but it must be of a more general and extensive description, as of a general composition, or paying creditors portions only of their demands, and not in the usual way. *Cutten* v. *Sanger*, 2 Y. & S. 459. And see *Reader* v. *Knatchbull*, 5 T. R. 228. *Bayly* v. *Schofield*, 1 M. & S. 338; Anon. 1 Camp. 135; and *Abraham* v. *George*, 11 Price, 423.

(*l*) *Hurst* v. *Gwennap*, 2 Starkie's C. 306; even although the assignees have demanded payment, *Ibid.* See the late st. *infra*, 172, 173.

(*m*) Per Lord Mansfield, Burr. 32; see 2 B. & A. 38.

(*n*) This has been so decided upon argument in the court of Exchequer. *Assignees of Potter* v. *Starkie*. See *Smith* v. *Mills*, 1 T. R. 475; *Bailey* v. *Bunning*, 1 Lev. 172; *Cole* v. *Davis*, Ld. Raym. 124; *Cooper* v. *Chitty*, 1 Burr. 20; and the cases collected, 1 Montague's B. L. 474. The single question determined in *Bailey* v. *Bunning*, and reserved by the special verdict, was, whether the taking was lawful; and upon that the court determined. B. N. P. 41. And now see *Garland* v. *Carlisle*, 10 Bing. 452; 4 Bing. N. C. 1; *Balme* v. *Hutton*, 2 Y. & J. 101.

(*o*) *Rush* v. *Baker*, B. N. P. 41.

Evidence in disaffirmance of bankrupt's acts.

sale as valid (*p*). And if the creditor assisted in the levying the execution, trover will lie against him, although the money remain in the hands of the sheriff (*q*). But where the sheriff takes goods in execution before an act of bankruptcy, he is not liable for a conversion in selling them afterwards (*r*). Where the sheriff seized the goods in execution, and afterwards, but on the same day, the trader surrendered himself in discharge of his bail, and committed an act of bankruptcy by lying in prison for two months, it was held that the assignees were not entitled to recover (*s*).

The assignees cannot recover in trover the amount of a cheque paid by the bankrupt's bankers after the bankruptcy, against a creditor to whom the cheque had been delivered and the money paid (*t*); neither can they recover in trover for bills fraudulently obtained from the bankrupt, after his bankruptcy, for the bankrupt never could have any property in them; but if the party obtaining them receive the proceeds, the assignees may recover for money had and received (*u*).

They cannot affirm a transaction as to part and disaffirm it as to the rest, nor disaffirm a transaction after having once affirmed it (*x*). A person after the bankruptcy buys bonds with the bankrupt's money and delivers them to the wife, the assignees cannot seize the bonds as part of the estate, and maintain trover for the money (*y*); so after recovering from a banker money which he paid to a holder of a draft of the bankrupts after the bankruptcy, they cannot recover from the creditor to whom the money was paid (*z*).

Money had & received.

It has been held, that the assignees may recover from a creditor in England money which he has attached abroad, after the assignment, as money had and received to their use (*a*). So they may recover, in the same form of action, money paid by a trader for the carriage of goods after a secret act of bankruptcy (*b*): money which is the produce of goods pledged by the trader's direction, after being arrested at the defendant's suit, but

(*p*) Where after notice of bankruptcy the sheriff seized and sold goods to the execution creditor, who afterwards sold them to *F.*, who subsequently became an assignee, held, that though they might have treated the sale as invalid and disposed of the goods, yet that they might suffer *F.* to continue the possession, and claim the value as against the sheriff. *Vaughan* v. *Wilkins*, 1 B. & Ad. 370.

(*q*) *Menham* v. *Edmonson*, 1 B. & P. 369.

(*r*) *Thomas* v. *Desanges*, 2 B. & A. 586. *Cole* v. *Davis*, Ld. Raym. 124. *Sadler* v. *Leigh*, 4 Camp. 197. And now see the stat. 6 G. 4, c. 16, s. 81, *infra*, 170. If the money be in the hands of the sheriff, and before the return of the writ, the debtor becomes bankrupt, the execution creditor is entitled. *Wymer* v. *Kemble*, 9 D. & R. 511. *Fox* v. *Burbidge*, in K. B.

(*s*) *Thomas and others* v. *Desanges and another*, 2 B. & A. 586; *Sup.* 102. See TIME.

(*t*) *Mathew* v. *Sherwell*, 2 Taunt. 439.

(*u*) *Walker* v *Laing*, 1 Moore, 281. A debtor deposited the title-deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered pursuant to the statute 7 Anne, c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt. Held, that although this instrument was void, the rents which the defendant had received as equitable mortgagee, could not be taken out of his hands by virtue of the registered assignment under the commission. *Sumpter and others* v. *Cooper*, 2 B. & Ad. 223.

(*x*) *Brewer* v. *Sparrow*, 7 B. & C. 310.

(*y*) *Wilson* v. *Poulter*, 2 Str. 859.

(*z*) *Vernon* v. *Hanson*, 2 T. R. 287. Even as trustees for the banker, who had no other means of recovering the money.

(*a*) *Hunter* v. *Potts*, 4 T. R. 182. See also *Sill* v. *Worswick*, 1 H. B. 665; *Phillips* v. *Hunter*, 2 H. B. 402.

(*b*) *Bradley* v. *Clark*, 5 T. R. 197.

without his privity, after a secret act of bankruptcy, and paid over to the defendant, although not the identical money raised by the pledge (*c*); money received by the banker of the bankrupt, and paid over to a creditor with knowledge of the bankruptcy (*d*), or to the bankrupt. Money paid by way of voluntary preference (*e*). So where the sheriff, after an act of bankruptcy, seized the bankrupt's goods under a *fieri facias*, and executed a bill of sale of them to the execution creditor, it was held that the assignees might recover the amount (*f*). Where a creditor, knowing the bankrupt's insolvency, induced him to draw bills, and induced the drawees to accept them, it was held, that though neither the bankrupt nor his assignees had any property in the bills, so that the latter could not maintain trover, yet that they might maintain an action for money had and received when the bills were paid (*g*).

Where a trader in prison employed an auctioneer to sell his goods, who returned him the proceeds by the hands of the defendant, who was the mere bearer, it was held that the assignees could not recover the money from him (*h*).

Where a debtor to the bankrupt on policies of insurance, which have been deposited by the bankrupt with a creditor as a collateral security after a secret act of bankruptcy, gives his acceptance, which he afterwards pays to the creditor, the assignees cannot recover the amount from the creditor, although the broker who paid the money retained the amount so paid by him on settlement with the assignees, for it was the money of the broker, and not of the bankrupt (*i*).

Where the trader has sold goods at prices very inferior to their value, the assignees cannot recover the difference (*k*).

Proof of disaffirmance of acts by the bankrupt.

Where a bill of exchange was indorsed by the bankrupt after his bankruptcy, and the indorsee received the amount, it was held that the assignees could not recover for money had and received, but must resort to the action of trover for the bill (*l*).

Proof of notice when necessary.

The general relation of the title of the assignees to the act of bankruptcy, is in several instances restricted, in order to relieve those who have dealt *bonâ fide* with a bankrupt without knowing him to be such. In cases within some of the provisions of the statute, it is incumbent on the assignees to prove that the defendant had *notice* of the prior act of bankruptcy.

(*c*) *Allanson* v. *Atkinson*, 1 M. & S. 583.

(*d*) *Vernon* v. *Hankey*, 2 T. R. 115. But they cannot afterwards recover from the creditor. *Vernon* v. *Hanson*, 2 T. R. 287.

(*e*) *Poland* v. *Glyn*, 2 D. & R. 310. In *assumpsit* by assignees for money received to the use of the bankrupt before the bankruptcy, plea, that the money, although in the defendant's possession after the bankruptcy, was in fact received before, and that the bankrupt was indebted to the defendant in a large sum, which he claimed to set off, held bad, as confessing, but not avoiding; as, if received before the bankruptcy, the assignees could only claim it as received under a fraudulent preference, in which case the general issue would be the proper plea. *Wood* v. *Smith*, 4 M. & W. 522; and 7 Dowl. (P. C.) 214.

(*f*) *Reed* v. *James*, 1 Starkie's C. 134; and see *Butler* v. *Carver*, 2 Starkie's C. 433.

(*g*) *Walker* v. *Laing*, 7 Taunt. 568. But where *A.* after his bankruptcy, and to procure his discharge from an arrest at the suit of *B.*, drew and indorsed bills of exchange, which *C.* accepted, under the expectation of receiving goods of *A.*'s, and after receiving and selling the goods, paid the amount to *B.*; it was held that the assignees could not recover the amount from *B.* *Waller* v. *Drakeford*, 1 Starkie's C. 481, *tamen quære.*

(*h*) *Coles* v. *Wright*, 1 Taunt. 498.

(*i*) *Hovil* v. *Pack*, 7 East, 163; and see *Willis* v. *Freeman*, 12 East, 656.

(*k*) *Hogg* v. *Mitchell*, 1 Starkie's C. 241.

(*l*) *Waller* v. *Deakeford*, 1 Starkie's C. 481.

The stat. 6 Geo. 4, c. 16, s. 81, enacts, that all conveyances by, and all contracts and other dealings and transactions (*m*) by and with any bankrupt *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied (*n*) more than two calendar months (*o*) before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice (*p*) of any prior act of bankruptcy by him committed: provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made,

(*m*) Under the stat. 46 G. 3, c. 138, s. 1, it was held, that by *transactions* are meant such as occur between parties in the usual course of business, and not such as are carried on through the medium of legal process (*Blogg* v. *Phillips*, 2 Camp. 129); and therefore that the terms did not extend to the levying under an execution by a creditor after a secret act of bankruptcy, more than two months before the commission. *Ib.* Where a bill was delivered by the trader, with intent to transfer the property, more than two months before the commission, but was not actually indorsed till within the two months, it was held, that the indorsement had relation to the delivery. 1 Camp. 492. Where the bankrupts had transferred wines more than two months before the issuing of the commission, by mistake, into the names of *A. & Co.*, instead of *A. & Son*, being different firms, but the mistake was corrected within two months; held, that the mistake did not defeat the right of *A. & Son*, as at all events *A. & Co.* would be trustees for them; held also, that a prior commission having issued, though not acted upon nor gazetted, was sufficient within the proviso of 6 Geo. 4, c. 16, s. 81, to deprive the defendant of the protection of the statute as to a subsequent transfer. *Peckham* v. *Lashmoor*, 1 M. & M. 251.

(*n*) The seizure is a levying within the Act. *Godson* v. *Sanctuary*, 4 B. & Ad. 255. See *Wray* v. *Lord Egremont*, Ib. 122. Where the execution is on a judgment obtained by default, confession, or *nil dicit*, sec. 108 enacts, that the creditor shall not avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably. An execution on a final judgment, after a judgment by default, was held to be within the provisions of the 6 G. 4, c. 16, s. 108, although obtained before the Act came into operation. *Cuming* v. *Welsford*, 6 Bing. 502. This section applies where, in such a case, the goods have been seized, but the execution is not completed; where the execution has been completed, the case falls within the 81st sect. *Wymer* v. *Kemble*, 6 B. & C. 479, and see *Thomas* v. *Desanges*, 2 B. & A. 586. *Sadler* v. *Leigh*, 4 Camp. 197. This clause, it is held, does not avoid an execution levied by seizure before bankruptcy on a judgment by *nil dicit*, but only provides that the execution creditor shall share rateably with the rest. *Taylor* v. *Taylor*, 5 B. & C. 392; 8 D. & R. 159. By the stat. 1 W. 4, c. 7, s. 7, no judgment signed or execution issued upon cognovit, signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the Court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, to be deemed within the 6 Geo. 4, c. 16, s. 108.

(*o*) On a commission issuing May 14th, a dealing March 14th is valid, *Cowie* v. *Harris*, M. & M. 141. The execution of a *fi. fa.* at 11 o'clock on the 13th of August, is a levying more than two months before the 13th of October, *Godson* v. *Sanctuary*, 4 B. & Ad. 256; 1 N. & M. 52.

(*p*) The issuing of a commission is not in itself notice, and therefore payment after commission issued, but without actual knowledge, &c. is protected. *Scarborough* v. *Brooks*, 4 B. & A. 523. A trader, after an act of bankruptcy, sells goods to *B.*, who *pays for them*, without knowledge of the bankruptcy; the assignees cannot maintain trover for the goods without tendering the money. *Cash* v. *Young*, 2 B. & C. 416; but see *Hurst* v. *Gwennap*, 2 Starkie's C. 306. Note, in the latter case the goods had not been paid for.

entered into, executed, or levied more than two calendar months before the issuing the first commission. Notice of bankruptcy.

Sec. 82 enacts, that all payments (*q*) really and *bona fide* (*r*) made, or

(*q*) A delivery of goods *bonâ fide* in part payment of a previous debt, after a secret act of bankruptcy, is protected. *Cannan* v. *Wood*, 2 M. & W. 465. So if cash be given for a bank-post bill, *Willis* v. *Bank of England*, 4 Ad. & Ell. 21. So where a party, within two months before the fiat, pledged goods on an advance of money. *Wright* v. *Fremley*, 5 Bing. N. C. 89. See also *Magee* v. *Nias*, 1 Bing. 311; and tit. PAYMENT. An assignment as a security for money lent in trust to permit the assignee at the expiration of a time specified to sell them in discharge of the debt, is not protected. A fiat issuing within two months after the assignment on a secret act of bankruptcy, previous to the assignment. *Cannan* v. *Denew*, 10 Bing. 292.

(*r*) This clause is substituted for the provision of the stat. 19 G. 2, c. 32, s. 1, which protects payments to real and *bonâ fide* creditors of any bankrupt, for or in respect of goods really and *bonâ fide* sold to such bankrupt, or for or in respect of any bills of exchange really and *bonâ fide* drawn, negotiated, or accepted by such bankrupt, in the usual or ordinary course of trade and dealing. A payment under an arrest of the bankrupt, as the acceptor of a bill of exchange, has been held to be within the Act. *Cox* v. *Morgan*, 2 B. & P. 398, Chambre, J. *diss.* See also *Holmes* v. *Wennington*, 2 B. & P. 398. *Ex parte Farr*, 9 Ves. 515. That payments on bills not yet due were not within the act (*semble*). *Tamplin* v. *Diggins*, 2 Camp. 312. Nor on *accommodation* bills. *Holroyd* v. *Whitehead*, 3 Camp. 530; 2 Camp. 315; 1 Marsh, 128; 2 H. B. 334; 11 East, 127. An advance of money upon a deposit of goods amounts to no more than a loan, and not a payment protected within the statute, although *bonâ fide*, and without notice of an act of bankruptcy. *Wright* v. *Fearnley*, 5 Bing. N. C. 89; 6 Sc. 813; and 7 Dowl. (P. C.) 129. And see *Cannan* v. *Denew*, 10 Bing. 292. A payment of a debt by weekly instalments after an act of bankruptcy was held not to be within the statute. *Bolton* v. *Jager*, 1 Ry. & M. 265. Where a factor accepted a bill in favour of his principal, after a *secret* act of bankruptcy, and *after notice* the factor paid the amount to the holder, it was held that the payment was within the protection of the statute. *Wilkins* v. *Casey*, 7 T. R. 711. *Coles* v. *Robins*, 3 Camp. 183. Where a banker, on whom a bill of exchange had been drawn, requested, when it became due, that it might remain in his hands, and promised to pay interest, and afterwards, upon application by the holder, who had no notice of a previous act of bankruptcy, paid the amount, it was held that the transaction amounted to a loan, and was not within the statute. *Vernon and others* v. *Hall*, 2 T. R. 648. Where *A.* having obtained a verdict against *B.*, who afterwards committed a secret act of bankruptcy, instead of entering up judgment and taking out execution, took a bill drawn by *B.* on *C.*, which was paid when due, it was held that the payment was not within the statute. *Pinkerton* v. *Marshall*, 2 H. Bl. 334.

The statute did not extend to a payment by the *debtor* of the bankrupt upon a judgment against him on a foreign attachment, since it mentions payments by the bankrupt only. *Hovil* v. *Browning*, 7 East, 154. Where a factor accepted and paid bills on the strength of goods consigned to him by his principal, after a secret act of bankruptcy, and after a commission, sold the goods and received the money; it was held that he was not protected either by the stat. I Jac 1, c. 15, s. 14, or 19 Geo. 2, c. 32, s. 1. A *bonâ fide* payment eight days before the commission issued, is protected by 6 G. 4, c. 16, s. 82. The creditor having met the party at an office where he knew he was going to receive money, obtains payment of his debt, not knowing either that his debtor was insolvent or a prisoner; the jury negativing any fraud, such payment is not a fraudulent preference. *Churchill* v. *Crease*, 5 Bing. 177; 2 M. & P. 415. Where the defendant, after an act of bankruptcy unknown to him, and within two months of the issuing of the commission, purchased a lot of books from the bankrupt, a hop-merchant, and paid him for them; held, that such payment was valid, and that the assignees could not rescind the contract and maintain trover for the books, without an offer to return the money; and that the same construction was to be applied in all cases of *bonâ fide* sales, whether the goods were or not such as the bankrupt usually dealt in. *Hill* v. *Farnell*, 9 B. & C. 45. Where the defendant, after a secret act of bankruptcy, sells goods at so low a price as not to be in the usual course of business, with the knowledge of the purchaser, the transaction is not within the protection of the statute. *Ward* v. *Clarke*, 1 M. & M. C. 497. The defendant, at the request of the bankrupt, after a secret act of bankruptcy, lent him his acceptance for 98 *l.*, and at a later period of the same day, in a conversation as to security, the bankrupt agreed to sell horses to the defendant for 70 *l.*, which were subsequently delivered; held, that the latter transaction was not protected by sect. 82 of 6 Geo. 4, c. 16, it not being a sale of goods with payment of the price, but a sale of goods with an

Notice of bankruptcy.

which shall hereafter be made (*s*) by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt, before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of (*t*) any act of bankruptcy by such bankrupt committed.

Sec. 83 enacts, that the issuing of a commission (*u*) shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission,) if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.

Sec. 84 enacts, that no person or body corporate, or public company having in his or their possession or custody any money, goods, wares, merchandizes or effects, belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order, provided such person or company had not at the time of such delivery or payment notice that such bankrupt had committed an act of bankruptcy.

Sec. 85 enacts, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice.

Sec. 86 enacts, that no purchase from any bankrupt *bonâ fide*, and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be im-

agreement to set off the price against a liability on the part of the bankrupt. *Carter* v. *Breton*, 6 Bing. 617. Where, after an act of bankruptcy by one of two partners, he paid a partnership debt to a creditor who had knowledge of the act of bankruptcy; held, that such payment was not protected by the 82d sect. of 6 Geo. 4, c. 16, as he had himself ceased to have any interest in the partnership funds, and his authority to make any payment for his partner was dissolved. *Craven* v. *Edmondson*, 6 Bing. 734. And see *Hawkins* v. *Penfold*, 2 Ves. 550. Mont. & B. 311. *Carter* v. *Picton*, 6 Bing. 617. Goods delivered in payment of a bill of exchange then overdue, is not a payment within this clause, *Smith v. Moon*, 1 M. & M. 458. *Shaw* v. *Batley*, 4 B. & Ad. 801. *Bradbury* v. *Anderton*, 1 C. M. & R. 486. See *Green* v. *White*, 3 Bing. N. C. 59.

(*s*) The expression "payments *made*," contrasted with the following, "henceforth to be made," clearly renders the provisions retrospective, and comprehends payments made at the time, and therefore before the passing of the Act. *Terrington* v. *Hargreaves*, 5 Bing. 489. And see *Churchill* v. *Crease*, 5 Bing. 180.

(*t*) These words are to be construed "notice of an act of bankruptcy by *any* of the bankrupts" committed. *Hawkins* v. *Whitten*, 10 B. & C. 217. A payment by one partner, who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy to a creditor who has notice of the act of bankruptcy, is not protected. *Craven* v. *Edmondson*, 6 Bing. 734. A payment for goods purchased from a bankrupt just before his bankruptcy is not protected if the purchaser knew, or had the means of knowing, the bankrupt's circumstances. *Dewes* v. *Venables*, 3 Bing. N. C. 400; and see *Green* v. *White*, Ib. 50. Although notice of a docket struck be not of itself evidence of an act of bankruptcy, yet being connected with the fact of the defendants requiring security before payment made, a jury may infer notice. *Spratt* v. *Hobhouse*, 4 Bing. 181.

(*u*) By the issuing of a commission is meant its passing under the great seal, whether it be opened, or acted upon, or not. *Watkins* v. *Maund*, 3 Camp. 308.

peached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. Notice of bankruptcy.

Again, in cases within the stat. 6 G. 4, c. 16, s. 73, it would be necessary that the assignees should prove the insolvency of the bankrupt at the time of the transaction which they seek to impeach. Insolvency.

This section enacts, that if any bankrupt, being at the time insolvent (*x*), shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him.

By 2 & 3 Vict., c. 29, all contracts made *bonâ fide* with any bankrupt previous to the date and issuing any *fiat* against him, are valid, provided the party had no notice of any prior act of bankruptcy.

The defence consists, either, 1st, in the denial of the plaintiffs' right to sue in the character of assignees (*y*), or supposing them to be assignees, 2dly, of their particular cause of action against the defendant. Under the first head the defendant may, it has been seen in some instances, dispute and controvert all the facts upon which the bankruptcy is attempted to be supported (*z*). Under the second he may not only controvert the claim of the plaintiff's resting on the proofs already announced (*a*), as by showing that the bankrupt himself could not have supported the action, (in cases where the assignees affirm the acts of the bankrupt, and claim solely through his merits,) but he may also show, that in point of law the interest which the bankrupt had did not pass to the assignees; or he may rely upon a set-off, or discharge by the assignees. Action by assignees. Defence.

(*x*) Compounding with creditors is evidence of insolvency. *Reader* v. *Knatchbull*, 5 T. R. 218. But *insolvency* means a general inability to answer engagements. And in order to invalidate a payment made by the bankrupt two months before the commission, it has been held to be insufficient to show that the creditor has renewed bills for the debtor, in consequence of the inability of the latter to provide for them. 1 Camp. 492. Notice to a creditor that there has been a meeting of the bankrupt's creditors, and that the state of his affairs was such that the demands of creditors could not be paid, except by instalments, although the creditor was assured by the bankrupt's agent that they would come round, was held to be notice of insolvency, (under the stat. 46 G. 3, c. 135, s. 1,) so as to defeat a subsequent payment by the bankrupt to the creditor. *Bayly* v. *Schofield*, 1 M. & S. 330. The plaintiffs to prove an execution creditor's knowledge of the trader's insolvency, proved a letter written by his attorney to the attorney of the execution creditor, stating that he had been embarrassed by the failure of another house, and strongly pressing for time, and offering to pay by instalments; it was held that it did not amount to the kind of insolvency meant by the statute, which being a term used in connexion with that of *bankruptcy* was not to be considered as used in its common acceptation, but as meaning insolvency of so decided and unequivocal a character as to be immediately followed by bankruptcy or stopping payment, as a necessary consequence. *Abraham* v. *George*, 11 Price, 423.

(*y*) In trover by assignees, a plea denying that the plaintiffs were assignees, puts in issue the petitioning creditor's debt and act of bankruptcy. *Buckton* v. *Frost*, 1 Perr. & D. 102. And see *Butler* v. *Hobson*, 4 Bing. N. C. 290.

(*z*) Except as to facts proved by the depositions, where they are given in evidence under the stat. 6 G. 4, c. 16, s. 92, for they are made conclusive evidence of those facts.

(*a*) Vide *supra*, 121.

Non-joinder.

In the first place, he may controvert the title of the plaintiffs to sue in the character of assignees (*b*). He may object that there is another assignee still living, who ought to have been joined (*c*), for this is a ground of nonsuit.

In an action by the assignees under a joint commission against *A.* and *B.*, against the sheriff for levying an execution on the goods of *A.* and *B.*, it appeared that the levy was made after the bankruptcy of *A.*, but before that of *B.*; and it was held that the action was not maintainable, since, although the bankruptcy of *A.* was a severance of the joint-tenancy, yet under a joint commission they could not sue for the separate property of one (*d*).

Prior act of bankruptcy.

Although no notice has been given of intention to dispute the commission, it may be shown that it is void, as by reason of infancy (*e*). At one time a defendant might disprove the title of the assignees by proof of an act of bankruptcy committed anterior to the petitioning creditor's debt, and of a sufficient debt to have supported a commission (*f*), although neither the bankrupt himself, nor any one claiming by assignment from him, could have sustained such an objection (*g*). But by the stat. 6 G. 4, c. 16, s. 19, no commission shall be deemed invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts (*h*).

Where the bankrupt was uncertificated under a former commission, and it was proved that all his effects were assigned under it; held, that in an action of trover by the subsequent assignees, the defendant might avail himself of the former commission, without notice to dispute having been given; for although the 94th section dispenses with proof of the facts enumerated, yet the commission must be put in evidence, and its validity in law is still open to examination (*i*).

Petitioning creditor's debt.

Payment of money to the petitioning creditor after the suing out of the commission renders the commission supersedable, but not *ipso facto* void (*k*). The defendant may impeach the petitioning creditor's debt, as by showing that it was due to the petitioning creditor and another, jointly, the latter not concurring in the petition (*l*); or that the petitioning creditors could not have sued upon the bill accepted by the trader upon which the debt is claimed, one of them having engaged to provide for the bill when due (*m*); that one

(*b*) An assignment to assignees after an action, well commenced by the provisional assignee, does not defeat the action. *Page* v. *Bauer*, 4 B. & A. 345.

(*c*) *Snelgrove* v. *Hunt*, 2 Starkie's C. 424; 1 Chitty's R. 71. Note that the action was in assumpsit.

(*d*) *Hogg* v. *Bridges*, 2 Moore, 122. See *Stonehouse and another* v. *De Silva*, 3 Camp. 399; and 2 Starkie's C. 17. Note, they were not the goods of *A.* and *B.* as alleged.

(*e*) *Belton* v. *Hodges*, 9 Bing. 365.

(*f*) *R.* v. *Bullock*, 1 Taunt. 72. 88. 14 Ves. 67. 452. *Beardmore* v. *Shaw*, 1 N. R. 263. But an act of bankruptcy alone was insufficient. *Parker* v. *Manning*, 2 Esp. 598; 4 Esp. 594; 9 East, 21.

(*g*) *Mercer* v. *Wise*, 3 Esp. 219; 1 Taunt. 80. 86. 94. *Donnevan* v. *Duff*, 9 East, 24. See *Doe* v. *Boulcott*, 2 Esp. C. 595, Eyre, C. J. *Bryant* v. *Withers*, 2 M. & S. 123.

(*h*) The corresponding clause in the stat. 46 G. 3, c. 135, s. 5, contains an exception which is omitted in the late Act, viz. "if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt was contracted."

(*i*) *Phillips* v. *Hopwood*, 1 B. & Ad. 619.

(*k*) *Garratt* v. *Theophilus Biddulph*, 4 Esp. C. 104.

(*l*) *Brickland* v. *Newsom*, 1 Camp. 474. 1 Taunt. 477.

(*m*) *Richmond* v. *Heapy*, 1 Starkie's C. 102.

of the petitioning creditors is resident and carrying on trade in an enemy's country (*n*).

The petitioning creditor cannot in an action against him by the assignees dispute the amount of the petitioning creditor's debt (*o*). But it seems that another defendant may show that the debt was merely colourable and collusive, although the bankrupt himself might have been estopped by the security which he had given from disputing it (*p*).

Act of bankruptcy.

A defendant who was not privy to the transaction may show that the act of bankruptcy which is relied upon was a concerted one (*q*). But neither the bankrupt, nor any one privy to the concert, can insist upon such an objection (*r*). It is no objection that the commission fiat or adjudication was concerted (*s*).

Declarations by the bankrupt before his bankruptcy, with a view to a fraudulent commission, are admissible in evidence to show collusion between the bankrupt and the petitioning creditor (*t*).

To impeach the cause of action.

2dly. The defendant may show that in point of law the right of action did not pass to the assignees. Whether a particular interest does or does not pass to the assignees, is of course a pure question of law; but it is incumbent on the defendant to give in evidence such facts as raise the question of law, where the plaintiff has made out a *primâ facie* case (*u*).

(*n*) *M'Connell* v. *Hector*, 3 B. & P. 113. So, *semble*, that one of them is an infant. *Ex parte Morton*, 1 Buck's B. C. 42. *Ex parte Barrow*, 3 Ves. 554.

(*o*) *Harmer* v. *Davis*, 1 Moore, 300.

(*p*) See Christian's B. L. 442, 2d edit.

(*q*) See Lord Mansfield's observations, in *Hooper* v. *Smith*, 1 Bl. 441; and see *Bamford* v. *Baron*, 2 T. R. 595, n. *Stewart* v. *Richman*, 1 Esp. C. 108. *Field* v. *Bellamy*, B. N. P. 39. *Cowley* v. *Hopkins*, Co. B. L. 84. 95. *Ex parte Bourne*, 16 Ves. 145. *Ex parte Edmundson*, 7 Ves. 303. But see *Bromley* v. *Mundee*, B. N. P. 39; *Ex parte Milner*, 1 Buck's B. C. 104. *Secus*, where the act of bankruptcy consists in a declaration of insolvency, under the stat. 6 G. 4, c. 16. See sec. 7.

(*r*) *Roberts and others* v. *Teasdale*, Peake, 27; B. N. P. 39, 40. *Cowley* v. *Hopkins*, Co. B. L. 84. 95. *Ex parte Bourne*, 16 Ves. 145. See also *Wilson* v. *Poulton*, 2 Str. 859; *Billon* v. *Hyde & Mitchell*, 1 Atk. 126; *Tappenden* v. *Burgess*, 4 East, 235.

(*s*) 1 & 2 Will. 4, c. 56, s. 42. See also *Shaw* v. *Williams*, 1 Ry. & M. C. 19. *Ex parte Binmer*, 1 Madd. 250; 1 Mont. & M. 438; 1 Rose, 87. The stat. does not make a concerted act good, to sustain a *fiat*. As where assignment is made for the benefit of all creditors, to which the petitioning creditor is a party. *Marshall* v. *Barkworth*, 4 B. & C. 508. A creditor assenting to an act of bankruptcy, cannot avail himself of it to support a *fiat*. *Ex parte Hall*, 3 Deacon, B. C. 405. A petitioning creditor, party to a deed of assignment for the benefit of creditors, cannot set up the deed as an act of bankruptcy, *Bunn, ex parte*, 3 Deac. (B. C.) 119. But it is no defence to show that the commission issued by the desire and at the request of the bankrupt. *Shaw* v. *Williams*, M. & M. 19. This was otherwise before the stat. *Ex parte Grant*, 1 C. & J. 17.

(*t*) *Thomson* v. *Bridges*, 2 Moore, 376. But declarations by the petitioning creditor after suing out the commission, that the commission was concerted, were held to be inadmissible. *Harwood* v. *Keys*, 1 Mo. & R. 204.

(*u*) Bills of exchange obtained by false pretences do not pass (*Gladstone* v. *Hadwen*, 1 M. & S. 517); nor trust property (*Webster* v. *Scales*, 25 G. 3, B. R. *Winch* v. *Keeley*, 1 T. R. 619); nor property equitably assigned before the bankruptcy. *Tibbits* v. *George*, 5 Ad. & Ell. 107. *Carvalho* v. *Burn*, 4 B. & Ad. 382. And see, as to cases under the Insolvent Act, *Best* v. *Angles*, 2 C. & M. 394; 4 Tyr. 256. *A.* agrees to assign to *B.* certain specific goods by way of security for money advanced by *B.* for the purchase of them, and afterwards assigns them under circumstances which would have made the assignment void under the Insolvent Act; the assignees of *A.* under the Insolvent Act are not entitled to the goods, although it would be otherwise if the goods were not ascertained at the time of the agreement. *Mogg* v. *Baker*, 3 M. & W. 195. Nor the property of the bankrupt's wife to her separate use (*Vandernanker* v. *Desborough*, 2 Vernon 95). *Aliter*, where stock stands in the name of a married woman (*Pringle* v. *Hodgson*, 3 Ves. 617); and the wife can have no assistance in equity where there is no trust created for her benefit (*Ibid.*; and see Christian's B. L. 483, 2d edit.) The assignment passes future personal property (*Kitchen* v. *Bartsch*, 7 East,

The assignees being only entitled derivatively from or through the bankrupt, as he could not have maintained an action against the East India

53); but a fresh assignment of real property was held to be necessary (*Ex parte Proudfoot*, 1 Atk. 253). The assignment passes contingent interests (*Higden* v. *Williams*, 3 P. Wms. 132); but not a possibility of taking by descent as heir (*Moth* v. *Frome*, Amb. 394. *Carleton* v. *Leighton*, 3 Mer. 667). Particular proceedings are made for the *transfer* of copyhold property by the stat. 2 G. 4, c. 16, s. 86. All *saleable* offices pass by assignment (1 Atk. 210); *secus*, of offices which concern the administration of justice, 5 & 6 Ed. 6, c. 16. See *Ex parte Butler*, 1 Atk. 210. 215. Amb. 73. 89. 112. Cooke's B. L. 283). So an officer's pay does not pass. *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248. An advowson passes, but the bankrupt must present, if a lapse occur before conveyance to a purchaser. See *Charman* v. *Charman*, 14 Ves. 580. The assignment passes the bankrupt's right to recover what he has paid as a gaming debt. *Brandon* v. *Pate*, 2 H. B. 308. A lease, notwithstanding a covenant not to assign without consent. *Philpot* v. *Horne*, 2 Atk. 219; Amb. 480. *Doe* v. *Carter*, 8 T. R. 7. *Aliter*, where there is a proviso for re-entry in case of the lessee's bankruptcy. *Roe* v. *Galliers*, 2 T. R. 133. An annuity demised to the bankrupt, and payable to *him only*, ceases upon the assignment. *Dommett* v. *Bedford*, 6 T. R. 684; 3 Ves. 150. A debt due to the wife *dum sola* passes (*Miles* v. *Williams*, 1 P. Wms. 249); so does a debt on mortgage (*Bosvil* v. *Brandon*, 1 P. Wms. 459); but the wife's right of survivorship is good against the assignees, if the husband dies before they obtain possession. *Mitford* v. *Mitford*, 9 Ves. 87. As to the wife's remainder in chattel interest, see *Doe* v. *Steward*, 1 Ad. & Ell. 300. Goods delivered to the bankrupt on a contract of sale pass to the assignees, although the bankrupt intended to defraud the vendor. *Milward* v. *Forbes*, 4 Esp. C. 171; but see *Gladstone* v. *Hadwen*, 1 M. & S. 517. So does the interest of a tenant for life in his redemption of the land-tax. *Emley* v. *Grey*, 3 Mer. App. 702. Money advanced to the bankrupt, being in prison (the act of bankruptcy), for the special purpose of settling with his creditors, which object fails, may be repaid by the bankrupt to the party advancing the money, and does not pass to the assignees. *Toovey* v. *Milne*, 2 B. & A. 683. Where the defendant delivered a cheque on his banker to two persons, for a specific purpose, and they returned it to him after their bankruptcy, not having used it; held that the assignees were not entitled to recover it in trover. *Moore* v. *Barthrop*, 1 B. & C. 5. Money received by an overseer of the poor, and set apart from the rest of his property, does not pass to the assignees. *R.* v. *Eggington*, 1 T. & R. 370. In general, the product of a substitute for the original follows the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case where the subject is turned into money, and mixed and confounded in a general mass of the same description. Per Lord Ellenborough, *Taylor* v. *Plumer*, 3 M. & S. 563. See *Scott* v. *Surman*, Willes, 400; *Whitcomb* v. *Jacob*, Salk. 650; *Copeman* v. *Gallant*, 1 P. Wms. 320. A draft is intrusted to a broker to buy exchequer bills; the broker receives the money and misapplies it, by purchasing American stock and bullion, and absconds, but is apprehended. The principal, who receives the American stock and bullion, is not amenable to the assignees under a commission against the broker, on an act of bankruptcy committed on the day on which he misapplied the money. *Taylor* v. *Plumer*, 3 M. & S. 563. Property passes to the assignees when received by a factor after the act of bankruptcy, although purchased with monies advanced by the factor for the purpose of purchasing the goods to be sold by him to repay himself out of the proceeds. *Copeland* v. *Stein*, 8 T. R. 199; and see *Carter* v. *Barclay*, 3 Starkie's C. 43. By the stat. 6 G. 4, c. 16, s. 63, the commissioners are to assign all the present and future personal estate of such bankrupt, wheresoever, &c. and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and the commissioners shall also assign, as aforesaid, all debts due, or to be due to the bankrupt, wheresoever, &c. to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof; neither shall the same be attached, &c., but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt. A valid appropriation or equitable assignment of a trader's funds is not revoked by his bankruptcy. *Hutchinson* v. *Heyworth*, 9 Ad. & Ell. 375. A money bond assigned by the trader to secure a debt to a larger amount, does not pass to the assignees. *Dangerfield* v. *Thomas*, 9 Ad. & Ell. 292. Where a sum was bequeathed, subject to forfeiture if the legatee should "mortgage, charge, sell, assign, or incumber;" held, that bankruptcy being an act of law, and not a voluntary assignment by the legatee, which was alone contemplated by the will, the assignees were entitled. *Whitfield* v. *Prickett*, 2 Keene, 608. Where a grantor settled estates on two in succession for life, on condition that the party entitled

Company for the arrears of his pension, his assignees cannot (*x*). By bringing an action in the form *ex contractu*, where it might have been laid in *tort*, they affirm the act of the bankrupt, and the defendant is entitled to the benefit of a set-off (*y*). For the assignees cannot affirm the same transaction in part, and disaffirm it for the rest. And therefore, where the bankrupt, after a secret act of bankruptcy, had transactions with the defendants, and the assignees brought an action of *assumpsit* to recover what the bankrupt had paid; Lord Hardwicke, C. held, that the defendants were entitled to set-off money which they had paid for the bankrupt (*z*); for by bringing an action of *assumpsit* the assignees had elected to consider the bankrupt as their factor, and affirmed his contract, and having done so, must take him as their factor in all things done fairly and without deceit. Set-off.

Upon an action by the assignees, the defendant was before, and is now, under the stat. 6 G. 4, c. 16, s. 50, where there have been mutual credits between the parties, entitled to set off a debt due from the bankrupt to him before the bankruptcy, without giving any notice of set-off; and he may either plead the set-off, or give it in evidence under the general issue (*a*).

By the stat. 6 G. 4, c. 16, s. 50, where there has been *mutual* (*b*) *credit* given by the bankrupt and any other person, or where there are mutual debts (*c*) between the bankrupt and any other person, the commissioners Mutual credit.

for the time being should reside in the mansion-house and bear the name and arms of the grantor, the latter becoming bankrupt; held, that having a vested right in remainder in the property at the time of his bankruptcy, it passed, under the bargain and sale, to his assignees, although liable to be defeated by the default of the party to fulfil the condition. *Ex parte Goldney*, 3 Deacon, B. C. 570; 1 Mont. & Ch. 75.

(*x*) *Gibson* v. *East India Company*, 5 Bing. N. C. 262.

(*y*) *Smith* v. *Hodgson*, 4 T. R. 211. In *assumpsit* by assignees on an agreement by the bankrupt for the sale of goods, to be paid for by an acceptance, alleging the refusal to accept, and damage by loss of the benefit of such acceptance, and injury to his estate thereby; held, that the damage resulting in pecuniary loss only, it did not amount to such an allegation of unliquidated damages as to preclude the debtor's right of set-off. *Groom* v. *West*, 1 Perr. & D. 19. And see *Gibson* v. *Bell*, 1 Bing. N. C. 743.

(*z*) *Billon* v. *Hyde & Mitchell*, 1 Atk. 120.

(*a*) *Grove* v. *Dubois*, 1 T. R. 112. *Ryall* v. *Larkin*, 1 Wils. 155; see also *Edmeads* v. *Newman*, 1 B. & C. 418, as to mutual securities held by country bankers. And see, as to the advance of money on the strength of consignments, *Easum* v. *Cato*, 5 B. & A. 861; *Ex parte Deere*, 1 Atk. 228. As to mutual accounts between an insurance broker and underwriter, see 19 G. 2, c. 32. *Graham* v. *Russell*, 5 M. & S. 498.

(*b*) These words are not confined to pecuniary demands, but extend to confidential deliveries of goods, likely, under the circumstances, to become productive. *Easum* v. *Cato*, 5 B. & A. 861. So if bankers discount bills yet running, and give credit to the bankrupt, in his account with them, for the amount *minus* the discount. *Arbouin* v. *Tritton*, 1 Holt's C. 408. *Secus*, if the trader deposit a bill with another for a specific purpose, as to raise money upon it; in such case the assignees, after tendering the amount advanced on the bill, are entitled to recover in trover. *Key* v. *Flint*, 1 Moore, 451; *Buchanan* v. *Findlay*, 9 B. & C. 738. This clause extends to mutual dealings *up to the time of the commission*, and therefore extends the protection of the stat. 46 G. 3, c. 135, s. 3. See *Kinder* v. *Butterworth*, 6 B. & C. 42; *Tamplin* v. *Diggins*, 2 Camp. 312. A mutual credit may be constituted although the parties did not mean particularly to trust each other, as where *A.* accepts a bill which gets into the hands of *B.*, who buys goods of *A.* *Hankey* v. *Smith*, 3 T. R. 507. A partner in the house of *M. & Co.* drew bills for the accommodation of *A.*, a customer with the firm, who discount the bill for *A.* and indorse it to *N. & Co.* The bill becoming due after the bankruptcy of *M. & Co.*, *N. & Co.* pay themselves out of the funds of *M. & Co.* in their hands. The assignees of *M. & Co.* sue *A.*; the latter is entitled to set off a debt from *M. & Co.* *Bolland* v. *Nash*, 8 B. & C. 105.

(*c*) The debt due from the creditor to the bankrupt, or the credit given by the latter to the bankrupt, must have existed at the time of the bankruptcy. See *Hankey* v. *Smith*, 3 T. R. 507 (n). *A.* bought of *B.* goods to the amount of 430 *l.*, at six months' credit, and afterwards to the amount of 230 *l.* at the like credit, and at the expiration of the first six months gave *B.* two bills of exchange on third persons for — *l.*, on an undertaking by the latter to pay the balance when the bills were paid.

Mutual credit.

shall state the account between them, and one debt or demand (*d*) may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given *to* or the debt contracted *by him*, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate (*e*); provided that the person claiming the benefit of such set-off had not, when such credit was given, notice (*f*) of an act of bankruptcy by such bankrupt committed.

The defendant, before this, must have showed that the debt which he proposed to set off, accrued before the act of bankruptcy (*g*); he could not set off cash notes payable to *J. S.* or bearer, although they were dated before the bankruptcy, without showing that they came to his hands before the bankruptcy (*h*). So where the defendant insisted on acceptances of the bankrupt in his hands, by way of set-off to an action by the assignees, on his own acceptance, he was bound to show either that his obligation to pay the bills subsisted before the bankruptcy, or that the bills originated in mutual credit (*i*).

A. having become bankrupt before the credit for the second parcel expired, it was held that *B.* might set off the 170*l.* against the price of the second parcel. *Atkinson* v. *Elliott*, 7 T. R. 378. See *Key* v. *Flint*, 8 Taunt. 21.

(*d*) Notwithstanding these terms, a more extensive sense is given to the terms *mutual credit*, in the earlier part of the clause. See Eden on the Bankruptcy Laws, 194. *Ex parte Marshall*, 1 Mont. & Ayr. 139.

(*e*) And therefore debts may now be set off which could not formerly have been set off as depending upon a contingency. See Eden B. L. 203. The terms are more extensive than *mutual debts*. But they are confined to such credits as must in their nature terminate in debts. *Rose* v. *Hart*, 8 Taunt. 499. *Rose* v. *Sims*, 1 B. & Ad. 521. *Easum* v. *Cato*, 5 B. & A. 861. *Young* v. *Bank of England*, 1 Deac. Bankruptcy Cases, 622. A mere guarantee against contingent damages, which cannot terminate in a debt, is not the subject of mutual credit. *Sampson* v. *Burton*, 2 B. & B. 89. Where a creditor employed his debtor to repair his carriage on a contract to pay ready money for the repairs, it was held that the assignees of the latter had a lien till payment. *Clarke* v. *Fell*, 4 B. & Ad. 404.

(*f*) As to the construction of these words, vide *supra*, 172.

(*g*) *Marsh* v. *Chambers*, Str. 1234.

(*h*) *Dickson* v. *Evans*, 6 T. R. 57. Lawrence, J. observed, that if the notes had been payable to the defendant himself, he should have thought it reasonable evidence that they came into his hands at the time they bore date. Where to an action by the assignees of a bankrupt, for a debt due to the bankrupt's estate, the defendant set off notes in his possession issued by the bankrupt before the bankruptcy; proof that notes to the amount of the set-off came into his hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore* v. *Wright*, 6 Taunt. 517. Under the above clause, a party who has industriously obtained notes of bankers after they had stopped payment, but who had no notice of any act of bankruptcy committed, is entitled to set them off. *Hawkins* v. *Whitten*, 10 B. & C. 217. See also *Dickson* v. *Cass*, 1 B. & Ad. 343. Bills were drawn by one partner and accepted by the defendant, and discounted by the firm for his convenience, having money in their hands of his at the time; held, that between the parties it constituted a mutual credit, and that the firm could not, by paying away the bills, which were afterwards returned to them, put an end to that mutual credit, so as to deprive the defendant of his right to set off any debt due from the firm to him against the sum claimed by them or their assignees from him, as such acceptor. *Bolland* v. *Nash*, 8 B. & C. 105. The defendant, in consideration of the bankrupt's delivering to him a bill accepted by him, promised to deliver to the bankrupt a bill accepted by *E.*, and indorsed by the defendant, and the latter afterwards proved the former bill under the commission, but refused to indorse the bill of *E.*; held, that it did not constitute a case of mutual credit between the bankrupt and defendant, but was a cause of action, from the non-performance of a contract, for which the assignees might sue. *Rose* v. *Sims*, 1 B. & Ad. 521.

(*i*) *Oughterlony* v. *Easterby*, 4 Taunt. 888. *Southwood* v. *Taylor*, 1 B. & A. 471. And see *Sheldon* v. *Rothschild*, 2 Moore, 43. The bankrupt accepted

Where *B.* agreed to indemnify *A.* his surety, by allowing him to retain out of any debt which he should owe to *B.*, in respect of mutual dealings in trade, as much as he should pay on the bond, and *B.* sold goods to *A.*, and after *B.*'s bankruptcy *A.* paid more than the price of the goods on the bond, it was held that the assignees could not recover for the goods, there being nothing due to the bankrupt's estate on the original contract (*k*). Mutual credit.

Where *B.*, a broker, was intrusted by *A.*, a merchant, with policies on goods, effected by *B.* for *A.*, and after *A.*'s bankruptcy *B.* received for losses under such policies; and *A.* had before his bankruptcy employed *B.* to sell goods for him as a broker, and *B.* had advanced money to *A.* upon a pledge of such goods and upon *A.*'s general credit; it was held that this was a mutual credit, and that *B.* might retain the sum received for the loss, in liquidation of his advances, and of the money due for premiums (*l*). The defendant having accepted bills for the accommodation of a trader, received money from him after an act of bankruptcy, but before the commission, to take up the bills which became due after the commission, and were then paid by the defendant: held that the defendant was bound to refund; for the statute is confined to mutual debts at any time before such person became bankrupt, and it was not the money of the bankrupt, but of the assignees (*m*). It is not sufficient for the defendant to show that the subject of his set-off was allowed as a debt by the commissioners (*n*). The defendant cannot, in an action by the assignees, set off a debt on a bill drawn by the bankrupt, of which he is the holder, after having set it off against a prior indorser (*o*). The debt must be due in the same right (*p*).

Where a party struck a docket, and afterwards became a trustee under an assignment of all the bankrupt's property in trust for creditors, and after he had incurred some expenses in executing the trust, another creditor issued a fiat, and the assignee seized the property; held, that the assignment being of itself notice of an act of bankruptcy, he could acquire no lien on the property as against the assignees (*q*).

A discharge by one assignee, on receiving monies due to the estate, will bind the rest (*r*); but a discharge by one assignee will not be effectual where the others have expressly dissented (*s*). So a release executed by one assignee in the presence of another will bind both (*t*): but if the co-assignee be absent, an express authority by him under seal must be proved (*u*). Discharge.

II. *Actions against Commissioners, Assignees, &c.*—In an action against a *commissioner* the plaintiff must prove notice of action, according to the stat. 6 Geo. 4, c. 16, s. 41 (*x*). And any plaintiff who sues in respect of any- Actions against assignees, &c.

a bill for 488 *l.* for the accommodation of *A.*, but becoming indebted to *A.* for part, drew a bill on *A.* for the balance, and became bankrupt. The latter bill was accepted and paid by *A.* without knowledge of the intervening bankruptcy; and it was held to be a case of mutual credit, although the principal sum was not due at the time of the bankruptcy; it was also held, that an action for money had and received did not lie against the purchaser of the bill, to whom *A.* had paid the amount.

(*k*) *Dobson* v. *Lockhart*, 5 T. R. 133.

(*l*) *Olive* v. *Smith*, 5 Taunt. 56. And see *Arbouin* v. *Tritton*, Holt, 408.

(*m*) *Tamplin* v. *Diggins*, 2 Camp. 312.

(*n*) *Pirie* v. *Mennett*, 3 Camp. 279.

(*o*) *Belcher* v. *Lloyd*, 10 Bing. 310.

(*p*) See tit. SET-OFF. *Fair* v. *M'Iver*, 16 East, (B. C.) 130.

(*q*) *Ex parte Swinburne*, 3 Deac. 396; and 1 Mont. & Ch. 119.

(*r*) *Smith* v. *Jameson*, 1 Esp. C. 114. *Contra*, *Carr* v. *Read*, 3 Atk. 695.

(*s*) *Bristow and others* v. *Eastman*, 1 Esp. C. 172, where one assignee had taken 20 *l.* in discharge of various sums embezzled by defendant, against the consent of a co-assignee.

(*t*) *Williams* v. *Walsby*, 4 Esp. C. 220. *Lord Lovelace's Case*, W. Jones, 208. *Ball* v. *Dunsterville*, 4 T. R. 313.

(*u*) 4 T. R. 313. *Harrison* v. *Jackson*, 7 T. R. 207.

(*x*) Which enacts, that no writ shall be sued out against, nor copy of any process

thing done in pursuance of the stat. 6 G. 4, c. 16, must (by sec. 44), show that his action was commenced within three calendar months next after the fact committed. In order to compel the defendant to prove the requisites of bankruptcy, the plaintiff must prove notice of his intention to dispute them under the stat. 6 G. 4, c. 16, s. 90 (*y*).

Evidence that the commissioners made out their warrant of commitment without showing any actual restraint, in consequence of such warrant, the party being previously, and still remaining, in custody for another cause, is not sufficient to support an action of imprisonment against them (*z*).

Where the assignees authorize the bankrupt to carry on the business for the benefit of creditors, they are liable for goods supplied to him, although ordered in his own name (*a*), and to pay him for his trouble. Where they enter and keep possession of the premises, although for the purpose of disposing of the bankrupt's estate, they become liable on the covenants (*b*).

Where a bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees executed an assignment of all the bankrupt's estate and reversionary interest, it was held that they must be taken to have assigned the lease, and consequently to have accepted it (*c*).

Where premises, with fixtures, were mortgaged, but the mortgagor continued in possession, and, becoming bankrupt, his assignees removed the fixtures; it was held, that the mortgagee, as against the defendants as strangers, was entitled to consider the mortgagor as his tenant at will, and maintain an action for the injury to his reversionary interest; and also,

served on any commissioner, for anything by him done as such commissioner, unless notice in writing of such intended writ or process shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party intending to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; and such notice shall set forth the cause of action which such party has or claims to have, &c., and on the back of such notice shall be indorsed the name of such attorney or agent, together with the place of his abode.

Sec. 42 enacts, that no such plaintiff shall recover any verdict against such commissioner, in any case where the action shall be grounded on any act of the defendant as commissioner, unless it is proved, upon the trial of such action, that such notice was given, as aforesaid; but in default thereof, such commissioner shall recover a verdict and costs, as hereinafter mentioned; and no evidence shall be permitted to be given by the plaintiff on the trial of any such action, of any cause of action, except such as is contained in the notice.

Sec. 43 enacts, that every such commissioner may, at any time within one calendar month after such notice, tender amends to the party complaining, or to his agent or attorney; and if the same is not accepted, may plead such tender in bar to any action brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and if the plaintiff shall become nonsuit, or shall discontinue his action, or if judgment shall be given for such defendant upon demurrer, such commissioner shall be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only; and if, upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant, on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover, together with costs of suit: provided that, if any such commissioner shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, he may, by leave of the court where such action shall depend, at any time before issue joined, pay into court such sum of money as he shall think fit, whereupon such proceedings shall be had in court as in other actions where the defendant is allowed to pay money into court.

(*y*) *Supra*, 89.

(*z*) *Crowley* v. *Impey*, 2 Starkie's C. 261.

(*a*) *Kinder* v. *Howarth*, 2 Starkie's C. 354.

(*b*) In order to protect themselves, they should enter with a protest, that it is not for the purpose of possessing themselves of the premises as assignees. *Hanson* v. *Stevenson*, 1 B. & A. 303. See *Turner* v. *Richardson*, 7 East, 335; *Wheeler* v. *Bramah*, 3 Camp. 340.

(*c*) *Page* v. *Golden*, 2 Starkie's C. 309. See tit. COVENANT.

that having the same right to the fixtures as his tenant, he might maintain trover for the fixtures so severed, and that they did not pass to the assignees as goods within the bankrupt's order and disposition (*d*).

Defence by assignees.

Defence by Commissioners, Assignees, &c. (*e*).—By the stat. 6 G. 4, c. 16, s. 44, commissioners and others may in all cases justify what they have done under the act under the general issue. In default of notice, under the 90th clause, no evidence need be given of the requisites of bankruptcy (*f*). Where the action is brought in respect of a commitment of the bankrupt or any other under the statute, the whole of the examination of that person shall be read and considered, and the defendant shall have the same benefit from it as if the whole had been recited in the warrant (*g*).

Where the action is brought by the bankrupt (*h*) to try the question of bankruptcy, and due notice has been given according to the stat. 6 G. 4, c. 16, s. 90, the defendants must either prove the different requisites of bankruptcy, or some direct or collateral admission by the plaintiff of his bankruptcy (*i*); as that he obtained his discharge under a Judge's

(*d*) *Hitchman* v. *Walton*, 4 M. & W. 409. And see *Partridge* v. *Bere*, 5 B. & Ald. 604.

(*e*) Upon an application for payment of a dividend against a surviving assignee after a great lapse of time, held that the onus of proving payment lay on the assignee, and that the statute of limitations did not attach to a debt once proved under the commission. *Ex parte Healey*, 1 D. & Ch. 331.

(*f*) The power given by the above clause to persons appointed by the commissioners to break open any house, &c. *of the bankrupt*, and seize upon the body or goods of such bankrupt, is confined to the house of the bankrupt, and does not extend to those of other persons where such party or property may be; the 29th sec., giving the power to search the houses of third persons, requires also the warrant of a justice to be obtained by the party appointed by the commissioners; and therefore, where the *assignees* entered the premises of the plaintiff to seize goods of the bankrupt, it is not an act done in pursuance of the stat., and the plaintiff is not limited to his action within three months after the act committed. *Edge* v. *Parker*, 8 B. & C. 697.

Doing an act "in pursuance of" a stat., is applicable only to cases where the party can be considered as founding his act upon the power given him by the Legislature. *Ib.* And see *Carruthers* v. *Payne*, 5 Bing. 270; *Worth* v. *Budd*, 2 B. & Ad. 177. The official assignee is not within the protection of the 44th clause. *Knight* v. *Turquant*, 2 M. & W. 101.

In order to justify the commissioners in issuing their warrant to apprehend a party summoned to attend before them as a witness under s. 33 of 6 G. 4, c. 16, there should be a reasonable interval between the service of the summons and the time appointed for his attendance, and it is for a jury to say whether under the circumstances such service be reasonable or not; but in order to justify them in issuing their warrant, it is not necessary they should have before them information on oath of the service of the summons. *Groocock* v. *Cooper*, 8 B. & C. 211.

Where no objection was made by the bankrupt to the course of the examination, but he objected to sign it afterwards, it is not necessary that the examination should be set out in the warrant. *In re Leak*, 3 Y & J. 46.

Upon a like application in the court of K. B., the Court also held it to be unnecessary to set out the examination, but that the bankrupt was entitled to be discharged, the warrant having concluded that "he should be committed until he should sign, and *true* answer make." 9 B. & C. 234.

Where the return to a *habeas corpus* set forth only a part of the warrant, omitting the questions which had been put to the bankrupt, the Court ordered that the gaoler should amend his return, and annex the warrant itself, or that a copy thereof, or the whole, should be set forth in the affidavit of the party opposing the discharge. *In re Power*, 2 Russ. 583.

(*g*) By sec. 40.

(*h*) When a commission is superseded, all acts done under it are void, and an action lies against the assignees for taking the goods. *Ex parte King*, 2 Ves. J. 40. *Perkins* v. *Proctor*, 2 Wils. 382. Mont. B. L. 613, n., the titles of purchasers are defeated. *Ibid.*

(*i*) See tit. ADMISSION, and *Crofton* v. *Poole*, 1 B. & Ad. 568. In order to prove a bankrupt to have been a trader, proof of his having acknowledged that he was in partnership with a trader, and that he spoke of partnership property being their joint property, is evidence of the fact as against him. *Parker* v. *Barber*, 1 B. & B. 9; 1 B. & A. 568. Shortly before

order (*h*), or solicited votes in the choice of assignees: proof that he surrendered is insufficient, since a surrender is compulsory (*l*).

Assignees, under a plea in trover, denying the property in the plaintiffs, are entitled to show that the goods were in the order and disposition of the bankrupt as the true owner, and that the defendants, as assignees, sold the goods (*m*).

Actions by a bankrupt.

III. *Actions by and against Bankrupts.*—It is no defence, that the debtor has notice of the insolvency of the plaintiff, and that he may be afterwards called upon by the assignees to pay the debt; for payments enforced by coercion of law are valid against the assignees (*n*). In general, it seems to be no defence to prove that the plaintiff is an uncertificated bankrupt, for a cause of action, as goods sold and delivered (*o*); or money lent (*p*); or a contract for the delivery of goods, subsequent to the bankruptcy (*q*), unless the assignees interpose (*r*). He may maintain trover for goods acquired by him after the bankruptcy, against all but his assignees (*s*).

Where the bankrupt was tenant from year to year, and a trespass was committed prior to his bankruptcy, it was held that he might maintain an action of trespass subsequently to his bankruptcy (*t*).

Actions against a bankrupt. Plea of certificate.

By the stat. 6 G. 4, c. 16, s. 126 (*u*), it is enacted, that any bankrupt who shall, after his certificate (*x*) shall have been allowed, be arrested, or have

the sale of the bankrupt's goods, he consulted with his assignees and the auctioneer as to the best means of disposing of them, and had also, in a notice to his landlord, in which he styled himself "a bankrupt," offered to surrender his lease, which was accepted; held, that the first did not amount to a consent to the sale, so as to estop him from questioning the validity of the commission, being referable to an intention to take care of and see that the most was made of the property, and with respect to his admission of being bankrupt to his landlord, and availing himself of the commission to surrender the lease, that although, as against his landlord, he might be precluded by his admission from denying it, yet that he was not, as against third persons, and that as against the defendants he was at liberty to prove such admissions to be mistaken or untrue. *Heane* v. *Rogers*, 9 B. & C. 586.

(*k*) *Supra*, tit. ADMISSIONS, 19.

(*l*) *Ibid.*

(*m*) *Isaac* v. *Belcher*, 5 M. & W. (EX.) 139; and 7 Dowl. 516.

(*n*) *Prickett* v. *Down*, 3 Camp. 131; 14 Ves. 557.

(*o*) *Foster* v. *Allanson*, 2 T. R. 479. *Silk* v. *Osborn*, 1 Esp. C. 140. *Chippindale* v. *Tomlinson*, Co. B. L. 446. *Coles* v. *Barrow*, 4 Taunt. 754.

(*p*) *Evans* v. *Brown*, 1 Esp. C. 170. But see *Kitchen* v. *Bartsch*, 7 East, 53.

(*q*) *Pebenning* v. *Roebuck*, Holt's C. 172.

(*r*) Where the plaintiff, whilst he was an uncertificated bankrupt, acted as a furniture broker, hiring vans, and employing men, and providing goods, it was held that it was such after-acquired property as the assignees intervening were entitled to recover, and that a payment by the defendant to them, between the writ and the declaration, might be given in evidence under the general issue, and was a good answer to the plaintiff's action. *Crafton* v. *Poole*, 1 B. & Ad. 568.

(*s*) *Webb* v. *Fox*, 7 T. R. 391. *Fowler* v. *Down*, 1 B. & P. 44. See also *Drayton* v. *Dale*, 2 B. & C. 293, as to his right to transfer a note made payable to him since his bankruptcy. Also *Ashley* v. *Kell*, Stra. 1207. Or where he is but a trustee for another. *Fowler* v. *Down*, 1 B. & P. 44. *Coles* v. *Barrow*, 4 Taunt. 754.

(*t*) *Clarke* v. *Calvert*, 3 Moore, 96; and *qu.* whether the assignees could have maintained the action. See *Webb* v. *Fox*, 7 T. R 391; *Fowler* v. *Down*, 1. B. & P. 44. *Smith* v. *Eustace*, 2 H. B. 444. *Cumming* v. *Roebuck*, 1 Holt's C. 172.

(*u*) The effect of 6 G. 4, c. 16, s. 121, discharging the bankrupt from all debts due by him before the bankruptcy, is to afford relief, not only to the person but to his subsequently acquired property; the Court therefore set aside an execution issued against such property, founded on a judgment obtained before his bankruptcy. *Davis* v. *Shapley*, 1 B. & Ad. 54.

The provisions of 6 G. 4, c. 16, s. 127, do not prevent the bankruptcy and certificate being a bar to an action against the bankrupt. *Eicke* v. *Nokes*, 1 M. & M. 303.

(*x*) By the stat. 6 G. 4, c. 16, s. 121, a certificate discharges the bankrupt from all claims proveable under the commission, but does not discharge any partner or other person jointly bound. Sec. 125 avoids all securities given for securing the payment of any money due from the bankrupt, as a consideration, or with intent to persuade a creditor to sign the certificate, and the party sued may give the matter in evidence under the general issue. A certificate obtained after the statute on a commission issued before it is proved by the

any action brought against him for any debt, claim or demand thereby made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence (*y*), and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate.

A certificate obtained after the commencement of the action is not evidence under the general issue, since it operates merely as a special discharge under the statute, and therefore must be made available, as the statute directs (*z*); but if the defendant plead such certificate it will be evidence (*a*), although obtained after the commencement of the action.

The effect of the certificate in evidence will be to bar all demands which were due at the time of the act of bankruptcy, and which could have been proved under the commission (*b*). Effect of certificate.

production of the certificate duly allowed. *Taylor* v. *Welsford*, M. & M. 503. A certificate of conformity under a flat must be proved to have been entered of record in the court of bankruptcy. See the 2 & 3 W. 4, c. 114, s. 8, and *supra*.

(*y*) Where the general plea of bankruptcy is pleaded, it concludes to the country, and the plaintiff can reply the *similiter* only. *Wilson* v. *Kemp*, 2 M. & C. 459, 1 B. & A. 22, which admits evidence of all matters which under the st. 6 G. 4, c. 16, s. 130, render the certificate void.

(*z*) *Gowland* v. *Warren*, 1 Camp. 363. *Stedman* v. *Martinnant*, 12 East, 664. *Joseph* v. *Orme*, 2 N. R. 180. A certificate allowed after plea pleaded should be pleaded *puis darrein* continuance. *Langmead* v. *Beard*, cited 9 East 85. It seems that the Court will take judicial cognizance of the Chancellor's signature of allowance. Eden, 426. Assumpsit against two defendants for goods sold, plea *non-assumpserunt*, and on the 15th June one of the defendants pleaded his bankruptcy *puis darrein continuance*, to which the plaintiff demurred, but the latter proceedings were entered on the *nisi prius* record. The cause was tried on the 29th of June, and a general verdict found against both the defendants. The Court set aside this verdict for irregularity, on the ground that the plaintiffs were not entitled to have an absolute verdict against both the defendants, but contingent only against the one who pleaded his bankruptcy. *Thompson and another* v. *J. Percival and C. Percival*, 2 B. & Ad. 967.

(*a*) *Harris* v. *James*, 9 East, 82.

(*b*) *Bamford* v. *Burrell*, 2 B. & P. 1 P. C. As to what is proveable under the commission, see above, p. 176. The defendant contracted for the purchase of goods to be delivered at stated times, and at prices of the then market day, and became bankrupt and obtained his certificate before the first delivery was to be made; the goods were afterwards tendered and refused; held, that the action was maintainable, notwithstanding the bankruptcy, the contract not being rescinded, as the assignees might have affirmed it if they thought fit, and the amount of damage being incapable of being ascertained until the market price known, was not proveable; held also, that the amount of damage was to be ascertained by the difference between the price contracted to be paid, and that which might have been obtained for the goods on the day when the contract ought to have been completed. *Bowman* v. *Nash*, 9 B. & C. 145. Upon agreement for the purchase of premises, the price was to be paid on a given day, or when a good title should be tendered, and if the purchaser should be desirous, it might remain as a charge on the premises, so as that upon completion of the conveyances, the vendor should have a proper security for the price, with interest, and the purchaser covenanted to pay interest so long as the price remained unpaid, with a proviso, that if the interest were in arrear for thirty days, the purchaser should be considered as a tenant to the vendor, at a stated rent, payable half yearly, and the latter should have power to distrain. The purchaser did require the purchase-money to remain so charged for five years, was let into possession, and subsequently became bankrupt; the vendor distrained for the stipulated rent, and it was paid by the assignees; upon further arrears becoming due after the bankrupt had obtained his certificate, and an action of covenant brought, to which he pleaded his bankruptcy generally, held that the agreement was in substance an agreement of sale, and could not be deemed to be a lease by reason of the default in paying the interest, but that the unpaid vendor being entitled to have the premises resold, and to prove for the residue, the claim for interest was proveable under the commission, and the certificate therefore a bar. *Hope* v. *Booth*, 1 B. & Ad. 498.

A defendant compromised an action for libel, by agreeing to apologize and pay the plaintiff's costs. The apology was made, and a rule of court obtained to pay the

Effect of certificate.

Where a verdict is obtained against the bankrupt in an action for damages before an act of bankruptcy, but judgment is not signed till after, the debt is not barred by the certificate (*c*). If an action be commenced against a bankrupt after the bankruptcy, for a debt due before, and after a verdict for the plaintiff the bankrupt obtain his certificate, the costs of the action, as well as the debt, are proveable under the commission (*d*), for the costs bear relation to the original debt.

Where a bankrupt acceptor pleaded his certificate, and it appeared that the commission was sued out after the day of the date of the bill, but before it became due, it was held to be incumbent on the plaintiff, an indorsee, to

costs, amounting to 67 *l.* On default made an attachment was issued, and the defendant was committed; while in custody he became bankrupt, and obtained his certificate; held, that the sum named in the rule of court was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody. *Riley* v. *Burne*, 2 B. & Ad. 779.

A commission of bankruptcy and certificate does not bar a clerk's claim for wages, where the commission issued in middle of year, and service down to time of commission, when clerk, for want of business, ceased to attend. For the bankruptcy does not dissolve the contract of service. The provision in the 48th section of the Bankrupt Act, in favour of clerks and servants, makes no difference in this respect. *Thomas* v. *Williams*, 1 Ad. & Ell. 685.

The plaintiff accepted a bill for a third party, a lessee of the defendant; the latter, on the bankruptcy of his tenant, and with a view of obtaining possession of the premises, undertook to satisfy the balance due on the bill, and deliver it up to the plaintiff, or indemnify him against it; the defendant failed to do either, and became bankrupt; the breach of promise is not proveable either as a debt due at the time of the bankruptcy, or as a contingent debt, or by the plaintiff in the character of a surety, within 6 G. 4, c. 16, s. 56, and the certificate therefore is no discharge. The relation of a party to a bill as principal cannot be converted into that of a surety, by any subsequent agreement to which the payee is no party. *Yallop* v. *Ebers*, 1 B. & Ad. 698; *Laxton* v. *Peat*, 2 Camp. 185, overruled. In an action in tort against a broker for a fraudulent sale of stock, it was held that the bankrupt's *certificate* of the defendant was *no bar* to the action. *Parker* v. *Crole*, 5 Bing. 63; and 2 M. & P. 150. And see *Parker* v. *Norton*, 6 T. R. 695. A bankrupt may plead a certificate under a second commission, to an action for a debt proveable under that commission, although he has not paid 15*s.* in the pound under that commission. *Robertson* v. *Score*, 3 B. & Ad. 338. Upon the question whether a debt is barred by the certificate, see further p. 176. Debts proveable under the commission, and debts discharged by the certificate, are convertible terms; and see *Goddard* v. *Vanderheyden*, 2 B. & P. 8, n. A debt is not discharged which accrued after the bankruptcy, but before the commission. *Ibid.*

(*c*) As in trespass on the case for seduction, judgment not being signed until after the bankruptcy, although the verdict was before it. *Buss* v. *Gilbert*, 2 M. & S. 70. *Ex parte Charles*, 14 East, 197; and see *Parker* v. *Crole*, 5 Bing. 63; *Atwood* v. *Partridge*, 4 Bing. 209.

(*d*) *Willet* v. *Pringle*, 2 N. R. 190. See also *Scott* v. *Ambrose*, 3 M. & S. 326. 5 B. & A. 453. In *Jameson* v. *Campbell*, 5 B. & A. 250, it was held, that although a right of action on a bill, and the costs of the action, were discharged by a commission and certificate, yet that the bond of the defendant to secure the payment of the damages and costs under the stat. 4 G. 3, c. 33, s. 1, given after the bankruptcy, but before the certificate, was not discharged.

Some demands, not proveable under the commission, are barred by the certificate, *e. g.* the costs of an action of contract, where there is no verdict before the bankruptcy, are not proveable under the commission, but are barred by the certificate. *Ex parte Poucher*, 1 G. & J. 386. *Ex parte Hill*, 11 Ves. 646. So where the party becomes bankrupt before costs taxed, on an award against him. *Haswell* v. *Thorogood*, 7 B. & C. 705. Where interlocutory costs ordered to be paid by a bankrupt are taxed before the bankruptcy, the certificate is a discharge. *Jacobs* v. *Phillips*, 1 C. M. & R. 195; 4 Tyr. 652. See furrther *Parslow* v. *Dearlove*, 5 Esp. 78; 4 East, 438; 1 Camp. 428; 6 Esp. 98; 4 Taunt. 90; 2 M. & S. 551. For cases of mutual acceptances and exchanges of securities. *Rolfe* v. *Caslon*, 2 H. B. 570. *Sarratt* v. *Austin*, 4 Taunt. 200. *Buckler* v. *Buttivant*, 3 East, 172. *Houle* v. *Baxter*, 3 East, 177. *Forster* v. *Surtees*, 12 East, 605. *Cowley* v. *Dunlop*, 7 T. R. 565. Of sureties. *Martin* v. *Court*, 2 T. R. 640. *Brookes* v. *Lloyd*, 1 T. R. 17. *Toussaint* v. *Martinant*, 2 T. R. 100. *Paul* v. *Jones*, 1 T. R. 599. *Hodgson* v. *Bell*, 7 T. R. 97. *Stedman* v. *Martinnant*, 13 East, 427. Unliquidated damages. *Hammond* v. *Toulmin*, 7 T. R. 612. *Overseers of St. Martin* v. *Warren*, 1 B. & A. 491; 3 Wils. 270; 6 East, 110. Covenant for rent. *Auriol* v. *Mills*, 1 H. B. 433; 4 T. R. 94. And see *Hornby* v. *Houlditch*, 1 T. R. 92,

show that an act of bankruptcy was committed before the date of the bill(*e*). But that an antecedent act of bankruptcy might be proved by the proceedings under the commission, stating a previous act of bankruptcy (*f*). Effect of certificate.

If *B.* plead his bankruptcy and certificate, and prove a commission against *A.*, and a certificate under it, he may prove that he was formerly known by the name of *A.*, and that the commission was issued against him, although at the time of the trial he was known by the name of *B.* only (*g*).

If upon the trial it appear that the bankruptcy was subsequent to the commencement of the action, the plea will not be available (*h*).

If a surety for the bankrupt, at the time of the act of bankruptcy, was compelled to pay money as such surety, after the act of bankruptcy, by the stat. 49 G. 3, c. 121, "he was entitled to a dividend under the commission, unless he had notice, when he became surety, of the bankruptcy or insolvency of the trader, of which the issuing a commission, although afterwards superseded, was to be deemed notice."

The plaintiff accepted a bill for the accommodation of the defendant, who became bankrupt before the bill was due, and a commission of bankrupt was

93. Debt for rent. *Wadham* v. *Marlowe*, 1 H. B. 437; 1 T. R. 91. *Gill* v. *Scrivens*, 7 T. R. 27. In case of a *cognovit* given. *Wyborne* v. *Ross*, 2 Taunt. 68. In cases of tort. *Parker* v. *Norton*, 6 T. R. 695. Of verdicts obtained before the bankruptcy. *Buss* v. *Gilbert*, 2 M. & S. 70. Bills of exchange. *Howis* v. *Wiggins*, 4 T. R. 714. *Brooks* v. *Rogers*, 1 H. B. 640. *Joseph* v. *Orme*, 2 N. R. 180. *Starey* v. *Barnes*, 7 East, 435. *Pottek* v. *Broum*, 5 East, 124; stat. 7 G. 1, c. 31. Of a bond given after bankruptcy to secure a previous debt. *Birch* v. *Sharland*, 1 T. R. 715. See also *Ex parte Douthat*, 4 B. & A. 671. *Macarty* v. *Barlow*, Str. 949. As to bonds, stat. 7 G. 1, c. 31. *Callowell* v. *Clutterbuck*, cited 2 Str. 867. *Ex parte Barber*, 9 Ves. jun. 110. *Cotterell* v. *Hooke*, Doug. 97. *Ex parte Granger*, 10 Ves. jun. 351. *Cockerill* v. *Owston*, 1 Burr. 436. *Boutflower* v. *Coates*, Cowp. 95. *Dimsdale* v. *Eames*, 2 B. & B. 8.

By the late stat. s. 51, any person who shall have given credit to the bankrupt upon valuable consideration, for any money or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove, as if the same was payable presently, &c. deducting only thereout a rebate of interest.

By s. 52, sureties, and others, however liable for any debt of the bankrupt, at the issuing of the commission, having paid the whole or part in discharge of the whole debt, though after the commission issued, shall be entitled to stand in the place of the creditor, if he has proved or may prove the debt under the commission, provided he had no notice of any act of bankruptcy when he became liable. See tit. SURETY. One of three co-sureties for the payment of an annuity, who has paid money on account of the annuity, after the bankruptcy of another, may sue the latter for contribution, notwithstanding the certificate, for he could not prove the debt under the commission; but he cannot recover more than one-third. *Brown* v. *Lee*, 6 B. & C. 689.

The 56th section enacts, that if a bankrupt shall, before the issuing the commission, have contracted any debt, payable on a contingency, &c., the person with whom the debt is contracted may apply to the commissioners to value the debt, and he may prove for the amount.

The 58th section enacts, that any person who shall have obtained a judgment, &c. for a debt, or demand, in respect of which he shall prove, may also prove for the costs, though they shall not have been taxed at the time of the bankruptcy. The costs of an action brought by the bankrupt are not a debt contracted within the former clause. *Birè* v. *Moreau*, 4 Bing. 57; and see *Walker* v. *Barnes*, 2 Taunt. 778; *Scott* v. *Ambrose*, 3 M. & S. 326. So a covenant by the defendant for the due payment of a premium of insurance by another is not within that clause; the breach necessarily gives a claim for unliquidated damages. *Atwood* v. *Partridge*, 4 Bing. 209. See *Ex parte Adney*, Cowp. 463.

(*e*) *Pearson* v. *Fletcher*, 5 Esp. C. 90. And see *Macartney* v. *Barrow*, where the court said they would not intend that the defendant was a bankrupt before the suing out of the commission, 7 East, 437, n.

(*f*) *Ibid.*

(*g*) *Stevens* v. *Eliseè*, 3 Camp. 256.

(*h*) *Tower* v. *Cameron*, 6 East, 413. For by the stat. 5 G. 2, c. 30, s. 7, the plea is given in case any bankrupt who has conformed to the law shall *afterwards* be arrested or impleaded for any debt due before such time as he became a bankrupt, and now see the stat. 6 G. 4, c. 16, s. 126, *supra*, 182.

Effect of certificate.

issued, and afterwards superseded; the plaintiff afterwards accepted another bill to take up the former dishonoured bill, and afterwards an effectual commission was sued out on the former act of bankruptcy, under which the bankrupt obtained his certificate, and the plaintiff afterwards paid the second bill; it was held, that the payment by the plaintiff was, in effect, a surety for the defendant upon the first bill, and therefore within the above statute; and that the case was not within the proviso as to notice, since the suretyship commenced before the issuing of the commission, which was afterwards superseded (*i*).

Under a joint commission.

A certificate under a joint commission will be evidence in bar of a separate debt (*k*), and *vice versâ*, a certificate under a separate commission in bar of a joint debt (*l*).

Unliquidated damages.

The certificate is no bar where the plaintiff's claim rests in unliquidated damages; as in an action of trespass or trover, although the conversion was before the bankruptcy (*m*).

In *assumpsit*, on a promise to pay a certain sum weekly for the support of an illegitimate child, which the plaintiff had by the defendant, upon plea of a certificate, it was held that the defendant was liable for the arrears which had accrued since the bankruptcy (*n*).

Foreign certificate.

The defendant in an action of *assumpsit* may prove that he obtained his certificate in the country where the debt was contracted, and that by the law of that country the debt was discharged (*o*). Where the defendant in America, gave to the plaintiff also residing there, a bill of exchange on England, which was dishonoured for non-acceptance, and the defendant afterwards, and whilst he resided abroad, became a bankrupt, and obtained his certificate, such certificate was held to be a bar to an action here on the bill; for the bill having been dishonoured here, the implied promise to pay it arose in America, by the law of which country the defendant had been discharged (*p*), such a certificate is no bar where the debt is contracted in this country (*q*).

Proof in answer.

In answer to evidence of a certificate, the plaintiff may show that it was obtained unfairly, and by fraud, and that it is void under the stat. 6 G. 4, c. 16, s. 130, which enacts, that no bankrupt shall be entitled to his certificate, and that any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering (*r*) in one day twenty

(*i*) *Stedman* v. *Martinant*, 13 East, 427.

(*k*) *Horsey's Case*, 3 P. Wms. 23. *Howard* v. *Poole*, Str. 995. 1157.

(*l*) *Ex parte Yale*, 3 P. Wms. 24, n. But such discharge is personal, and will not relieve the joint-debtor from his liability. See 10 Anne, c. 15. s. 3.

(*m*) *Parker* v. *Norton*, 6 T. R. 695.

(*n*) Per Lord Ellenborough, *Millen* v. *Whettenbury*, 1 Camp. C. 428.

(*o*) *Hunter* v. *Potts*, 4 T. R. 182. *Ballantine* v. *Golding*, Co. B. L. 499, 5th edit. A certificate in England bars creditor in Calcutta, although creditor had no notice. *Edwards* v. *Ronald*, Knapp's C. 259. *Secus*, where the remedy only is barred. *Williams* v. *Jones*, 11 East, 439.

(*p*) *Potter* v. *Brown*, 5 East, 124. It seems that a certificate under a bankruptcy in England is so far a judgment in respect of foreign states, that it may be pleaded in bar to the action of foreign creditors. *In re Odwin* v. *Forbes*, 1 Buck's B. C. 57; in the Cock-pit. And see *in re Stein & Co.* 1 Rose's B. C. 402.

(*q*) *Smith* v. *Buchanan*, 1 East, 6. *Shallcross* v. *Dysart*, 2 Gl. & J. 87. *Lewis* v. *Owen*, 4 B. & A. 654.

(*r*) See the repealed provision, 5 G. 2, c. 30, s. 12, under which it was held that insuring in the lottery is not within that act (*Lewis* v. *Piercy*, 1 H. B. 29); nor the keeping a lottery-office. *Ex parte Richardson*, Co. B. L. 463, 5th edit. Sel. N. P. 238). It was also held that the plaintiff must elect whether he would give evidence of one loss to the amount of 5 *l.*, or of several, to the amount of 100 *l.* *Hughes* v. *Morley*, Holt's C. 520. A loss by gaming defeats a certificate, although the bankrupt on the same day wins more that he loses. *Ex parte Newman*, 3 Glynn. & J. 329.

pounds, or within one year next preceding his bankruptcy two hundred pounds; or if he shall, within one year next preceding his bankruptcy have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract, or shall after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings or securities, or made, or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors, or shall have concealed property to the value of ten pounds or upwards; or if any person having proved a false debt under the commission, such bankrupt being privy thereto (*s*), or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

So the plaintiff may show that it was obtained from one of the creditors under a promise from the bankrupt to pay him his whole debt (*t*). If the plaintiff adduce evidence to prove concealment to the value of 10 *l.*, the defendant may show that the concealment was not wilful (*u*). By the stat. 6 G. 4, c. 16, s. 127, by a certificate under a second commission the person only of the bankrupt is protected if his effects are not sufficient to make a dividend of 15 *s.* in the pound. But this clause, when applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate for a debt which he might have proved under the commission (*x*).

Proof to defeat the certificate.

Previous to that statute it was sufficient in order to defeat a defence by a certificate under a second commission, to produce the former commission, certified as of record, and the proceedings under it, to show that the bankrupt submitted to it without proving the steps of the former bankruptcy in detail (*y*): where there had been no notice to produce the certificate, proof of the affidavit of conformity was held to be insufficient (*a*); but after proof of such notice, it was held (before the late statute) to be sufficient to prove, by the solicitor under the commission, that he was employed by the defendant to obtain his certificate, and had no doubt, from the entries in his books, that it had been obtained (*b*).

The person who had the possession of the former commission and proceedings was served with a *subpœnâ duces tecum* to produce them (*c*). After such proof by the plaintiff, it lay on the defendant affirmatively to prove

(*s*) In order to prove this, the person who proved the false debt may be called as a witness, or the fact may be proved by presumptive or collateral evidence. *Edmonstone* v. *Webb*, 3 Esp. C. 264.

(*t*) *Phillips* v. *Dicas*, 15 East, 248, under the stat. 5 G. 2, c. 30, s. 11, and now under the stat. 6 G. 4, c. 16, s. 132.

(*u*) *Cathcart* v. *Blackwood*, in Dom. Pro. 1765.

(*x*) *Robertson* v. *Score*, 3 B. & Ad. 338. The stat. does not apply to a bankrupt who has obtained his certificate under a subsequent commission after the statute had passed. *Carew* v. *Edwards*, 4 B. & Ad. 351.

(*y*) *Haviland* v. *Cooke*, 5 T. R. 665. 3 Esp. C. 195.

(*a*) *Graham* v. *Grill*, 4 Camp. 282.

(*b*) *Henry* v. *Leigh*, 3 Camp. 499.

(*c*) It seems that the book at the Bankrupt-office, in which entries are made of the allowance of certificates by the Chancellor, is not secondary evidence of the allowance of the certificate; for it is not seen or referred to by the Chancellor, and the entries are not made by any officer of the court appointed for that purpose. *Henry* v. *Leigh*, 3 Camp. 499. See the late statute.

Proof to defeat the certificate.

that he has paid 15 *s.* in the pound under the second commission (*d*); proof that it would *probably* produce so much was insufficient (*e*).

Where the action was brought before a dividend had been made under the second commission, or the period had elapsed under the stat. 5 Geo. 2, c. 30, s. 37, it was held that the certificate would be no bar, if it were shown that it was not probable that the bankrupt would be able to pay 15 *s.* in the pound.

Compounding with creditors, &c.

So the plaintiff, under the stat. 6 G. 4, c. 16, s. 127, may show that the defendant has compounded with his creditors (*f*), or delivered to them his estate and effects, and been released by them (*g*). Where the defendant had compounded with his creditors, but afterwards, and before he became bankrupt, paid them the whole of their debt, and did not pay 15 *s.* in the pound under a subsequent commission, his certificate under it was held to be a bar (*h*) to a subsequent action. Under the same section the plaintiff may also show that the bankrupt has been discharged under an act for the relief of insolvent debtors.

The certificate is void if any one of the creditors, although without the privity of the bankrupt, was induced by money to sign the certificate (*i*).

Subsequent promise.

The plaintiff may also reply to the certificate by evidence of an express promise by the bankrupt to pay the debt, and is not bound to declare specially on such subsequent promise (*k*). But it seems that if the promise be special to pay when he is able, the plaintiff should prove his ability at the time of the action brought (*l*); and the promise is not binding unless it be precise and positive (*m*), and in writing (*n*).

A promise made by a bankrupt before he has obtained his certificate will revive the debt, although the certificate be obtained afterwards (*o*). A mere admission of the debt is insufficient (*p*), though accompanied by an unaccepted offer to pay the debt by instalments (*q*).

A bankrupt sued by his surety, who paid the debt subsequently to the

(*d*) *Gregory* v. *Morton*, 3 Esp. C. 195.

(*e*) *Coverley* v. *Morley*, 16 East, 225; and *qu.* whether the actual payment of 15 *s.* in the pound be not a condition precedent. See the judgment of Bayley, J.; and see *Jelfs* v. *Ballard*, 1 B. & P. 467.

(*f*) Such a clause, it has been held, under the stat. 5 G. 2, c. 30, s. 37, does not contemplate limited compositions with part of a trader's creditors, but general ones only, such as would admit all creditors, of whatsoever description. *Norton* v. *Shakespeare*, 15 East, 619. See *Slaughter* v. *Cheyne*, 1 M. & S. 182.

(*g*) *Jelfs* v. *Ballard*, 1 B. & P. 467.

(*h*) *Read* v. *Sowerby*, 3 M. & S. 78.

(*i*) *Holland* v. *Palmer*, 1 B. & P. 95.

(*k*) *Williams* v. *Dyde*, Peake's C. 68. *Trueman* v. *Fenton*, Cowp. 548; but see *Penn* v. *Bennett*, 4 Camp. 206. *Leaper* v. *Tatton*, 16 East, 420.

(*l*) *Besford* v. *Saunders*, 2 H. B. 116. *Qu.* whether payment of interest after bankruptcy, on a bond for the payment of money forfeited before bankruptcy, will render the bankrupt liable on the bond. *Alsop* v. *Brown*, Doug. 191. *Semble*, not.

(*m*) *Lynbury* v. *Weightman*, 5 Esp. C. 198, where the bankrupt said that his effects would pay 20 *s.* in the pound, and that he would pay every body, it was held that he was not bound.

(*n*) By the stat. 6 G. 4, c. 16, s. 131, no bankrupt after being discharged by a certificate shall be liable to pay any debt, &c., discharged by such certificate upon any promise made after the suing out of the commission, unless it be in writing, signed by the bankrupt, or by some person authorized by him.—But the plaintiff in such case need not declare specially. *Williams* v. *Dyde*, Peake's C. 68. *Russell* v. *Hardman*, Ibid. The initial of the defendant's surname is not a signature within the statute. *Hubert* v. *Moreau*, 2 C. & P. 528.

(*o*) *Roberts* v. *Morgan*, 2 Esp. C. 736. And see *Ernst* v. *Sciaccaluga*, Cowp. 527.

(*p*) *Fleming* v. *Hayne*, 1 Starkie's C. 370. *Bailey* v. *Dillon*, 2 Burr. 736. *Besford* v. *Saunders*, 2 H. B. 116. *Alsop* v. *Brown*, Doug. 182.

(*q*) *Ibid.*

bankruptcy, cannot avail himself of his certificate without having specially pleaded it (*r*).

By the stat. 6 Geo. 4, c. 16, s. 59, the proving by a creditor under the commission is an election by him not to sue at law; but it seems that such an election cannot either be pleaded or given in evidence in bar of the action (*s*).

Discharge from lease accepted by assignees.

The stat. 6 Geo. 4, c. 16, s. 75, enacts, that where any bankrupt is entitled to any lease or agreement for a lease, if the assignees accept the same, he shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance of the conditions, covenants, and agreements therein contained; and if the assignees decline the same, shall not be liable in case he deliver up such lease or agreement to the lessor or person agreeing to grant such lease, within fourteen days after notice that the assignees have declined (*t*).

(*r*) Under the stat. 49 Geo. 3, c. 121, s. 8; for that statute discharged the bankrupt, having his certificate, of all such demands, at the suit of every such person, in *like manner* to all intents and purposes as if such person had been a creditor before the bankruptcy *Stedman* v. *Martinnant*, 12 East, 664. The stat. 6 Geo. 4, c. 16, s. 121, discharges a certificated bankrupt from all claims proveable under the commission.

(*s*) The proving a debt under the commission is no defence to an action at law for the same debt; and the election of the creditor under the stat. 49 Geo. 3, c. 121, s. 14, is confined to the debt actually proved, and does not extend to distinct debts, though *ejusdem generis*, and due at the same time. *Harley* v. *Greenwood*, 5 B. & A. 95. *Watson* v. *Medex*, 1 B. & A. 121; and see *Bridget* v. *Mills*, 4. Bing. 19. But see *Reed* v. *Sowerby*, 3 M. & S. 78. So it was held that the statute did not exclude a creditor who had proved a joint debt under a commission against one from suing the rest. *Heath* v. *Hall*, 4 Taunt. 326. See also *Young* v. *Glass*, 16 East, 252. So it was held that the drawer of a bill of exchange, who had paid the amount to the holder, after a commission of bankruptcy against the acceptor, might sue the acceptor before he had obtained his certificate, and arrest him on the bill, although the holder had proved the bill under the commission. *Mead* v. *Braham*, 3 M. & S. 91. A bankrupt lessee is discharged by the statute, not only from the lease, but from all covenants to be performed as lessee. *Kearsey* v. *Carstairs*, 2 B. & Ad. 716. But the statute does not put an end to the lease, but merely discharges the bankrupt from payment of rent or observance of the covenants. *Manning* v. *Flight*, 3 B. & Ad. 211. The bankruptcy of the lessee does not discharge a surety on a bond for the performance of covenants in a lease. *Inglis* v. *M'Dougall*, 1 Moore, 196. Lease of a mill, with covenants that on the determination of the lease, the machinery should be again valued, and the difference between that and the former valuation paid by the lessor or lessee, as it was greater or less than the former, the lessee becoming bankrupt, his assignees repudiate the lease, and the lessor declines to pay the difference, the assignees may (after demand and refusal), recover the value in trover. *Fairburn* v. *Eastwood*, 6 M. & W. 679; and see *Kearsey* v. *Carstairs*, 2 B. & Ad. 716.

(*t*) The statute does not apply to a lessee and his *assignees* of a lease. *Taylor* v. *Young*, 3 B. & A. 521, under the statute 49 G. 3, c. 121. By the clause 6 G. 4, c. 16, s. 75, assignees may be compelled to elect and to deliver up the lease if they decline to accept it. Where the lessee covenanted not to assign, became bankrupt, and after acceptance of the lease he came in again as assignee, it was held that he was discharged. See *Doe* v. *Smith*, 5 Taunt. 795, as to proof of acceptance, vide *supra*, 131. The chancellor has no authority to decide whether the assignees *have elected* or not; it is a question of fact for a jury. *Ex parte Quantock*, Buck. 180. It has been held, that the mere advertising a lease for sale, without taking possession, and without stating themselves to be the owners or possessors, did not amount to an assent. *Turner* v. *Richardson*, 7 East, 335. But if a bidder had been accepted, and a deposit received, it would have been evidence of an acceptance. *Hastings* v. *Wilson*, 1 Holt's C. 290. Where they allowed the bankrupt's goods to remain on the premises nearly a twelvemonth, and then to avoid a distress paid the rent, but informed the landlord that they did not mean to take the lease unless it could be advantageously disposed of, and afterwards put it up to sale, when there was no bidder, and omitted to return the key for near four months afterwards, but never took possession, Lord Ellenborough held that they were not liable. *Wheeler* v. *Bramah*, 3 Camp. 340. So though they have released an under-tenant of the lessees. *Hill* v. *Dobie*, 8 Taunt. 325.

Indictment against a bankrupt.

IV. Upon an indictment against a bankrupt for a felonious embezzlement of his effects, &c, the steps of his bankruptcy must be strictly proved (*u*)

Where the petitioning creditor's debt was alleged to be due to *A. B.* and *C*, surviving executors of the last will and testament of *D*, after proof that *A B* and *C* were the executors, and were directed by the will to carry on the business, it was held to be necessary to prove that they all acted in discharge of the trust (*x*)

An allegation, that the commission issued under the great seal of Great Britain, is proved by evidence of an instrument issued under the great seal of the United Kingdom of Great Britain and Ireland (*y*)

Upon an indictment against a bankrupt for perjury, alleged to have been committed in his examination before the commissioners, it was held to be necessary to prove the bankruptcy in strict detail, and that the declaration of his bankruptcy by the commissioners was not sufficient (*z*), for if he was not a bankrupt at the time, the commissioners had no jurisdiction to administer an oath and examine him The case of a person who makes a deposition, on which the judgment of the commissioners is to be founded, as to the bankruptcy itself, falls under a different consideration, the perjury may consist in the falsely swearing that the party was a bankrupt, so that if it were necessary to prove the bankruptcy, the perjured party could not be punished at all In such a case the offence of perjury seems to be complete, independently of the question of bankruptcy, for a false oath is taken before commissioners duly authorized to administer the oath (*a*)

The indictment against a bankrupt, on 5 Geo 2, c 30, for not making a full and true disclosure, &c, stated a notice requiring him *personally to appear*, &c, according to the several statutes then in force concerning bankrupts, and particularly the statute passed in the 5th Geo 2, stating its title, but upon the notice being produced it set forth the title of the 49th Geo 3 held that the variance was fatal It seems also, that the averment *of personal service of the notice should state* whether the party was at large or in prison, the statute pointing out modes of service in each case (*b*)

Competency of witnesses

V. It is an inveterate and universal rule, that the bankrupt himself (*c*) is not a competent witness to prove any fact to support or impeach the commission, either on an issue to try the bankruptcy, or in an action by the assignees to recover a debt due to the estate, even though he shall have obtained his certificate, and have released the assignees, for he is inte-

(*u*) See the form of the indictment, and the necessary allegations, CRIMINAL PLEADINGS, and see the stat 6 Geo 4, c 16, s 112

(*x*) *R* v *Barnes*, 1 Starkie's C 243

(*y*) *R* v *Bullock*, 1 Taunt 71

(*z*) *R* v *Punshon*, 3 Camp 96, *cor* Ellenborough, C J

(*a*) See *R* v *Raphael*, *cor* Abbott, J Devon Spring Assize. 1818, Manning's Index, 2d edit 232, where it is stated to have been ruled, that on an indictment against a third person examined before the commissioners, their declaration that the party is a bankrupt is sufficient It is not stated whether the examination in this case was preparatory or subsequent to the adjudication

(*b*) *R* v *Barraston*, 1 Gow C 210 Where the bankrupt did not surrender, being detained in prison, it was held, that he was not bound to apply to the commissioners to be brought up to surrender, nor to the chancellor to enlarge the time, although he was privileged so to do and the omitting to take those steps could not make him guilty of felony, under the 6 G 4, c 16, ss 113 119. *R.* v *Mitchell*, 4 C & P 251.

(*c*) Neither can his wife be examined for that purpose *Ex parte James*, 1 P. Wms 611, 12 Vin Ab 11, pl 28

Competency of Bankrupt.

rested in the certificate which is founded upon the bankruptcy (*d*). And it makes no difference whether the question be asked upon an examination in chief, or upon his cross examination (*e*); neither can he be asked questions with a view to establish an antecedent act of bankruptcy (*f*), or to explain an act relied on by the adversary as an act of bankruptcy (*g*). Accordingly, upon the trial of issues out of Chancery, to try whether *Herbert* and *Ryton* were bankrupts, and whether they owed the petitioning creditor 100*l.*, *Ryton*, who had obtained his certificate, was produced to prove the debt; but Ryder, C. J. was of opinion that he was not competent to prove that he and *Herbert* were jointly indebted to the petitioning creditor, or that they were partners, or that *Herbert* was a bankrupt, since each of those facts *tended* to support the commission; and if that were not good the certificate would become bad (*h*). Neither can he be examined to explain an equivocal act of bankruptcy (*i*). But the rule is restricted to evidence affirming or disaffirming the bankruptcy. He is competent, in an action by the assignees against a creditor who has levied under an execution, to prove the defendant's knowledge of his insolvency (*j*).

An *uncertificated bankrupt* is not a competent witness in actions by the assignees, for he is interested in procuring funds (*k*) for the discharge of his debts; but he is a competent witness against the assignees to diminish the

(*d*) *Field* v. *Curtis*, 2 Str. 829. *Flower* v. *Herbert*, 2 H. & B. 279. *Chapman* v. *Gardiner*, 2 H. B. 279, n. *Ewens* v. *Gold*, B. N. P. 41. In *Oxlade* v. *Perchard*, 1 Esp. C. 287, it was held that the bankrupt was competent to explain a doubtful act of bankruptcy. But this was overruled in *Rabbett* v. *Gurney*, 1 Montague, 489, and is contrary to *Chapman* v. *Gardiner*, 2 H. B. 279. *Qu.* whether this rule is not to be regarded, in some instances at least, as a rule of policy rather than as a rule founded on the ordinary principle of exclusion on the score of interest; where, for instance, the bankrupt has obtained his certificate, and released his assignees, he has no immediate interest in the event of an action brought by the assignees, for the result would not affect his certificate. See Christian's B. L. 444, 2 edit. *Binns* v. *Tetley*, 1 M'Clell. & Y. 397. Raymond, C. J. admitted a bankrupt to give evidence as to the *time* of an act of bankruptcy, although he refused him as a witness to prove the act, 12 Vin. Ab. 11, pl. 28.

(*e*) *Elsom* v. *Bailey*, Sitt. after Mich. T. 50 Geo. 3, *cor.* Lawrence, J. 1 Sel. N. P. 271. *Binns* v. *Tetley*, 1 M'Clell. & Y. 397.

(*f*) *Wyatt* v. *Wilkinson*, 5 Esp. C. 187.

(*g*) *Sayer* v. *Garnett*, 7 Bing. 103.

(*h*) *Flower* v. *Herbert*, cited 2 H. B. 279; and see *Cross* v. *Fox*, Ibid.

(*i*) *Hoffman* v. *Pitt*, 5 Esp. C. 22. *Sayer* v. *Garnett*, 7 Bing. 103.

(*j*) *Reed* v. *James*, 1 Starkie's C. 134. It is necessary, however, that he should have obtained his certificate, and released his assignees.

(*k*) *Kennet* v. *Greenwollers*, Peake's C. 3. *Evans* v. *Gold*, B. N. P. 41. *Langden* v. *Walker*, Cowp. 70. *Butler* v. *Cooke*, Ibid. In an action to recover money paid to a creditor out of voluntary preference, it was held that the wife of the bankrupt was a competent witness for the assignees, on the ground of indifference, since, if the assignees recovered, the defendants would recover to the same amount under the commission. *Jourdaine* v. *Lefevre*, 1 Esp. C. 66, *cor.* Ld. Kenyon. But see *infra*, 134 (*p*). In an action by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt is not competent to prove the payment of a sum of money to the defendant by the bankrupt, after the bankruptcy, for malt supplied before the bankruptcy, although the bankrupt has released his assignees, he not having obtained his certificate. The objection, however, is not that if the plaintiff failed the costs of the suit would be paid out of the estate, and so diminish the general fund; because that is not a *certain necessary* legal consequence, but is to depend on the judgment of the commissioners; the main ground of objection is, that the bankrupt has an interest in the assignees recovering the amount claimed, and that there not being yet a definite surplus, it is not a releasable interest. And although it was suggested, that if the assignees recovered the amount claimed, the creditor would recover for his demand against the uncertificated bankrupt, yet this is not a countervailing interest; for the liability of the bankrupt is not the result of the present action; a verdict for the plaintiff would not create or forward his liability to the creditor, nor would the verdict be evidence of it. Neither, as it seems, would a verdict against

fund (*l*). Neither would he be a competent witness for his surety in a joint bond to prove payment, where the obligees had made their election to prove under the commission (*m*), for the plaintiffs, if defeated, could no longer sue him; but if they succeeded, he would be liable to his surety.

But he is a competent witness for a defendant, his surety (the acceptor of an accommodation bill), who has released him in the usual form, for the defendant cannot prove against his estate (*n*).

Upon an action against the assignee of a bankrupt to recover the penalty upon an usurious loan of money to the bankrupt, it was held that the latter, who had not obtained his certificate, or repaid the money, was not a competent witness to prove the offence, although he was ready to release to the assignee all benefit which might arise from the discharge of that debt in particular, and also all claim to surplus and allowance (*o*), and although the defendant had proved under the commission; because (as it was said) the creditor might still bring an action at law, and arrest the bankrupt for the whole of the debt. But now, by the stat. 6 G. 4, c. 16, s. 50, the creditor after proving the debt could not afterwards in such a case sue the bankrupt; and even if he could, yet, as the verdict would not be evidence for the bankrupt in an action afterwards brought by the assignee, it seems that he would not be an incompetent witness on that ground (*p*).

Certificated Bankrupt.

A *certificated bankrupt* having *released* his surplus and allowance to the assignees, or executed a general release to them, is a competent witness in actions by the assignees to increase the divisible fund, for he is no longer interested in the amount (*q*). In such case he is competent to identify the proceedings under the commission, to establish them in evidence for the assignees (*r*); yet it has been held that he is not in such case a competent witness for his assignees against the Crown (*s*). But a certificated bankrupt under a second commission is not competent for the assignees, unless he has paid 15*s.* in the pound under that commission (*t*).

A certificated bankrupt who has released his assignees is still incompetent to be a witness for the assignees, if it appear that he has done any

the assignees relieve him from liability to the creditor; it would be no answer to say, that he had been already paid; the answer would be, that it was the money of the assignees. *Williams* v. *Williams*, 6 M. & W. 170.

(*l*) *Langden* v. *Walker*, cited Cowp. 70. *Butler* v. *Cooke*, Ibid.

(*m*) *Townend* v. *Downing*, 14 East, 565.

(*n*) *Cartwright* v. *Williams*, 2 Starkie's C. 340. See Vol. I. tit. INTEREST, and below, tit. BILL OF EXCHANGE. The drawer and acceptor of a bill having had mutual dealings, were in ignorance of the state of the account, which was in fact in favour of the acceptor (the defendant); and before the bill became due, the drawer had become insolvent, and, whilst avoiding other creditors, upon being pressed by the plaintiff, a creditor, indorsed the bill to him after an act of bankruptcy, upon which a commission was afterwards sued out; the bankrupt having been called, and the Judge having directed the jury to say whether, under the circumstances, the transfer was a *bonâ fide* transfer, they found for the defendant; it was held, that such a bill could not be considered an accommodation bill, and therefore there was no implied undertaking to indemnify the acceptor, and the bankrupt, therefore, was a competent witness for him. *Baynall* v. *Andrews*, 7 Bing. 217.

(*o*) *Masters* v. *Drayton*, 2 T. R. 497.

(*p*) See tit. INTEREST.

(*q*) *Nares* v. *Saxby*, cited 2 T. R. 497. See *Carlisle* v. *Eady*, 1 C. & P. 234. He may, it seems, show his certificate, and release by oral evidence on the *voir dire*. *Carlisle* v. *Eady*, 1 C. & P. 234. *Wandless* v. *Cawthorne*, M. & M. 321. But see *Goodhay* v. *Henry*, M. & M. 319; ib. 121.

(*r*) *Morgan* v. *Pryor*, 2 B. & C. 14.

(*s*) *Crauford* v. *The Attorney-general*, Price, 5.

(*t*) *Kennet* v. *Greenwollers*, Peake's C. 3. A bankrupt who, having obtained his certificate, takes the benefit of an Insolvent Act, and then releases his assignees under the commission, is not a competent witness for those assignees, for he could not bind the assignees of his estate under the Insolvent Act. Per Bayley, J., York Lent Ass. 1826.

act which avoids the certificate, for then his future effects remain liable. And therefore, in an action by an assignee to recover money lost by the bankrupt at play, he is not a competent witness for the plaintiff (*u*). But even in such a case he may be rendered competent by releases from all his creditors and his assignees (*x*). And where such a release was executed a year after the issuing the commission, by all the creditors who had proved under the commission, it was held that the release was sufficient. Certificated Bankrupt. —Competency.

Though he has pleaded his certificate he is not, it is said, a competent witness for a co-defendant (*y*). Otherwise if as to him a *nolle prosequi* has been entered (*z*).

It has been said, that if in an action by assignees the defendant calls the bankrupt as a witness, he waives all objections to his competency, and he may then be cross-examined as to the requisites of bankruptcy (*a*).

Where the assignees sought to recover money paid to a creditor by way of voluntary preference, it was held that the wife of the bankrupt was a competent witness for the plaintiffs, on the ground that she stood indifferent in point of interest (*b*); since, if the assignees recovered the amount, it would be proved under the commission by the creditor. This decision, however, seems to be questionable, since it is obvious that unless the estate be sufficient to pay 20*s.* in the pound, the dividend to the rest would be diminished by allowing any one creditor his whole debt; and so would the allowance to the bankrupt.

A petitioning creditor is in general incompetent to support the commission (*c*), since he enters into a bond to the Chancellor, conditioned to establish the facts on which the commission depends, and to cause it to be effectually executed; but he is competent to cut it down (*d*). Creditors.

A creditor is in general an incompetent witness to increase the estate (*e*). It has been doubted whether he is not competent where he has not proved his debt under the commission (*f*). But it seems to be now held that he is incompetent in all cases, so long as he remains a creditor, whether he has or has not proved his debt, and whether an action be brought by the assignees to recover a debt, or the question be tried on an issue, for a creditor has an interest in the preferable remedy for recovering his debt under the commission (*g*). But he is a competent witness for the assignees after

(*u*) *Carter* v. *Abbott*, 1 B. & C. 444.

(*x*) *Ibid.*

(*y*) *Raven* v. *Dunning*, 3 Esp. C. 25. *Emmett* v. *Bradley*, 1 Moore, 332; Peake's L. E. Append. 87. *Currie* v. *Child*, 3 Camp. 283.

(*z*) *M'Iver* v. *Humble*, 16 East, 171.

(*a*) *Fletcher and another* v. *Woodmass*, Sel. N. P. 253.

(*b*) *Jourdaine* v. *Lefevre*, 1 Esp. C. 66.

(*c*) *Green* v. *Jones*, 2 Camp. 411. *Reed* v. *James*, 1 Starkie's C. 136.

(*d*) Per Lord Ellenborough, 2 Camp. R. 411. *Lloyd* v. *Stretton*, 1 Starkie's C. 40. In an action against a sheriff, for a false return to a *fi. fa.*, the defence being the bankruptcy of the debtor, the petitioning creditor is, it seems, a competent witness. *Wright* v. *Lainson*, 2 M. & W. 739.

(*e*) *Eggleshaw* v. *Haines*, 12 Vin. 11. *Ambrose* v. *Clendon*, C. T. Hardw. 267. *Koopes* v. *Chapman*, Peake's C. 19. *Adams* v. *Malkin*, 3 Camp. 534. *Crooke* v. *Edwards*, 2 Starkie's C. 302. *Ex parte Osborn*, 1 Rose, 287. 392. So if being a creditor under a first commission, the bankrupt, before his certificate, promises full payment, he is not competent to support a second commission. *Roberts* v. *Morgan*, 2 Esp. C. 736. But now see the stat. 6 G. 4, c. 165, as to promises made by the bankrupt. Where parties claiming debts were summoned to attend for examination before commissioners, held that they were not to be deemed "witnesses" within the 6 G. 4, c. 16, s. 20, to entitle them to an auxiliary commission for their examination. *Ex parte Kirby*, 1 Mont. & M. 440.

(*f*) *Williams* v. *Stevens*, 2 Camp. 300.

(*g*) *Ex parte Malkin, in re Adams, cor.* Gibbs, C. J. Sitt. after Hil. Term, 1814, 2 Christian's B. L. 453. 3 Camp. 545. See *Ex parte Osborn*, 2 Ves. Beames, 177; 1 Rose, 377. 392; *Crooke* v. *Edwards*, 2 Starkie's C. 302; *In re Gould*, 2 Schoales & Lefroy, 116, per Lord Redesdale; *contra*, *Williams* v. *Stevens*, 2 Camp. 301. Where the adjudication was founded upon the

he has assigned his debt (*h*). He is not a competent witness upon an issue to try whether the bankrupt has lost more than 5*l.* at one sitting by gaming (*i*); he would be entitled to a share of the bankrupt's allowance forfeited by the gaming. A creditor who has assigned his debt, although by parol only, is competent (*k*). It was held that he was *ex necessitate* competent to prove an act of bankruptcy under the stat. 4 Geo. 3 c. 33 (*l*).

In an action by a creditor against the defendant for inducing him by misrepresentations to trust a bankrupt, another creditor of the bankrupt is a competent witness for the plaintiff, for a recovery by the plaintiff would not discharge his claim on the bankrupt's estate (*m*). A release by a creditor to the assignees is sufficient, without a release to the bankrupt (*n*).

A creditor is competent to negative the petitioning creditor's debt (*o*).

Assignee. An assignee is a competent witness in actions relating to the bankrupt's estate, where he is not a party, for as assignee he is a mere trustee (*p*).

A commissioner called to support the commission under which he had acted was allowed to be examined (*q*).

Production of documents. Where the act of bankruptcy consists in the execution of a deed by the bankrupt, the Chancellor will order the person who has the possession of it to attend before the commissioners (*r*). If the petitioning creditor be called by the assignees, merely for the purpose of producing a promissory note on which the debt is founded, he is not liable to be cross-examined by the defendant (*s*). After the death of a witness his examination entered of record is evidence under the stat. 5 Geo. 2, c. 30, s. 41 (*t*). A deposition

examination of a party, a creditor, who at the time stated he did not consider himself a creditor, and should make no claim, the court refused to supersede the commission. *Ex parte Hills*, 1 Mont. & M. 272. And see *King* v. *Bullock*, 1 Taunt. 78.

(*h*) *Granger* v. *Tudor*, Bl. 1272. Where a creditor had sold his debt, held that he was a competent witness to support the *fiat*. *Pulling* v. *Meredith*, 8 C. & P. 763.

(*i*) *Shuttleworth* v. *Bravo*, Str. 507.

(*k*) *Heath* v. *Hall*, 4 Taunt. 326. *Granger* v. *Furlong*, 2 Bl. R. 1273.

(*l*) Which adjudges a member of parliament to be a bankrupt who does not pay or secure the debt, as prescribed by the statute, within two months after personal service of summons. Per Ld. Eldon, C. *Ex parte Harcourt*, 1 Rose's B. C. 203. and now see the stat. 6 G. 4, c. 14. s. 10.

(*m*) *Burton v. Loyd*, 3 Esp. C. 207.

(*n*) *Ambrose* v. *Clendon*, C. T. H. 267. *Koopes* v. *Chapman*, per Ld. Kenyon, Peake's C. 19; and he is competent to prove the act of bankruptcy, although the bankrupt be plaintiff in the action. *Ibid.* And see *Sinclair* v. *Stevenson*, 1 C. & P. 582.

(*o*) *In re Cadd*, 2 Sch. & Lef. 116.

(*p*) In an action by an execution creditor of the bankrupt against a sheriff for a false return to a writ of *fieri facias*, it was held, that an assignee who had released his claims on the bankrupt's estate, was a competent witness to establish an antecedent bankruptcy *Tomlinson* v. *Wilkes*, 2 B. & B. 397.

(*q*) *Crooke* v. *Edwards*, 2 Starkie's C. 302, the objections were that he had received fees and would be liable to an action of trespass in case the commissioners were to be questioned. Ld. Ellenborough observed, that he would not be called on to return the fees, but said that he would not then pronounce upon the question. It has been observed on this case, that the interest of the witness in future fees was not noticed.

(*r*) *Ex parte Treacher*, 1 Buck's B. C. 17; and now see the stat. 6 G. 4, c. 16, s. 24.

(*s*) *Reed* v. *James*, 1 Starkie's C. 136. *Qu.* whether he is compellable by a court of law to produce the document. *Ib.*

(*t*) See *Jansen* v. *Wilson*, Dougl. 257. The statute directs that the Chancellor shall appoint a proper person to enter the proceedings of record. An examined copy of a record so made would therefore be evidence. The provisions of this statute, as to recording proceedings, are confirmed by the stat. 6 G. 4, c. 16, s. 95. See further as to Enrolment. *Ex parte Robson*, Ambler, 180. The commissioners have no estate given them in the bankrupt's real property, but only a *power* to be executed by deed indented and enrolled. *Perry* v. *Bowers*, T. Jones, 196. The enrolment has no relation to the date of the deed. *Elliot* v. *Danby*, 12 Mad. 3. *Bennett* v. *Gaudy*, Carth, 178; 1 Vent. 360. A writ of *supersedeas* is evidence that a commission issued on the day mentioned in the writ. *Gervis* v. *Grand Western Canal Company*, 5 M. & S. 76.

formerly made by a very old witness may be read to him in order to refresh his memory (*u*).

Declarations.

A declaration by a petitioning creditor since deceased, made after the commission, is not evidence against the assignees upon an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney (*x*).

In an action on a promissory note against three partners, one of whom pleaded his bankruptcy, and proved it on the trial, the court would not allow a verdict to be taken for him pending the trial, to enable him to prove an alteration in the note to defeat the action (*y*).

The examination of a party before the commissioners is evidence against him, although the whole of it was not taken down, having been signed by him after it had been read over to him (*z*).

A declaration by a bankrupt before his bankruptcy as to his acts or property is evidence against his assignees (*a*), and such evidence is adducible although the bankrupt himself has been called and examined (*b*).

Where the defence was that goods had been delivered in payment of an antecedent debt, and that the payment was protected by the 82d clause in the Bankrupt Act, and it was contended by the plaintiffs that such delivery was by way of fraudulent preference, and was not a *bonâ fide* payment under that clause, Lord Denman admitted evidence of declarations by the trader on his arrest at the suit of the defendants after the delivery of the goods, and after *primâ facie* evidence of an act of bankruptcy committed previous to the delivery, in order to show that the delivery was under pressure. The plaintiff had a verdict (*c*).

For the evidence in an action of covenant by or against the assignee of a bankrupt, see tit. COVENANT.

BARGAIN AND SALE. *Vide* INDEX, VOL. I.

BARON AND FEME. *See* HUSBAND AND WIFE.

BARRATRY. *See* POLICY OF INSURANCE.

BARRATRY.

UPON an indictment for this offence, the prosecutor must give the defendant notice before the trial of the particular instances of barratry intended to be proved (*d*).

BARRISTER. *See* CONFIDENTIAL COMMUNICATION.

(*u*) *Vaughan* v. *Martin*, 1 Esp. C. 440.

(*x*) *Harwood* v. *Keys*, 1 R. & M. 204. In answer to the cases of *Dowden* v. *Fowle*, 4 Camp 38, *Young* v. *Smith*, 6. Esp. C. 121, Patteson, J. observed, that the latter were loosely stated, and that the declarations must have been made before the commission, and that the former was probably decided by Mr. J. Dampier on the principle of the petitioning creditor's having indemnified the sheriff.

(*y*) *Currie v. Child*, 3 Camp. 283.

(*z*) *Malward* v. *Forbes*, 4 Esp. C. 172.

(*a*) *Supra*, II. 26. 104.

(*b*) —— v. *Shackles*, *cor.* Parke, B. York spring assizes, 1835, where in an action by the assignees to recover deeds, the property of the bankrupt before his bankruptcy, which were alleged to have been deposited by way of lien, a declaration by the bankrupt before his bankruptcy was admitted, although the bankrupt had been called by the plaintiffs.

(*c*) *Dixon* v. *Sanderson*, York Spring Assizes, 1836.

(*d*) 5 Mod. 18; 1 T. R. 754.

BASTARDY (e).

Evidence to prove bastardy. Of a child born in wedlock.

THE law, in its anxiety to protect the rights of children born of women in a state of wedlock, presumes their legitimacy, unless the contrary be satisfactorily established by those who deny it. It has indeed, in some instances, been held that the presumption of legitimacy from non-access could not be overcome by any proof less than that of the absence of the husband *beyond seas* previous to and during the whole time of gestation (*f*). But it seems to be now settled, that if such non-access be proved as plainly shows that the husband could not in the course of nature have been the father of the child, the proof will suffice to bastardize the child (*g*); as, where it is proved that the husband had no access for more than two years previous to the birth of the child, until about a fortnight previous to the birth (*h*).

(*e*) Where the issue is upon the general bastardy of a party to an action, whether real or personal, depending on the validity of the marriage of the parents, the trial is by the certificate of the ordinary, (2 Roll. 584, l. 35. 586. l. 7. 20. 3 Leo. 11). And as the certificate is peremptory, provided judgment be afterwards given, or the party alleging bastardy be nonsuited, proclamations are to be made in the court and in Chancery, in order that all persons may have notice to attend the bishop (9 Hen. 6. 11.) But where bastardy is alleged on special grounds not involving the marriage (2 Roll. 586. 3 Leo. 11,) or where general bastardy is not directly in issue (Ibid.) as in an action for calling the plaintiff a bastard, where the defendant justifies (2 Rol. 586. Hob. 179,) or where the party alleged to be a bastard is a stranger, is dead, or is an infant, or if the issue arise on a plea in abatement, the issue is to be tried by the country; and the reason of this is, that the certificate of the ordinary would be peremptory, and in such instances the party or his representatives ought not to be concluded. See 2 Com. 584. Com. Dig. tit. BASTARD, [D] 2. For decisions depending on the effect of a foreign marriage, see tit. HEIR.—MARRIAGE.—PEDIGREE.

An unborn illegitimate may take by particular description before its birth. *Dawson* v. *Dawson*, 6 Mad. 292.

The testator being at the date of the will married, and having no legitimate children, after providing for his wife, and devising certain premises to *A. L.* for life, gave certain lands, upon trust, for the children which he might have by *A. L.*, and living at his decease or born within six months after; upon the death of his wife he duly republished his will, and upon clear proof of his having acknowledged and treated the children of *A. L.* as his own, and that they had acquired the character of reputed children, held that they took an estate under such devise. *Adam* v. *Wilkinson*, 12 Pri. 471; affirming the decree in the court below. 1 Ves. & B. 422.

An order of filiation not expressly *adjudging* the defendant to be the father, but only that the Court was satisfied of that fact, was held to be sufficient; so the stating generally the child to be chargeable, by reason of the mother's inability, without going on to state the circumstances. *R.* v. *Lewis*, 1 Perr. & D. 112.

An order of filiation at sessions upon the evidence of the mother, and corroboration thereof, not stating it to be in some material particular, was held to be bad. *Reg.* v. *Read*, 1 Perr. & D. 413.

(*f*) 4 Vin. Ab 21, [B.] pl. 3, 4, 5, & 6.

(*g*) *Pendrell* v. *Pendrell*, 2 Stra. 925. *R.* v. *Bedall*, Str. 1076. B. R. H. 379. Stra. 51.

(*h*) *R.* v. *Luffe*, 8 East, 193. In the case of the Banbury claim of peerage, the following questions were proposed to the judges:—First, whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access. Secondly, whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact.

On the 4th July 1811, the Lord Chief Justice of the Common Pleas delivered the following unanimous answers: First, "That in every case were a child was born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse was presumed to have taken place between the husband and wife, until that presumption was encountered by such evidence as proved to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband

Of a child born in wedlock.

Access is not to be conclusively presumed merely because the parties are within such distance as to render it possible under circumstances (*i*).

Where however a husband and wife are proved to have been together at a time such that in the order of nature the husband might have been the father of the child, if sexual intercourse did then take place, intercourse is to be presumed, and it lies on those who dispute the legitimacy of the child to disprove the fact of such intercourse having taken place by evidence affording an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact (*k*).

If there be a separation by consent, the presumption of law will still be in favour of access and of legitimacy till the contrary be proved (*l*); but if there be a divorce *a mensâ et thoro*, non-access will be presumed, for (as it is said) it will be intended that the parties obeyed the sentence of the Court (*m*).

It has been held, from very early times, that issue born during wedlock might be bastardized by proof of a natural impossibility that the husband could have been the natural father. In *Foxcroft's Case*, 10th of Edw. 1 (*n*), where the husband was an infirm, bedridden man, a child born within twelve weeks after the marriage was held to be a bastard. So it was held, where the husband was shown to be within the age of puberty (*o*). So where a husband was under the age of fourteen (*p*). But evidence that a husband was divorced from his first wife for impotence does not prove the bastardy of a child born during the second marriage (*q*).

could according to the laws of nature be the father of such a child."—Secondly, "That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, could only be legally resisted by evidence of such facts, or circumstances, as were sufficient to prove to the satisfaction of those who were to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child. That where the legitimacy of a child in such a case was disputed on the ground that the husband was not the father of such a child, the question to be left to the jury was, whether the husband was the father of such child: and the evidence to prove that he was not the father must be of such facts and circumstances as were sufficient to prove, to the satisfaction of the jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child."

(*i*) *Clark* v. *Maynard*, 6 Mad. 304.

(*k*) By Sir J. Leach, *Head* v. *Head*, 1 Sim. & Stu. 154; S. C. 1 Turner, 139; and see *Morris* v. *Davis*, 3 C. & P. 427. And if the husband have access, legitimacy will be presumed although other persons are at the same time carrying on criminal intercourse with the wife. *Cope* v. *Cope*, 1 Mo. & R. 269; 5 C. & P. 608. *Secus* (it is said) where although the husband has opportunity of access, but where the wife is living in open and notorious adultery. For then it is said that if the husband on one single occasion only had opportunity of access, and then at a time and under circumstances rendering it extremely improbable that he availed himself of the opportunity, those facts *might perhaps* be urged as a legal ground for concluding that sexual intercourse did not take place. The case of *Morris* v. *Davis* was decided on that principle, per Alderson, B. 1 Mo. & R. 275.

(*l*) *St. George and St. Margaret*, Salk. 123.

(*m*) *Ibid.*

(*n*) 1 Roll. Ab. 359. It does not appear, from the abridged note of the case in Rolle, whether the inability existed at the time of conception; but it must necessarily be presumed that it was so proved, for the inability at the time of marriage, twelve weeks only before the marriage, would be perfectly immaterial.

(*o*) 1 Roll. Ab. 358. In *Lomax* v. *Holmden*, Str. 940, evidence of inability from a bad habit of body was admitted; but the evidence amounting to an *improbability* only, and access being presumed from the visits of the husband, the evidence was deemed to be insufficient.

(*p*) Year-book, 1 Hen. 6, 3, b.

(*q*) Com. Dig. BASTARD [B.] 5 Co. 98, b.; 2 Leo. 169. 173; Dy. 179, a. For, as is said, a man may be *habilis & inhabilis diversis temporibus*, and this whether the

Of a child born in wedlock.

Where the husband is within the realm, it is not incumbent on the party alleging bastardy to prove that the husband could not by any possibility have had access to the wife; it is sufficient to adduce such circumstantial evidence as satisfies the minds of the jury (*r*).

The removal of the husband to a place distant from the wife, her cohabiting with another man, and the fact that the son, whose legitimacy is questioned, took the name of the latter from his birth, which he and his descendants afterwards retained, is strong evidence to prove the illegitimacy (*s*). So it may be proved that the mother was a woman of ill fame (*t*).

In *Lomax* v. *Holmden* (*u*), the marriage being proved, and evidence given that the husband was frequently in London, where the mother lived, so that access must be presumed, the defendants were admitted to give evidence of his inability from a bad habit of body, but the evidence showing an improbability only, the plaintiff had a verdict (*x*).

Where the birth occurs so soon after the marriage as to show that the conception was *ante*-nuptial, that circumstance will not affect the legitimacy; but that case stands upon its own peculiar ground. The marriage of the parties is then the criterion of legitimacy; at least it raises a presumption that the husband was the father of the child (*y*). In this respect our law adopts the rule of civil law, according to which the offspring was legitimate if the parents married at any time before the birth (*z*). It seems, however, that in such case it is competent to prove that it was impossible that the husband could have been the father, for a stronger presumption cannot arise in such a case than is made in favour of a child conceived after wedlock (*a*). It is held, that although the wife was pre-contracted, or within the prohibited degrees of consanguinity or affinity, yet if she be not afterwards divorced, the issue will not be bastards (*b*); and after the death of the parties the marriage cannot be drawn into question to bastardize the issue (*c*).

Although there has been an actual marriage, the issue may be bastardized by proof that the marriage was actually null and void; as by evidence that one of the parties had a wife or husband still living (*d*); or by proof of a divorce *a vinculo matrimonii* (*e*). But a divorce cannot be prosecuted after the death of the parties (*f*). Nor can a marriage be drawn in question upon any collateral surmise after the death of either of the parties, such as that it was incestuous (*g*), in order to bastardize the issue. The effect of sentences in the ecclesiastical courts has already been considered (*h*).

divorce was *causâ impotentiæ quoad hanc*, or *propter perpetuam impotentiam* (Mo. 227), 1 And. 105; 2 Lev. 169.

(*r*) *Goodright* v. *Saul*, 4 T. R. 356. And see *R.* v. *Bedall*, Str. 1076.

(*s*) 4 T. R. 356. And a new trial was granted, the judge on the first having informed the jury that the *possibility* of access must be negatived.

(*t*) *Pendrell* v. *Pendrell*, 2 Str. 925; B. N. P. 113.

(*u*) B. N. P. 113.

(*x*) *Lomax* v. *Holmden*, 6 Geo. 2, at Bar. Str. 940; B. N. P. 113.

(*y*) See the observations of the Judges in *R.* v. *Luffe*, 8 East, 193.

(*z*) See 8 East, 210.

(*a*) And see *Foxcroft's Case*, above cited, 1 Roll. Ab. 359. But see 1 Roll. 358, l. 20.

(*b*) 1 Roll. 357, l. 42. 45.

(*c*) Ibid; and Com. Dig. BASTARD [B]. But the marriage may, after the death of the parties, be proved to be void.

(*d*) See MARRIAGE. — PEDIGREE. — POLYGAMY.

(*e*) 2 Roll. 586, l. 20. For the causes of such a divorce, see Com. Dig. BARON AND FEME, [C.] 1.; & *supra*, V. I. Ind. tit. JUDGMENT, as to the effect of a judgment in the spiritual court.

(*f*) 1 Roll. 360, H.; 1 Salk. 21; Com. Dig. BARON AND FEME, [C.] 6.

(*g*) Carth. 271; Comb. 200; 4 Mod. 182.

(*h*) *Supra*, Vol. I. Ind. tit. JUDGMENTS.

In the case of a posthumous child (*i*), its legitimacy appears to be a question of fact to be tried by a jury (*k*), unless it appear to be manifestly impossible, according to the course of nature, that the child can be legitimate. Posthumous child.

A case is mentioned in the books (*l*), where the child was found to be born eleven days *post ultimum tempus legitimum mulieribus pariendi constitutum*, and because of that fact, *et quia per veredictum juratorum invenitur quod prædictus Robertus* (the husband), *non habuit accessum ad prædictum Beatricem per unam mensem ante mortem suam per quod magis præsumitur contra pradictum Henricum* (the issue), therefore the brother and heir of Robert had judgment to recover in assize; and L. C. J. Rolle adds a note to that case, that the jury found that the husband languished of a fever long before his death (*m*). Hence it appears, that in addition to the mere presumption, from the interval which elapses between the death of the husband and birth of the child, other circumstances are admissible to confirm that presumption. And in *Pendrell* v. *Pendrell* (*n*) it was held that the party who disputed the legitimacy might show that the mother was a woman of ill fame.

Where a woman marries so soon after the death of the first husband that it is uncertain which of the two husbands is the father, it is a question of fact to be tried by a jury (*o*).

Either of the parents is competent to prove the bastardy of a child for want of a legal marriage, although such evidence is open to much observa- Competency.

(*i*) *Alsop* v. *Stoney*, 17 J.—B. R. Co. Litt. 123, b. by Hargrave and Butler, in the note. The wife, who was, it seems, a lewd woman, was delivered of a child forty weeks and ten days after the death of the husband, and it was held to be legitimate (Hale's MSS.) So where the child was born forty weeks and eleven days after the death of the first husband. 18 Rich. 2, Hale's MSS. See Cro. Jac. 541; Godb. 281; Palm. 9.

(*k*) It has been quaintly said that the law does not appoint any certain time for the birth of a child, and that it is sufficient for the purpose of legitimacy if it be born within a few days after the forty weeks, if it can be proved by circumstances to be the issue of the husband (1 Rol. 356, l. 10; 2 Cro. 541; Pal. 9). The Roman law was very liberal in this respect. The Decemviri allowed that a child might be born in the tenth month; and although a law in the Digest excluded the eleventh, yet the emperor Adrian, after consulting with *philosophers* and physicians, decreed even to this extent, where the mother was of good and chaste manners (Dig. 1. 4. 12). See the note by Hargr. & Butler, 1 Inst. 123, b. from which it appears that the judges of Friesland in one instance allowed to the extent of twelve lunar months, *minus* three days. It is not probable that an English jury would go quite so far.

The very learned editors of Lord Coke's Institutes procured the following information from Dr. Hunter.—"1. The usual period of gestation is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months, but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time; at six months it cannot be. 3. I have *known* a woman bear a living child in a perfectly natural way fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive in a natural way above ten calendar months from the hour of conception."

Lork Coke lays it down as a peremptory rule, that forty weeks is the longest time to be allowed for gestation (Co. Litt. 123); this, however, seems to be without foundation. See the note by Hargr. & Butler, Co. Litt. 123, b.

(*l*) Roll. Ab. 356.

(*m*) Roll. Ab. 356.

(*n*) 2 Str. 925.

(*o*) Hale's MSS. Cro. J. 615; Winch. 71; Litt. R. 177. Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Duncomb, within three weeks after the death of Thecar, marries her; 281 days and 16 hours after his death she is delivered of a son; and it was agreed, that though it was possible that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.

Competency.

tion (*p*). It has been said, that the mother being a married woman, is not competent to prove the non-access of the husband, as it seems, upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter which affects his interest or character, unless in cases of necessity (*q*); and on that account it is at all events allowable to examine her as to the fact of her criminal intercourse with another, since it is a fact which must probably be within her own knowledge and that of the adulterer only (*r*).

But the parents are competent witnesses to prove the legitimacy of their children (*s*).

So the mother is competent to prove the access of the husband (*t*).

The declarations of the wife during her lifetime are not admissible in evidence, except for the purpose of contradicting her (*u*). Such declarations are not admissible to prove her son not to be the son of her husband, but of another man (*x*).

As cohabitation and repute are evidence to prove the fact of marriage, so declarations by deceased parents, as to their being or not being married, are evidence as accompanying and explaining such cohabitation, and the presumption arising from cohabitation is either strengthened or destroyed by such declarations (*y*). So such declarations are admissible to prove whether the child was born before or after marriage (*z*), but they are not admissible to prove the illegitimacy of a child born in wedlock (*a*).

The declaration by a deceased husband that his wife was a legitimate child is evidence; for it is probable, that although not connected with her by

(*p*) 6 T. R. 330, 331. Or to prove the legitimacy (Ibid.) It is said that the sole evidence of the mother, a married woman, shall not be sufficient to bastardize her child. Ca. T. H. 70. *R.* v. *Rook*, 1 Wils. 340. See also *Standen* v. *Standen*, Peake's C. 32; *Standen* v. *Edwards*, 1 Ves. jun. 133.

(*q*) *R* v. *Sourton*, 5 Ad. & Ell. 180. *R.* v. *Bedall*, 2 Str. 941. 1076; R. T. Hardw. 379. In the case of *Goodright* v. *Moss*, Cowp. 591, Lord Mansfield says, it is a rule founded in decency, morality, and policy, that the parties shall not be permitted after marriage to say that they had *no connexion*. See *R.* v. *Reading*, 1 East, 180; B. N. P. 112. The rule is the same though the husband be dead at the time of giving her testimony. *R.* v. *Inhab. of Kea*, 11 East, 132.

(*r*) See Ld. Ellenborough's observations, *R.* v. *Luffe*, 8 East, 202, where an order of bastardy was stated to be made upon the oath of the wife as *otherwise*, it was held to be good, since it was to be presumed that the non-access of the husband was proved by other witnesses, or if proved by her also, that the judgment of the justices was founded on the other proof. *R.* v. *Luffe*, 8 East, 193. And see *R.* v. *Lubbenham*, 4 T. R. 251.

(*s*) In *Lomax* v. *Lomax*, (*cor.* Ld. Hardwicke,) C. T. H. 380, the mother was admitted to prove the marriage; and in an ejectment against *Sarah Brodie*, Hereford, 1744, Wright, J. admitted the father to prove the daughter legitimate, her title being as heir-at-law to her mother. And see *Stapleton* v. *Stapleton*, Ca. T. Hardw. 277; *Lord Valentia's Case*, in D. P. Cowp. 593; *Sacheverell's Case*, B. N. P. 241.

(*t*) *Pendrell* v. *Pendrell*, *cor.* Ld. Raym. Str. 925; B. N. P. 287.

(*u*) 2 Str. 925; B. N. P. 113.

(*x*) *R.* v. *Cope*, 1 Mo. & R. 275.

(*y*) B. N. P. 294, where it is said that such declarations are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or other. In *May* v. *May*, B. N. P. 112, on a trial at bar on an issue out of Chancery, the preamble of an act of parliament, reciting that the plaintiff's father was not married, to the truth of which he had sworn, was given in evidence; yet, upon proof of constant cohabitation, and of his having always acknowledged her to be his wife, the marriage was established. But where, in a settlement case, there was no evidence either as to the parentage, place of birth, or illegitimacy, except the testimony of the father, who denied any marriage, the court of K. B. held, that however difficult it might be to admit his evidence to bastardize a reputed legitimate child, yet, as all depended upon his testimony, the whole must be taken together. *Parish of St Peter, Worcester*, v. *Old Swinford*, B. N. P. 112.

(*z*) *Goodright* v. *Moss*, Cowp. 591. *R.* v. *Bramley*, 6 T. R. 330.

(*a*) *Ibid.*

blood, he would know the fact (*b*). And so would the declarations of members or relations of the family, or perhaps of others living in habits of intimacy with them (*c*).

One charged as a reputed father of a bastard cannot be compelled to give evidence tending to prove the fact (*d*).

Where one or more justices have power to examine in a case of bastardy, they have incidentally power to compel the woman to answer (*e*).

In the case of the *King* v. *Ravenstone* (*f*), it was held, that the examination of a woman pregnant of a bastard, was admissible evidence after her death against the party whom she charged as the putative father, although the proceeding was *ex parte*, the party charged not being present (*g*). This decision, however, conflicts with general principles, and the cases of depositions before magistrates under the stat. of Philip & Mary, upon which the court are reported to have relied in the above case, are in direct opposition to it.

As to the competency of inhabitants of a parish in cases of bastardy, see tit. INHABITANT.—INTEREST.

BILLS OF EXCEPTIONS. *See* Vol. I. and INDEX.

BILLS OF EXCHANGE.

Under this head may be considered,

I. THE EVIDENCE IN AN ACTION ON A BILL OR NOTE, p. 202.

II. THE EVIDENCE IN DEFENCE, p. 241.

III. THE COMPETENCY OF WITNESSES, p. 257.

IV. THE EFFECT OF A BILL OR NOTE IN EVIDENCE, p. 261.

I. ACTIONS on bills of exchange (*h*) differ from actions upon parol contracts, principally in these circumstances, 1st, it is in general unnecessary for the plaintiff to prove the consideration for which the bill or note was

(*b*) *Vowels* v. *Young*, 15 Ves. jun. 148.

(*c*) 3 T. R. 723; B. N. P. 295; 1 M. & S. 689. *Supra*, Vol. I. Index, tit. HEARSAY.

(*d*) *R.* v. *St. Mary's, Nottingham*, 13 East, 58, in note.

(*e*) *R.* v. *Jackson*, 1 T. R. 655. And if she refuse, may commit until she answer. *Ibid.* But *one* justice has no such power under the stat. 6 G. 2, c. 31. See *R.* v. *Beard*, 5 T. R. 373. *R.* v. *West*, 6 Mod. 180; *Billings* v. *Prinn*, 2 W. Bl. 1017.

(*f*) 5 T. R. 373. *Infra*, tit. DEPOSITIONS.

(*g*) In the subsequent case of *The King* v. *Clayton*, 3 East, 58, the case of *The King* v. *Ravenstone* was referred to by Ld. Ellenborough, C. J. as an authority. In the case of *R.* v. *Clayton*, which was one of an order of bastardy made by two justices, which had been confirmed *on an appeal* to the sessions, it appeared that the original order had been made on the oath of *R. T.* and the examination of *Mary Cole* (the mother) taken before another justice. The title of the original order recited that *Mary Cole* was since deceased. And the court held the order to be good, by intendment that the examination of *M. C.* had been taken in writing, and that the examination had been verified by the oath of *R. T.* Note, that stress was laid on the fact that the second order was made on appeal to the sessions, where the objection for want of appearance, and for want of proof that the woman was dead at the time, might have been proved if well founded. The same reason, it is obvious, would apply to the objection that the examination took place in the absence of the party charged.

(*h*) Upon the question, whether a bill of exchange be joint or several, see *Collins* v. *Prosser*, 1 B. & C. 682. A note not payable at all events, but intended as a set-off, is not a promissory note. *Clarke* v. *Percival*, 2 B. & Ad. 660. An instrument, whereby the party promises to pay a sum with interest, "and all fines according to rule," cannot be declared on as a note. *Ayrey* v. *Fearnsides*, 4 M. & W. 168; and 6 Dowl. 654.

given, the bill or note being in itself *primâ facie* evidence of a sufficient consideration; and 2dly, because the interest in the bill, and the right of action consequent upon it, is of a transferable nature; so that in addition to the undertaking of the defendant, which is usually a consequence of his being a party to the bill, it is in many instances necessary to prove the plaintiff's title to sue.

Actions brought in respect of bills of exchange or promissory notes are either founded on the instrument itself, or upon a collateral liability.

Where the action is founded on the instrument itself, the liability of the defendant is either, 1st, primary and immediate upon his direct undertaking, where it is brought against the acceptor of a bill or maker of a note; or, 2dly, it is a secondary and conditional liability of a drawer or indorser consequent upon the default of the acceptor or maker; or, 3dly, the liability is consequent upon the party's own default in not paying the bill according to his undertaking; as, where the action is brought by a drawer or indorser who has been compelled to take up the bill against the acceptor, or by the acceptor, who has paid the bill against the drawer.

Primary liability.

Secondary liability.

Collateral liability.

The proofs will be considered in the following order:

1. Proofs in an action by a payee or bearer (*i*) - - - - - - - *v.* An acceptor of a bill or maker of a note.
2. - - - by an indorsee (*k*) - - *v.* An acceptor of a bill or maker of a note.
3. - - - by a payee (*l*) - - *v.* The drawer of a bill.
4. - - - by an indorsee (*m*) - *v.* The drawer of a bill. An indorser.
5. Presumptive evidence (*n*).
6. Proofs by a drawer or indorser (*o*) *v.* An acceptor.
7. - - - by an acceptor (*p*) - *v.* A drawer.
8. Proof of damage (*q*).
9. Proofs in defence (*r*); want of consideration (*s*); or of value given (*t*); illegality of consideration (*u*); discharge by satisfaction, release, &c. (*x*); laches (*y*); giving time (*z*); waver (*a*); indorsement of bill after it is due (*b*); alteration of bill (*c*).
10. Competency of witnesses, declarations, &c. (*d*).
11. Effect of bill, or note in evidence in payment, &c. (*e*).

In an action by the payee against the maker of a note or acceptor of a bill, the direct proofs (*f*) are, 1st. By the production of the note or bill, or proof of its destruction, &c. 2dly. Proof of the making of the note, or of the drawing and acceptance of the bill. 3dly. In some instances proof of the performance of conditions precedent or presentment. 4thly. In some cases of the identity of the payee, or title of bearer.

Production or proof of destruction.

1st. By the production of the bill or note. The ordinary proof of loss, in order to warrant the introduction of parol evidence of an instrument, is in

(*i*) 202.
(*k*) 214.
(*l*) 221.
(*m*) 233.
(*n*) 237.
(*o*) 239.
(*p*) 239.
(*q*) 240.
(*r*) 241.
(*s*) 242.
(*t*) 243.
(*u*) 245.
(*x*) 249.
(*y*) 250.
(*z*) 250.
(*a*) 252.
(*b*) 253.
(*c*) 254.
(*d*) 257.
(*e*) 261.
(*f*) Under the new rules the general issue cannot be pleaded, and of course no part of the ordinary proof of title need be proved which is not put in issue by some traverse.

this case frequently insufficient (*g*), the instrument being of a negotiable nature, such proof must be given, where it is not produced, by evidence of its destruction (*h*), or otherwise, as shows that the defendant cannot afterwards be compelled to pay the amount again to a *bonâ fide* holder. In the absence of such proof the plaintiff cannot recover on the special count, or on the money counts, or upon the original consideration for which the bill or note was given, even although he has tendered to the defendant a bond of indemnity, for it may be still in existence, and the defendant may again be called upon to pay it (*i*). But where a bill has been specially indorsed to the plaintiff, (and for the same reason, where it is made payable to the plaintiff specially,) the plaintiff may prove that it has been stolen, without having been indorsed by him, and recover on giving parol evidence of the contents (*k*). Production.

In the case of a foreign bill drawn in sets, both the sets should be produced. Foreign bill.

2dly. The next step is to prove the making of the note, or the acceptance, (and in some cases the drawing) (*l*) of the bill.—Where the instrument has been signed by the defendant, and is unattested, the usual proof is by evidence of his hand-writing, or by evidence of his acknowledgment that it was signed by him (*m*). If the instrument has been attested by a subscribing witness, that witness must be called (*n*). Where the declaration alleges that the note was made, or bill accepted by a party, his proper hand being thereunto subscribed, it has been said that proof of the hand-writing of the party cannot be dispensed with, and that a precise allegation is essential, in order that the party may be prepared to show, if such be the fact, that no autho- Proof of the making and accepting.

(*g*) See 1 Esp. C. 50. 2 B. & P. 93. 1 Atk. 446. Ld. Raym. 731. For the usual proof to warrant the introduction of secondary evidence, see above, Vol. I. Ind. tit. SECONDARY EVIDENCE.

(*h*) As that the defendant tore his own note of hand, 1 Lord Ray. 731.

(*i*) *Pierson* v. *Hutchinson*, 2 Camp. 211; 6 Esp. C. 126; 3 Camp. 324; 4 Taunt. 602. *Dangerfield* v. *Willby*, 4 Esp. 159. *Hansard* v. *Robinson*, 7 B. & C. 90. Although the bill was lost after it became due. Ib. *Poole* v. *Smith*, Holt, 144. The remedy of the loser of the note is in equity (1 Ves. 341. 6 Ves. 812. 10 Ves. 430); and in general the holder of a bill cannot insist on payment from the acceptor without offering to deliver up the bill (*Hansard* v. *Robinson*, 7 B. & C. 90. *Champion* v. *Terry*, 7 Moore, 130. *Powell* v. *Roach*, 6 Esp. C. 76); and cannot, having lost the bill, though after it has become due, recover upon it, although an indemnity has been offered (*Ib.*) An express promise to pay the contents of a lost bill, without some new consideration, is void. (*Davis* v. *Dodd*, 4 Taunt. 602.) An indorser in blank cannot recover, even where the bill has been lost after notice of trial given, although more than six years have elapsed since the bill became due. *Poole* v. *Smith*, Holt's C. 144. So though the half of a bank-note has been lost. *Mayor* v. *Johnson*, 3 Camp. 324. Where the defendant had admitted that he owed money on the bill, which was in his own possession, Abbott, C. J., held that it was evidence under the common counts without notice to produce the bill. *Fryer* v. *Browne*, R. & M. 145.

(*k*) *Long and others* v. *Baillie*, Guild. Dec. 1805, *cor.* Ld. Ellenborough, 2 Camp. 214, (n.) And *see Smith* v. *Clarke*, Peake's C. 225.

(*l*) The acceptance admits the hand-writing of the drawer, and also the procuration, if the bill be drawn by procuration. *Porthouse* v. *Parker*, 1 Camp. 82. *Robinson* v. *Yarrow*, 7 Taunt. 455. And this excludes the acceptor from insisting that a bill purporting to be drawn by a firm, was drawn by a single person. *Bass* v. *Clive*, 4 M. & S. 13. Or that the drawer's name is forged, *Ib.*; and *Smith* v. *Chester*, 1 T. & R. 655. Or that he is an infant. *Taylor* v. *Croker*, 4 Esp. C. 187; and see *Shultz* v. *Astly*, 7 C. & P. 99.

(*m*) See tit. ADMISSIONS. In an action by the indorsee against the acceptor, the witness negativing the hand-writing to be that of the drawer, held that some proof of the hand-writing ought to be given, notwithstanding the defendant had acknowledged it to be his acceptance. *Allport* v. *Meek*, 4 C. & P. 267.

(*n*) *Supra*, Vol. I. Ind. tit. ATTESTING WITNESS. A note for less than 5*l.* if not attested, is void by the stat. 17 Geo. 3, c. 30, s. 31. If the note appear to have been attested, the attesting witness must be called, the adversary is entitled to have any writing on the face of it read. *Richards* v. *Frankum*, 9 C. & P. 221.

Proof of acceptance.

rity or procuration has been given (*o*). Some evidence as to the identity of the defendant with the party whose hand-writing, or whose authority to sign the note, is proved, is also necessary (*p*).

An acceptance (*q*) of a bill in blank without the name of a payee is an authority to a *bonâ fide* holder to insert a name (*r*).

By the stat. 1 & 2 Geo. 4, c. 78, s. 2, no acceptance of any inland bill (*s*) of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts. The defendant, by the act of acceptance (*t*) admits the signature of the drawer, and his ability to draw the bill (*u*); but where the acceptance is made without sight of the bill, it is necessary to prove the drawer's handwriting (*x*).

An allegation that a bill was drawn by certain persons using the firm of *A.* & *Co.* is satisfied by a bill drawn by *A.* in the name of such a firm, payable to *our order*, although *A.* has no partner (*y*).

Acceptance by several.

If the action be against *several* as makers or acceptors, the hand-writing of each must be proved (*z*); or if it be signed by one only in the name of the firm, it must be proved that they were partners (*a*) at the *time* of the acceptance.

(*o*) *Levy* v. *Wilson*, 5 Esp. C. 180. But where the drawer's name had been indorsed by the wife, Ld. Ellenborough was inclined to think that such an allegation would be satisfied by proof that the name had been written by an authorized agent (*Helmsley* v. *Loader*, 2 Camp. 450); and where the declaration alleged that the defendants made a note in their own hands, &c. and the note had in fact been subscribed by one in the name of the firm, Ld. Ellenborough refused to nonsuit the plaintiffs. *Jones* v. *Mars*, 2 Camp. 305. Where the defendant's name had been signed by his wife, it was held that it was not sufficient to show that she had managed his business as an innkeeper, and applied the proceeds in discharge of debts incurred in the business, and that three months afterwards she had signed other notes, the amount of which was paid to his creditors. *Goldstowe* v. *Tovey*, 6 Bing. N. C. 98.

(*p*) *Middleton* v. *Sandford*, 4 Camp. 34; B. N. P. 171. See *Nelson* v. *Whittal*, 1 B. & A. 19.

(*q*) *Vide supra*, 141. In an action against the acceptor of a bill for 46*l.*, with the common counts; plea, that the defendant accepted a bill drawn on him for 60*l.* in satisfaction of the plaintiff's demand; held not sustained by evidence that the defendant transmitted to the plaintiff a blank acceptance, with 60*l.* in the margin, but which when produced had been altered to 46*l.* *Baker* v. *Jubber*, 1 Sc. N. S. 26; and 8 Dowl. (P. C.) 538.

(*r*) *Cruchley* v. *Clarence*, 2 M. & S. 90. *Attwood* v. *Griffin*, 1 Ry. & M. 425.

(*s*) In the case of foreign bills a collateral acceptance is still sufficient.

(*t*) Str. 442. 668. 946. *Taylor* v. *Croker*, 4 Esp. C. 187. *Robinson* v. *Yarrow*, 7 Taunt. 445; 1 Moore, 150; Burr. 1354; Chitty, O. B. 286; 1 T. R. 655. But where the bill is payable to the drawer's order, proof of acceptance is no evidence of indorsement by the drawer (Peake's C. 20). The acceptor is concluded by his acceptance as to the hand writing of the drawer, although the bill be forged. *Smith* v. *Chester*, 1 T. R. 654.

(*u*) Consequently it is no defence on the part of the acceptor to show that the bill was drawn by an infant (*Taylor* v. *Croker*, 4 Esp. C. 187); or that the bill is forged (6 Taunt. 83; 4 M. & S. 15; *Leach* v. *Buchanan*, 4 Esp. C. 226); or by one without the authority of his supposed principal (*Porthouse* v. *Parker*, 1 Camp. C. 82); or by a single person, when it purports to have been drawn by several persons composing a firm (*Bass* v. *Clive*, 4 M. & S. 13). So if the party acknowledge the acceptance to be in his hand-writing he cannot afterwards set up a forgery of the bill as a defence. *Leach* v. *Buchanan*, 4 Esp. C. 226.

(*x*) Peake's L. E. 220; Bayley, O. B. 219. It seems that the word accepted written on the bill is sufficient without the acceptor's signature. *Dufaur* v. *Oxenden*, 1 M. & R. 90. And an acceptance in blank, the bill being afterwards drawn in pursuance of the acceptor's authority, is sufficient. *Leslie* v. *Hastings*, 1 M. & R. 119.

(*y*). *Bass* v. *Clive*, 4 M. & S. 13.

(*z*) Peake, 18; Chitty, 627, 9th edit. *Gray* v. *Palmers*, 1 Esp. C. 135; B. N. P. 279.

(*a*) Every partner has an implied authority to bind his co-partners by the drawing, accepting, and indorsing of bills for commercial purposes (7 T. R. 210; 10 East, 264; 13 East, 175). Hence an acceptance by one partner in the name of the firm, is

Acceptance by several.

The implied authority of one to draw or accept a bill in the name of the firm, may be rebutted by proof of fraud, or of notice to the party that the other partners would not be responsible for bills so drawn or accepted (*b*).

Where the action is against *A.* and *B.* as acceptors of a bill, and *A.* suffers judgment by default, the signature of *A.* must be proved as well as that of *B.* (*c*).

An admission by one defendant that he accepted the bill will not be evidence against the co-defendants, without previous proof that they were partners at the time (*d*), and then his admission of the acceptance in the name of the firm will be evidence against all, even although the partnership was dissolved previous to making the admission.

Where all the partners except the defendant have been outlawed, it is still necessary to prove a joint acceptance by all; but in such a case Lord Ellenborough held, that a letter written by that defendant, in which he admitted the partnership, was evidence of the fact; for in an action by him against the rest for contribution, the record in the present action would not be evidence against the rest to prove the partnership, and it would be necessary to prove the fact *aliunde* (*e*).

The provisions of the bank-act do not apply to a note issued by a mere commercial firm, though consisting of more than six members (*f*).

primâ facie evidence of the assent of all (13 East, 175. *Pinkney* v. *Hall*, 1 Salk. 126). But this presumption, arising from the relative situation of the parties (see tit. ADMISSIONS), is liable to be rebutted, by proof that the party insisting upon the usual presumption, knew that the partner had no authority, as by proof of express notice to that effect. Where one partner gave express notice that he would not be responsible for bills signed in the name of the firm, it was held that he was not bound by a security given to the party to whom such notice was given, although the latter advanced money upon it for the payment of partnership debts, and although part was so applied (*Lord Galloway* v. *Matthew*, 10 East, 264); or by proof of covin between the partner who signs the bill or note, and the party who takes it (*Ridley* v. *Taylor*, 13 East, 175). To prove fraud, it is not, it seems, sufficient to show that the holder took the bill in payment of the separate debt of the partner (*Ibid.*) See *Golding* v. *Davis*, 2 Gl. & J. 218; *Ex parte Husbands*, 2 Gl. & J. 4. But the giving a bill in payment of the debt of two partners, contracted previously to their partnership with a third, has been held to be fraudulent as against the third (*Shirreff* v. *Wilkes*, 1 East, 48. See *Swann* v. *Steele*, 7 East, 210; *Ex parte Bonbonus*, 8 Ves. jun. 542; *Williams* v. *Thomas*, 6 Esp. C. 18; 15 Ves. 286; 15 East, 10; *Pinkney* v. *Hall*, Salk. 126; 1 Camp. 108. 384. 403). Where a partner accepted a bill in the name of the firm, but not in a partnership transaction, it was held at *Nisi Prius* that an indorsee could not recover on that acceptance against a dormant partner whose name did not appear, who was not known to be a partner, or where the bill was not taken on his credit (*Lloyd* v. *Ashley*, 2 C. & P. 138). In the case of a bill drawn on several partners, an acceptance by one need not be in the name of the firm (*Ibid.*); but a promissory note drawn by one of several partners in his own name cannot be declared on as drawn by the firm, although given for a debt due to the partnership. *Siffkin* v. *Walker and another*, 2 Camp. 308.

(*b*) See the preceding note. See also *Wells* v. *Masterman*, 2 Esp. C. 731. *Ex parte Ayrer*, 2 Cox, 312. It lies on a separate creditor, who takes a partnership security for payment of his separate debt, if it be so taken, and there is nothing more in the case, to prove that it was given with the consent of the other partners. Per Master of Rolls, in *Frankland* v. *M'Garty*, 1 Knapp, 301. One partner having become bankrupt, a solvent partner may still bind the firm by accepting a bill for a debt previously due to the firm, such bill being in the hands of a *bonâ fide* indorsee. *Ex parte Robinson*, 1 Mont. & Ayr. 18. See *Wadbridge* v. *Swann*, 4 B. & Ad. 633. A member or director of a joint stock company has no implied authority to accept bills on the part of the directors. See tit. PARTNERS, and *Bramah* v. *Roberts*, 3 Bing N. C. 972; *Ex parte Ellis*, Mont. & B. 249.

(*c*) Bay. O. B. 227; 1 Esp. C. 135.

(*d*) *Gray* v. *Palmer*, 1 Esp. C. 135. *Wood* v. *Braddick*, 1 Taunt. 104.

(*e*) *Sangster* v. *Mazzaredo and others*, 1 Starkie's C. 161.

(*f*) *Wigan* v. *Fowler and others*, 1 Starkie's C. 459, and afterwards by the Court of K. B. But a corporation not established for trading purposes cannot accept bills of exchange payable at a less period than six months from the date

Proof of acceptance by an agent.

Where the acceptance is by means of an agent, the authority of the agent must be proved (*g*). A letter of attorney from *A.* as executor, enabling *B.* to transact the executorship affairs, gives him an authority to accept bills of exchange drawn by a creditor relating to a debt due from the testator, so as to make *A.* personally liable (*h*). The agent who accepted the bill by the authority of another, is a competent witness to prove his authority (*i*). If the authority was in writing, the instrument must be produced and proved (*k*).

Time of acceptance.

Proof of an acceptance after the bill became due is sufficient (*l*). Where an executor declares upon promises to the testator, he must prove an acceptance in the lifetime of the testator.

Proof of collateral acceptance.

A collateral acceptance (*m*) may be proved either in writing (*n*), or by evidence of an oral assent (*o*); and it is not necessary that the holder should be privy to such parol acceptance (*p*). What amounts to proof of an acceptance is a question of law, and not of fact (*q*). If the acceptance be by parol, the witness must be produced who heard the defendant accept the bill; and if it be in writing, it must be produced and proved; and if attested, must be proved by the attesting witness. In general, a promise to accept an *existing* bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, is a complete acceptance as to the person to whom the promise is made in the one case, and the person influenced on the other (*r*), and all the subsequent parties in each (*s*).

Where the acceptance is by a letter collateral to the bill, the letter must be produced, and the hand-writing proved; and evidence is also requisite to identify the bill in question with that mentioned in the letter.

An assurance by a collateral letter that the bill shall meet with due honour,

(*Broughton* v. *Manchester Waterworks Company*, 3 B. & A. 1. It was there observed that in *Wigan* v. *Fowler* it did not appear on the face of the bill to be accepted by more than six persons. And *semble*, a corporate body not established for trading purposes cannot without express authority bind itself but by deed (*Ibid.*); and see *Slarke* v. *The Highgate Archway Company*, 5 Taunt. 792.

(*g*) 1 Esp. C. 90, Chitty, C. B. 28. As to proof of agent's authority, see tit. AGENT. A secretary to a joint stock company has no implied authority to accept bills. *Neale* v. *Turton*, 4 Bing. 149. Where the declaration on a bill alleged it to have been drawn by one *Hannah P.* on, and accepted by the defendant, and afterwards indorsed by the said *H. P.* to the plaintiffs, the bill appeared to be indorsed "for *H. P.*," in the hand-writing of one *J. P.* and a witness stated that his employers had dealings with a Mrs. *P.* and that he had seen bills drawn and indorsed in the same form and hand-writing, which had been paid, and held that upon a question of authority, the statements of the witnesses were admissible, without the production of such bills; and the Court after a verdict for the plaintiff, upon an affidavit that the real name was *Hannah*, and that the bill was drawn and indorsed by her son *J. P.*, by her authority, refused a new trial. *Jones* v. *Turner*, 4 C. & P 204.

(*h*) 2 H. B. 218. But see 6 T. R. 591.

(*i*) *Supra*, 41.

(*k*) Ibid.

(*l*) 5 East, 514.

(*m*) No such acceptance of an inland bill subsequent to the first of August 1821 is valid. See the stat. 1 & 2 G. 4, c. 78, s. 2, *supra*, 204.

(*n*) 1 T. R. 182. 186. *Pillans* v. *Van Mierop*, 3 Burr. 1663.

(*o*) *Lumley* v. *Palmer*, 2 Str. 1000. C. T. Hardw. 74.

(*p*) *Powell* v. *Monnier*, 1 Atk. 611. *Wynne* v. *Raikes*, 5 East, 514. *Fairlee* v. *Herring*, 3 Bing. 625.

(*q*) 1 T. R. 182. 186. But see *Rees* v. *Warwick*, 2 Starkie's C. 411. *B.* undertakes to guarantee *A.*'s debt, and draws a bill on *A.*, which *A.* accepts; *B.* also writes an acceptance. *B.* is not liable as an acceptor; it is a collateral undertaking for the debt of *A.*, which must be specially declared on. 2 Camp. 447; Beawes, L. M. 422.

(*r*) *Milne* v. *Prest*, 4 Camp. 393.

(*s*) Bayley on Bills, 78. 5 East, 514. *Pierson* v. *Dunlop*, Cowp. 571. *Mason* v. *Hunt*, Doug. 284. *Clarke* v. *Cock*, 4 East, 75.

is an acceptance (*t*); and so is an assurance of the drawee, by letter, that the bill shall be duly honoured (*u*). So a letter by the drawee, stating that the holder might rest satisfied as to payment, written after the bill was drawn, is an acceptance (*x*). But a promise to accept a non-existing bill is no acceptance (*y*). An indorsee may avail himself of that as an acceptance of which the drawer could not avail himself; as, where *A.* to give credit to *B.* made an absolute promise to accept his bill, and *B.* showed the letter upon the Exchange (*z*). Collateral acceptance.

Where the plaintiff, being unable to prove the acceptance of the defendant upon the bill, proved, that when the bill was taken to the defendant's house for acceptance, a clerk in the defendant's banking-house answered that the bill would be taken up when due, (the defendant not being at home,) it was held that the proof was insufficient, without showing that the answer was given by the drawee, or his authority (*a*).

A direction on the bill to another to pay the sum out of a particular fund is an acceptance (*b*). So any words written upon the bill which do not negative its request, as "accepted" (*c*), "presented," "seen," or the day of the month, are *primâ facie* a complete acceptance. Even a refusal to accept written on a bill, will amount to an acceptance, if it be shown to have been done with intent to deceive the party who presented it, and to delude him into the belief that the bill had been accepted (*d*).

Where the drawee said on presentment of the bill, "there is your bill, take it, it is all right," it was held to be no acceptance (*e*).

Where the drawee stated in his letter, "your bill shall have attention," the court held that the phrase was too ambiguous to amount to an acceptance, in the absence of evidence to show that in mercantile acceptation the phrase amounted to an unequivocal acceptance (*f*).

Where there is no direct evidence of acceptance, presumptive evidence may be resorted to in proof of the fact; for this purpose, the conduct of the parties, especially if it be explained by mercantile usage and understanding, is frequently very important. The fact that a bill sent to the drawee for acceptance has been *detained* by him, may be evidence of an acceptance; but according to the usual course of commercial dealings, the mere neglect and silence of the drawee, or even a refusal to return the bill, or its actual destruction, does not *necessarily* make the drawee liable as acceptor (*g*). Presumptive evidence of acceptance.

(*t*) *Clarke* v. *Cock*, 4 East, 57. So, this I accept, and you may call for it when you like. *Canissa* v. *Lanos*, 2 Knapp, 276. The drawer of foreign bills being arrested, said he would have accepted them when presented, but he had not the funds from France; that when he got the funds he would have paid them, but for some expression of the indorsee, adding, that he told the clerk of the indorsee, that when he got the funds from France the bills should be paid. It was held, that this was a good conditional acceptance, on which the defendant having got funds from France was liable. *Mendizabel* v. *Machado*, 6 C. & P. 218. 3 M. & S. 831.

(*u*) *Powell* v. *Monnier*, 1 Atk. 611; 5 East, 520.

(*x*) *Wilkinson* v. *Lutwidge*, Str. 648. See also *Wynne* v. *Raikes*, 5 East, 514; *Clarke* v. *Cock*, 4 East, 57.

(*y*) *Johnson* v. *Collins*, 1 East, 98.

(*z*) Per Ld. Mansfield, in *Mason* v. *Hunt*, Dongl. 284. Cowp. 571. Le Blanc, J. in *Johnson* v. *Collins*, 1 East, 105. *Clarke* v. *Cock*, 4 East, 70. But see *Milne* v. *Prest*, 4 Camp. 393.

(*a*) *Sayer* v. *Kitchen*, 1 Esp. C. 209.

(*b*) *Moor* v. *Withy*, B. N. P. 270.

(*c*) See *Pillans* v. *Van Mierop*, 3 Burr. 1663; *Mason* v. *Hunt*, *Powell* v. *Monnier*, 1 Atk. 611; 5 East, 220; *Pierson* v. *Dunlop*, Cowp. 571.

(*d*) Bayley O. B. 78. Ann. 75. But it is no acceptance if the drawee apprize the party at the time that what he had written was no acceptance.

(*e*) Per Ld. Kenyon, 1 Esp. C. 17.

(*f*) *Rees* v. *Warwick*, 2 B. & A. 113.

(*g*) See the case of *Jeune* v. *Ward*, 2 Starkie's C. 326; 1 Camp. 435; Bayley

The acceptance of a bill of exchange imports a *contract*, which requires the *assent* of the party; and acts of detention, disfiguring, cancellation, or even destruction, do not necessarily and conclusively prove such assent, but are capable of explanation, by evidence of the usual course of dealing (*h*), and the conduct of the parties.

Proof of acceptance by mistake.

Evidence is admissible to shew that a bill with a cancelled acceptance upon it has been accepted by mistake (*i*). So proof may be given that a cheque has been cancelled by mistake, and it may be returned unpaid (*k*).

By the custom of London, the drawee of a cheque coming through another banking-house, may retain it till five in the afternoon (*l*); but if a cheque be cancelled by mistake, it may be returned unpaid (*m*).

Where the defendant's notice to produce, in an action on the bill, described the bill as accepted by the defendant, it was held that proof of the attorney's hand-writing to the notice was sufficient *primâ facie* evidence of acceptance (*n*).

3dly. The performance of conditions precedent:—

Conditional acceptance.

Whether an acceptance be absolute or conditional is a question of law (*o*). Where it is conditional, the plaintiff must allege that the condition has been performed; as, where the condition is that a house shall be given up to the acceptor on a day specified (*p*); or if the condition has not been performed, a legal excuse must be averred (*q*) and proved accordingly; and

O. B. 81; *Mason* v. *Barff*, 2 B. & A. 26. One who without authority accepts a bill as by procuration, is guilty of a fraud in law. *Polhill* v. *Walter*, 3 B. & Ad. 114; but is not liable as acceptor.

(*h*) *Mason* v. *Barff*, 2 B. &. A. 26. Where the usage was to return the bills accepted, provided the goods had been delivered and the carrier's receipt sent, and the parties had made a second application to have the bill accepted which they had before sent, and an answer was returned that the invoice had not been received, but was expected shortly, the Court held that they could not afterwards treat the detention of the bill as an acceptance. Where a bill was drawn on the defendant, an executor, by a minor, to whom a legacy was to be paid by the defendant in a few days, and the bill being left at the executor's for acceptance, he detained it for a considerable time, and afterwards destroyed it, Lord Ellenborough ruled that the detention and destruction of the bill amounted to an acceptance; but the Court of K. B. (Ld. Ellenborough *dissent.*) afterwards, on a motion to set aside the verdict, held, that inasmuch as it appeared from the plaintiff's conduct that he did not rely upon the detention of the bill as an acceptance, but had used other means to intercept the money, the defendant could not be considered to be liable as an acceptor. *Jeune* v. *Ward*, 2 Starkie's C. 326; 1 B. &. A. 653. Where the writing on the bill returned by the drawee is illegible, it has been doubted whether it should be declared on as an accepted or defaced bill. Bayley O. B. 88, 89. *Trimmer* v. *Oddie*, Ibid. *Paton* v. *Winter*, 1 Taunt. 420. And see *Thornton* v. *Dick*, 4 Esp. 270; Marius, 29, 30; *Bentinck* v. *Dorrien*, 6 East, 199; *Harvey* v. *Martin*, 1 Camp. 425, n.

(*i*) *Bentinck* v. *Dorrien*, 6 East, 199, *semble.* And see Bayley O. B. 88, 89; *Jeune* v. *Ward*, 2 Starkie's C. 326; *Paton* v. *Winter*, 1 Taunt. 420, 3; *Raper* v. *Birkbeck*, 15 East, 17; *Fernandez* v. *Glynn*, 1 Camp. 426, n. *contra.*; *Thornton* v. *Dick*, 4 Esp. C. 270; *Trimmer* v. *Oddie*, Bayley O. B. 88. In *Cox* v. *Troy*, 5 B. & A. 474, the Court held that a drawer might erase his acceptance previous to any communication of his acceptance of the bill.

(*k*) *Fernandez* v. *Glynn*, 1 Camp. 426, n.

(*l*) 1 Camp. 426, n.; Str. 415, 416. 550.

(*m*) 1 Camp. 425; Bayley, O. B. 81, n.

(*n*) *Holt* v. *Squire*, 1 Ry. & M. 282.

(*o*) *Sproat* v. *Matthews*, 1 T. R. 182. Where *A.*, the joint consignee of goods in London, on being applied to accept a bill for the amount, refused to accept, because he did not know whether the ship would arrive at London or Bristol; on which *B.*, the holder, agreed to leave it, reserving the liberty of protesting in case *A.* did not accept; and on a second application *A.* said he would accept the bill even if the ship were lost; held, that this was a conditional acceptance, depending on two events, the ship's arrival in London, or being lost; and that *B.* having the liberty of refusing such conditional acceptance, could not afterwards note the bill for non-acceptance.

(*p*) See *Swan* v. *Cox*, 1 Marsh, 176.

(*q*) *Leeson* v. *Pigott*, Bayley, O. B. 187. *Bowes* v. *Howe*, 5 Taunt. 30.

matter of excuse cannot be proved under an allegation of presentment (*r*), or that the event has happened upon which it is to become absolute (*s*). Conditional acceptance.

The payee or other holder of a bill may consider a qualified acceptance as a nullity, and cause the bill to be noted; but if he note for non-acceptance he is precluded from afterwards insisting upon the transaction as an acceptance (*t*).

Where the purchaser of goods requested *A.* to accept a bill drawn in favour of the seller, and to draw on *B.* for the amount, and *A.* accordingly drew upon *B.* for the amount, and *B.* refused to accept the bill, it was held that the drawing the bill by *A.* upon *B.* did not amount to an acceptance by *A.* of the former bill, since he did not mean to make himself liable unless the bill he drew was accepted and paid (*u*).

The date written above the acceptor's signature upon a bill payable after sight is *primâ facie* evidence of the time of acceptance, although the date be in a different hand-writing; for it is usual for a clerk to write upon the bill the word "accepted," and the date, and for the drawee to write his name under the date (*v*).

In the case of *Rowe* v. *Young*, in the House of Lords, where a bill of exchange was specially accepted, payable at a particular place, proof of presentment there was held to be essential, though no place of payment was mentioned in the body of the bill (*w*).

But by the stat. 1 & 2 Geo. 4, c. 78, from and after the 1st day of August 1821, if a person shall accept a bill (*x*) payable at the house of a banker, or other place, without further expression in his acceptance, it shall be taken to be a general acceptance; but if the acceptor shall in his acceptance (which by sec. 2 must be in writing on the back of the bill) express that he accepts it at a banker's house or other place *only*, and not otherwise or elsewhere, such acceptance shall be taken to be a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.

Under this statute, where a bill was accepted payable at a banker's, without exclusive words, the acceptor was not discharged by the omission to present it there, though the banker failed in the meantime (*y*); and it has been held, subsequently to the above statute, that though a place of payment be mentioned in the body of a bill of exchange, as where the bill is drawn payable to the drawer's order in London, no proof of presentment is necessary (*z*).

If a promissory note be made payable at a particular place, presentment there is still necessary (*a*).

(*r*) Ibid.

(*s*) Bayley, O. B. 44, n. *c. Sproat* v. *Matthews*, 1 T. R. 182. *Mason* v. *Hunt*, Doug. 299. *Smith* v. *Abbott*, Str. 1152. *Julian* v. *Shobrooke*, 2 Wilson, 9. *Pierson* v. *Dunlop*, Cowp. 571. Where the drawee of a bill on account of a cargo consigned to him, says it will not be accepted till the ship with the wheat arrives; upon arrival, it is an absolute acceptance. *Milne* v. *Prest*, 4 Camp. 393.

(*t*) *Bentinck* v. *Dorrien*, 6 East, 199, 200.

(*u*) *Smith* v. *Wissen*, 1 T. R. 269.

(*v*) *Glossop* v. *Jacob*, 4 Camp. 227.

(*w*) 2 B. & B. 165.

(*x*) A bill drawn in Ireland upon a person in England is not an inland bill, and may therefore be accepted without writing on such bill, notwithstanding the above statute. But that section, as well as 9 Geo. 4, c. 24, s. 8, applies to bills drawn in Ireland upon persons there. *Mahoney* v. *Ashlin*, 2 B. & Ad. 478.

(*y*) *Tower* v. *Hayden*, 4 B. & C. 1.

(*z*) *Fayle* v. *Bird*, 6 B. & C. 531. *Selby* v. *Eden*, 3 Bing. 611. *Gibb* v. *Mather*, 2 C. & J. 254.

(*a*) *Sanderson* v. *Judge*, 2 H. B. 509. *Jamieson* v. *Bowes*, 14 East, 500, (*a*). *Dickenson* v. *Bowes*, 16 East, 110. Previous to

If a note be made payable at a particular house, a demand there is a demand upon the maker (*a*).

Identity of payee.

4thly. Where a bill is drawn with the payee's name in blank, and the plaintiff inserts his own name as payee, he must adduce evidence to show that he was intended as the payee (*b*).

If a note be payable to *A.* in trust for *B.*, *A.* is the legal owner, and may sue upon the bill (*c*).

Where a note or bill is payable to the *bearer*, or where it has been indorsed in blank, the mere possession of the bill or note is *primâ facie* evidence of the property in it (*d*).

Proof of a promissory note payable to *A. B.*, generally, is *primâ facie* evidence of a promise to *A. B.* the father, and not to *A. B.* the son, their names being the same; but *A. B.* the son, although described in the declara-

the decision in *Rowe* v. *Young*, 2 B. & B. 165, in the House of Lords, where no place of payment was specified on a bill of exchange, a special acceptance of the bill, making it payable at a particular place, was regarded by the Court of K. B. as a mere memorandum inserted for the purpose of apprizing the holder where he might apply for his money, and not as a condition restricting the general liability of the acceptor. *Fenton* v. *Goundry*, 13 East, 459; 2 Camp. 656. *Lyon* v. *Sundius*, 1 Camp. 423. But the contrary had been decided in the Common Pleas, *Ambrose* v. *Hopwood*, 2 Taunt. 61, and *Callaghan* v. *Aylett*, 2 Camp. R. 549; where it was held, that in case of a special acceptance, a presentment at the particular place was necessary. See *Huffan* v. *Ellis*, Bay. O. B. 98. See also *Sanderson* v. *Bowes*, 14 East, 500; Bay. O. B. 96; *Sunderson* v. *Judge*, 2 H. B. 509. In *Gammon* v. *Schmoll*, 5 Taunt. 344; 1 Marsh. 80, it was held, that if a drawee accept a bill payable at a particular place, the holder is not bound to receive it, but may resort to the drawee, as in case of non-acceptance; but that if the holder accept it, the acceptance interposes a condition precedent.

Where the bill or note is payable at a particular place, a presentment and demand must be alleged, unless a discharge be shown on the face of the declaration. *Bowes* v. *Howe*, 5 Taunt. 30. And an allegation that the makers of a note had become insolvent, and had ceased, and wholly declined and refused to pay at the place specified any of their notes, does not show a discharge of presentment and demand. Ibid. 34. But see *Howe* v. *Bowes*, 16 East, 112; where it was held, that if the makers had become insolvent, and shut up and abandoned their shop, it was evidence of a declaration to all the world of their refusal to pay their notes there.

A promissory note, promising to pay so much at the defendant's banking-house, must be presented there. *Dickenson* v. *Bowes*, 16 East, 110. By the acceptance of the bill the drawee recognises and adopts the place of payment specified in the bill. *Gray* v. *Milner*, 3 Moore, 90.

(*a*) *Saunderson* v. *Judge*, 2 H. B. 509. In an action against the maker of a note payable at Guildford, a presentment at a banking-house at Guildford is a presentment to the defendant, although he lived in London. *Hardy* v. *Woodroofe*, 2 Starkie's C. 319. Notice to the acceptor is unnecessary, even although the banker at whose house the note is payable has effects of the acceptor in his hands. *Smith* v. *Thatcher*, 4 B. & A. 200. *Treacher* v. *Hinton*, 4 B. & A. 413. *Edwards* v. *Dick*, 4 B. & A. 212. So in an action by the drawer against the acceptor of a bill payable at a banker's, presentment there is unnecessary, and the omission to present affords no defence. *Rhodes* v. *Gent*, 5 B. & A. 244. The acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and a refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. *Hoare* v. *Cazenove*, 16 East, 391.

(*b*) *Crutchley* v. *Mann*, 1 Marsh, 29. And held, that a letter from the acceptor, promising to accept the bill, with the address torn off, was not evidence to prove the fact. (*Ibid.*) And held also, that the letter, had it been efficient, would have required a stamp. And see *Parkins* v. *Hawkshaw*, 2 Starkie's C. 239; B. N. P. 171; *Myddelton* v. *Sandford*, 4 Camp. 34. *Corfield* v. *Parsons*, 1 C. & M. 730; *Bulkely* v. *Butler*, 2 B. & C. 441; *Roach* v. *Ostler*, 1 Man. & B. 120.

(*c*) *Smith* v. *Kendal*, 1 Esp. C. 231; 6 T. R. 112. *Evans* v. *Cramlington*, Carth. 5; 2 Show. 507; 2 Vent. 309; Skinner, 264.

(*d*) Per Lord Mansfield, Doug. 632; Bayley, 116; Chitty, 278. 289. *King* v. *Milsom*, 2 Camp. 5. See 2 Saund. 47. *Blackham's Case*, 1 Salk. 290. *Peterson* v. *Harducre*, 4 Taunt. 115; 18 Ves. 49.

tion as *A. B.* the younger, bringing the action, and being in possession of the note, is entitled to recover upon it (*e*).

If a payee annex a condition to his indorsement before acceptance, the drawee who afterwards accepts the bill is bound by the condition; and if the condition be not performed, the right of action reverts to the payee, and he may recover against the acceptor (*f*).

A bill payable to the order of *A.*, is payable to *A.* if he make no order, and none is to be presumed (*g*).

Admissions.

A promise to pay the amount of a bill, or part-payment of it, is an admission of the acceptance (*h*). An acknowledgment by one of several acceptors, of his own liability, is not evidence against the rest (*i*); but it is of his own, although made during a treaty for negotiation (*k*). Although the defendant on being applied to for payment, but without seeing the bill, desired the holder of the bill to call again, it was held that he might still prove that his acceptance had been forged; but on proof that he had on former occasions paid several similar bills drawn by the same person, *Taylor*, upon which, *Taylor*, who was connected with the defendant in business, had, it was supposed, written the defendant's name, it was held that the defendant had adopted the acceptance, and was liable on the bill (*l*).

If the acceptance of a bill appear on the face of it to have been cancelled, the plaintiff may still show that it was cancelled by mistake (*m*).

Stamp

Before the bill is read the defendant may object the want of a proper stamp (*n*); or that the note or bill appears to have been cancelled, so as to throw upon the plaintiff the burthen of giving evidence in explanation; as, to show that the apparent cancellation was accidental, or resulted from mistake (*o*). The defendant cannot insist on reading an indorsement upon the note, which is no part of the note itself (*p*); and a witness called to prove the hand-writing of a maker of a note cannot be cross-examined as to an indorsement to which there is an attesting witness (*q*).

Variance

In general, an allegation descriptive of the bill must be precisely proved, because a variance shows that the instrument produced is a different one from that declared on; but it is sufficient if an averment, according to the substance and effect, be substantially proved (*r*).

Where a bill or note appears to have been altered, it lies on the party producing it to show that the alteration was not improperly made (*s*).

(*e*) *Sweeting* v. *Fowler*, 1 Starkie's C. 106.

(*f*) *Robertson* v. *Kensington*, 4 Taunt. 30.

(*g*) *Smith* v. *M'Clure*, 5 East, 476.

(*h*) *Jones* v. *Morgan*, 2 Camp 474.

(*i*) 2 T. R. 613; 3 Esp. C. 60; 4 Esp. C. 226; Doug. 651; 1 Esp. C. 135; B. N. P. 273; Str. 640. 1051; 12 Mod. 309.

(*k*) 1 Esp. C. 143; B. N. P. 236. Vide *infra*, PRESUMPTIVE EVIDENCE.

(*l*) *Barber* v. *Gingell*, 3 Esp. C. 60.

(*m*) *Raper* v. *Birkbeck*, 15 East, 17. And see below, ALTERATION, &c.

(*n*) See tit. STAMP.

(*o*) See *Raper* v. *Birkbeck*, 15 East, 17; and see Ind. tit. CANCELLATION. As to the question whether a drawee can cancel his acceptance before re-delivery, see *Bentinck* v. *Dorrien*, 6 East, 199.

(*p*) *Stone* v. *Metcalf*, 1 Starkie's C. 53.

(*q*) *Ibid.*

(*r*) See tit. VARIANCE. And see the late stat. Where the declaration alleged a special acceptance, payable at a certain place, "and not elsewhere," which latter words were not on the bill; it was held to be an allegation of a special acceptance, and the variance fatal, but that the sheriff was bound to have allowed the record to be amended as to such variance, and a new trial was granted. *Higgins* v. *Nichols*, 7 Dowl. (P. C.) 551.

(*s*) *Henman* v. *Dickenson*, 5 Bing. 183. Where it was left to the jury to say, from the nature of a blot appearing on the alteration, whether the alteration was made at the time of making the note, and the jury finding that it was so made, the Court directed a nonsuit to be entered. *Knight* v. *Clements*, Q. B. T. T. 1838. Roscoe on Ev. 201.

In date. In the case of a note payable by instalments, where the days of payment are described in the declaration, a variance in one of the days of payment is fatal (*t*).

If the bill be alleged to have been *made* on the 3d, and the bill produced bear date on the 6th, the variance is not material; and it is unnecessary to prove that the bill was really made on the 3d (*u*). But a variance from the date of the bill, as alleged in the declaration, is fatal (*x*).

In names. A variance as to the names of parties is fatal, where the allegation operates as a description of the bill; but otherwise, as it seems, where it merely relates to the names of the parties to the action, who might have pleaded the misnomer in abatement, provided the identity be proved (*y*). Where a bill was alleged to have been drawn by *Crouch*, (no party to the action,) and the bill itself appeared to have been drawn by *Couch*, the variance was held to be fatal (*z*). And where in an action against three as the makers of a note, the declaration alleged it to have been made by William Austin, Robert Strobell, and William *Shutliff*, of whom, the two latter were outlawed in the action, and the bill, on the trial against the third, appeared to have been drawn by William Austin, *Samuel* Strobell, and William *Shirtliff*, the variance was held to be fatal. In this case no evidence was given to prove the identity of the parties (*a*). But where the declaration was against *Thomas Ray* and others, as the joint makers of a note, and Thomas Ray suffered judgment by default, and the note was proved to have been signed by J. Hodgson for Rowes, J. Hodgson, *Ray* & Co., and the real name of the partner was *John Rey*, it was objected that Thomas Ray the party sued was not a partner; but proof being given that *John Rey*, the party intended to be sued, had actually been served with process, and was a co-partner with the other defendants, the variance in the christian names was held to be immaterial, and the variance in the surnames Ray and Rey was held to be immaterial, their pronunciation being similar (*b*).

Where an action was brought by Willis, as the payee of a note, and on production the note was payable to Willi*son*, evidence was admitted on the part of the plaintiff to show that she was the party really meant, and to explain the mistake (*c*).

Where a bill is drawn with the payee's name in blank, and it is stated in the declaration that *A. B.* (a *bonâ fide* holder, who has inserted his own name) was the payee, it is no variance (*d*).

A declaration, alleging a note to have been made by *A.* and *B.* is not satisfied by evidence of a note given by *A.* alone, to secure a partnership

(*t*) *Wells* v. *Girling*, 3 Moore, 79; 1 Gow. 21.

(*u*) 1 Camp. 307. And see *Pasmore* v. *North*, 13 East, 517, where the note was issued and indorsed by the payee, who died before the day of the date.

(*x*) *Cozon* v. *Lyon*, 2 Camp. 308; Fitz. 130.

(*y*) See tit. VARIANCE; and see *Boughton* v. *Frere*, 3 Camp. 29. *Mayor, &c. of Stafford* v. *Bolton*, 1 B. & P. 40. *Jowett* v. *Charnock*, 6 M. & S. 45. The general rule seems to be, that if the identity of the parties be proved, a variance in their names is immaterial. A description of the plaintiffs as executors and trustees of *A. B.* is mere surplusage, the bill being payable to them in the name of a firm which they had assumed. *Aguttar* v. *Moses*, 2 Starkie's C. 499.

(*z*) *Whitwell* v. *Bennett*, 3 B. & P. 559.

(*a*) *Gordon* v. *Austin*, 4 T. R. 611.

(*b*) *Dickenson* v. *Bowes*, 16 East, 110.

(*c*) *Willis* v. *Barrett*, 2 Starkie's C. 29. Note, the declaration alleged a promise to pay Willis by the name of Willison. As to the admissibility of parol evidence to remove a latent ambiguity, see tit. PAROL EVIDENCE.

(*d*) *Atwood* v. *Griffin*, R. & M. 425. A variance between the real name of a payee and indorser, and that alleged in the declaration, and which appears on the bill, is immaterial. *Forman* v. *Jacob*, 1 Starkie's C. 47.

debt (*e*); but it would be otherwise if *A.* had prefixed to his signature, "for *A.* and *B.*" (*f*). Proof that others joined with the defendants in drawing, accepting, or indorsing the bill, is immaterial under the general issue, but is pleadable in abatement (*g*). In parties to the bill.

An undertaking to provide for the acceptance of a bill is not a promissory note (*h*).

An allegation that a bill is payable to *A.*, is proved by a bill payable to the order of *A.* (*i*).

If a bill be made payable at a particular place, it is a variance to state it without that qualification (*k*).

But it is no variance when the place of payment is merely mentioned at the foot of the note (*l*). And in such case it has been held, that an allegation of being payable there was a variance (*m*).

It is essential that the bill read in evidence should agree in *legal effect*, as well as in words, with that specified in the declaration; and therefore, where the bill proved was drawn in Dublin for payment in currency, but there was nothing in the declaration to show that Irish currency was meant, the variance was held to be fatal (*n*). The omission of the word sterling is immaterial (*o*). A memorandum indorsed on a note after it has been signed, stating it to have been given on a condition mentioned in an agreement referred to in the memorandum, is a mere ear-marking of the note, and does not incorporate the agreement (*p*). Where the variance arises in consequence of any artifice in framing the bill, as by the introduction of some words in small characters, or by the use of illegible marks (*q*) for the purpose of deceit, the variance is also immaterial (*r*). In legal effect.

Where the declaration was on a bill of exchange, and the instrument given in evidence contained the word *at*, inserted before the drawee's name, it was held that it was no variance (*s*).

An allegation that the defendant made the note, "his own proper handwriting being thereunto subscribed," may be rejected as surplusage, and proof that it was made by another with his authority is sufficient (*t*).

Where the declaration stated the making and acceptance, and it appeared that the acceptance had been written before the bill was drawn, it was held to be no variance (*u*).

An allegation that the bill was directed to the defendant is not supported by proof of a bill drawn payable to the drawer's order at a certain place named, although the defendant, when it was presented there, wrote his name upon it as the acceptor (*x*). Direction.

(*e*) 2 Camp. 308; 15 East, 7.

(*f*) 1 Camp. 403.

(*g*) *Mountstephen* v. *Brooke*, 1 B. & A. 224. And see *Richards* v. *Heather*, 1 B. & A. 29; and *Evans* v. *Lewis*, 1 Will. Saund. 291, *d.* n.

(*h*) Peake's C. 24.

(*i*) *Smith* v. *Maclure*, 5 East, 476.

(*k*) Bayley on Bills, 310. *Roche* v. *Campbell*, 3 Camp. 247. *Hodge* v. *Fillis*, 3 Camp. 463.

(*l*) *Williams* v. *Waring*, 10 B. & C. 2. *Price* v. *Mitchell*, 4 Camp. 200. Where the memorandum at the foot of the note was printed, Ld. Ellenborough considered the place to be part of the contract. *Trecothick* v. *Edwin*, 1 Starkie's C. 468.

(*m*) *Eron* v. *Russel*, 4 M. & S. 585. But see *Sprowle* v. *Legge*, 3 Starkie's C. 157. *Hardy* v. *Woodroofe*, 2 Starkie's C. 319.

(*n*) *Kearney* v. *King*, 2 B. & A. 301. *Sprowle* v. *Legge*, 1 B. & C. 18.

(*o*) *Ibid.*

(*p*) *Brill* v. *Criche*, 1 M. & W. 232.

(*q*) *Allan* v. *Mawson*, 4 Camp. 115.

(*r*) Where the word *at* was inserted before the drawer's name, the instrument was held to have been properly described as a bill of exchange. *Shuttleworth* v. *Stevens*, 1 Camp. 402. And see *Edis* v. *Burg*, 6 B. & C. 433.

(*s*) Dougl. 651; and see note (*r*).

(*t*) *Booth* v. *Grove*, 1 Mood. & M. 182, and 3 C. & P. 335. This was formerly doubted. 2 Camp. 305.

(*u*) *Molloy* v. *Delves*, 7 Bing. 428; 4 C. & P. 492.

(*x*) *Gray* v. *Milner*, 2 Starkie's C. 336.

Variance. In an action against the acceptor on a bill directed to him, or, in his absence, to J. S., the conditional direction need not be stated (*y*).

Consideration. Where the allegation was, that the bill was for value *received* in leather, and the evidence was that it was for value *delivered* in leather, it was held to be no variance (*z*); but if the bill be drawn in the usual form for value received (which means by the *drawer*), and the declaration allege it as value received by *the drawee*, the variance is material (*a*).

Delivery. It seems that an allegation of the delivery of the bill to the payee may be rejected as surplusage (*b*).

If the acceptance of the bill be unnecessarily alleged in an action against the drawer, it need not be proved (*c*).

Where the writing of the drawee upon the bill is not legible, it has been doubted whether it is to be considered as an accepted or as a defaced bill (*d*).

Indorsements. Indorsements unnecessarily alleged must be proved (*e*). If there be no date to the indorsement, a variance from the allegation that the bill was indorsed before it became due will not be material (*f*).

Upon a declaration against *B.* as an indorser of the bill, it appeared in evidence that the bill had been indorsed to *B.* in blank, and that *B.* without writing his own name, had converted the blank indorsement into a special indorsement to the plaintiff, and it was held that *B.* was not liable as indorser (*g*).

In the case of a general acceptance, it is not necessary to allege or prove a presentment (*h*).

Presentment. Although the declaration allege a presentment by a person specified, it is sufficient to prove a presentment by another (*i*). A variance as to the time of presentment and acceptance is not material, even although the bill be payable after sight (*k*).

If presentment be alleged to have been made when the bill was due and payable, the day alleged under a *videlicet* will not be material, although it be on a Sunday (*l*).

Indorsee *v.* maker or acceptor. The *indorsee* of a note or bill, in an action against the *maker or acceptor*, must prove, 1st, the *making* of the note, or the *drawing* and *acceptance* of

(*y*) 12 Mod. 447. Bayley on Bills, 390.

(*z*) Bayley, O. B. 16, n. *Jones* v. *Mars*, 2 Camp. 305.

(*a*) *Highmore* v. *Primrose*, 5 M. & S. 65. *Priddy* v. *Henbrey*, 1 B. & C. 675.

(*b*) *Smith* v. *Maclure*, 5 East, 476; 7 T. R. 596.

(*c*) *Tanner* v. *Bean*, 4 B & C. 312.

(*d*) Bayley, O. B. 88; Chitty, 204, n. 9; 6 East, 199; 1 Taunt. 420.

(*e*) *Waynam* v. *Bend*, 1 Camp. 175; *R.* v. *Stevens*, 5 East, 244. *Williamson* v. *Allison*, 2 East, 446. *Peppin* v. *Solomon*, 5 T. R. 496.

(*f*) *Young* v. *Wright*, 1 Camp. 139.

(*g*) *Vincent* v. *Hurlock*, 1 Camp. 442. Where a note contains in the body of it, and not merely in a memorandum at the foot, a promise to pay at a particular place, a presentment at such place must be proved, but notice of dishonour to the maker is unnecessary. *Pearce* v. *Pemberthy*, 3 Camp. 261. A note payable at two places may be presented at either. *Beeching* v. *Gower*, Holt's C. 313. A promissory note being in the following form, "I promise to pay *M. A. D.*, or bearer, on demand, the sum of 10*l.* *at sight*," a presentment for sight was held to be necessary. *Dixon* v. *Nuttall*, 1 C. M. & R. 307. Where a note is payable on demand, a demand need not be alleged or proved; the action itself is a demand. *Rumball* v. *Bull*, 10 Mod. 38.

(*h*) *Turner* v. *Hayden*, 4 B. & C. 1. *Secus*, in case of a qualified acceptance. *Roice* v. *Young*, 2 B. & B. 165. Where an acceptance, under the st. 1 & 2 Geo. 4, c. 78, is general, and the holder neglects to present it, and the bankers fail with money of the acceptor's in their hands, the acceptor is not discharged. *Turner* v. *Hayden*, 4 B. & C. 1.

(*i*) *Boehm* v. *Campbell*, 1 Gow's C. 55. *Bolton* v. *Dugdale*, 4 B. & Ad. 619.

(*k*) *Forman* v. *Jacob*, 1 Starkie's C. 46.

(*l*) *Bynner* v. *Russel*, 1 Bingh. 23.

the bill by the defendant. 2dly, *presentment*, where necessary. These proofs, and the effect of variance, have been already stated. 3dly, he must prove his own *title* to it by *transfer*; and 4thly, in some instances, must show that he gave *value* for it.

Title by transfer.

3dly. His title to the bill.—In the first place, it must appear from the bill itself that it is a *negotiable* instrument, which is a pure question of law (*m*); and next he must prove that the bill or note has been transferred to him.

An indorsement is equivalent to a new drawing. If after a special indorsement, and before the special indorsee signs his name, the defendant indorses the bill, and then the special indorsee indorses it, he may sue the defendant, and no new stamp is requisite (*n*).

Transfer by indorsement.

Where the bill or note is not payable to the bearer, but to a particular person, or to his order, an indorsement *in writing* made by that person, or by his authority, is essential to the transfer; and therefore, evidence of that person's hand-writing or of another person (*o*) proved to be his authorized agent, is essential to prove the transfer (*p*).

(*m*) 3 Burr. 1523. 1526. 1528; but see *Grant* v. *Vaughan*, Burr. 1516, where Lord Mansfield left this question to the jury. (*Vid. infra*, tit. CUSTOM.) A bill or note payable on a contingency cannot be declared on as a negotiable instrument. *Haussoullier* v. *Hartsincke*, 7 T. R. 733. *Collis* v. *Emmett*, 1 H. B. 313. *Hill* v. *Halford*, 2 B & P. 413. *Blanckenhagen* v. *Blundell*, 2 B. & A. 417. See *Trier* v. *Bridgman*, 2 East, 359; *Caxlos* v. *Fancourt*, 5 T. R. 482; *Colehan* v. *Cooke*, Willes, 393. An instrument acknowledging the receipt of an acceptance, and containing an undertaking to provide for it, is not a promissory note, and requires a receipt stamp. *Scholey* v. *Walsby*, Peake's C. 24. See *Williamson* v. *Bennett*, 2 Camp. C. 417; also *Leeds* v. *Lancashire*, 2 Camp. 205, in the note.) If a note, before it is signed, be indorsed with a memorandum that it shall be void on the happening of a contingent event, it is not within the stat. 3 & 4 Ann. c. 9. *Hartley* v. *Wilkinson*, 4 Camp. 127. But a defeasance indorsed by the payee on the instrument is no part of the contract, unless proved to have been made at the same time. *Stone* v. *Metcalf*, 1 Starkie's C. 53. *I promise to pay*, signed by two persons, is a joint and several note. *March* v. *Ward*, Peake's C. 130. A note payable to *A.* only, without the words, bearer or order, is a valid note. *Smith* v. *Kendal*, 1 Esp. C. 231; 6 T. R. 123. *Burchell* v. *Slocock*, 2 Ld. Raym. 1545. *Moor* v. *Paine*, C. T. Hard. 288. A request to pay 15*l.* out of half-pay which will become due in January, is not a promissory note. *Stevens* v. *Hill*, 5 Esp. 247.) And see *Evans* v. *Underwood*, 1 Wils. 262. *Jenny* v. *Herle*, 2 Ld. Raym. 1362; 1 Str. 591; 8 Mod. 25. *Josselyn* v. *L'Acier*, 10 Mod. 294. 316.

(*n*) *Penny* v. *Innes*, 1 C. M. & R. 439.

(*o*) An authority to draw does not of itself import an authority to indorse bills, but is evidence to go to a jury. *Prescott* v. *Flinn*, 9 Bing. 19. There the clerk of the payees had been accustomed to draw bills and cheques for them, and had been in one instance authorized to *indorse* a bill, and had in two other instances indorsed bills which had been discounted by the payees at their bankers, and the jury were held to be warranted in finding a general authority.

(*p*) Skinn. 411; 1 Atk. 282; 2 Burr. 674; 3 East, 482, *infra*, 163. *A.*, the indorsee of a bill of exchange, indorses it "pay to *B.*, or his order, for my use." *B.*'s banker discounts the bill for *B.*, and applies the proceeds for *B.*'s use; the property in the bill remains in *A.*, and he may maintain an action against the banker's for the amount. *Sigourney* v. *Lloyd*, 8 B & C. 622. As to the transfer in a foreign country of a bill or note made in England, see *Chaumette* v. *The Bank of England*, 9 B. & C. 208. A Bank of England note is transferable in France under the stat. 3 & 4 Anne, c. 9. Where a set of foreign bills, drawn abroad, were sent to the drawee, the defendant, who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had beeen indorsed by the defendant to his father conditionally, but who had never insisted on payment, but gave it up on the substitution of other securities; held that the plaintiff was entitled to recover; and per Tenterden, L. C. J. and Parke, J., it would have been the same if the first part had been indorsed and delivered unconditionally. *Holdsworth* v. *Hunter*, 10 B. & C. 449. So if a bill be drawn and issued in blank as to the name of the payee, it may be filled up by a *bona*

Where all the indorsements through which the plaintiff claims are special, they must all be alleged and proved by evidence of the hand-writing of the different indorsers, or of admissions on the part of the defendant (*q*).

Where the first, or any subsequent indorsement, is made in blank, the indorsee may claim immediately under that indorsement, although after the blank indorsement there be one or more special indorsements (*r*). Where, however, the intermediate indorsements are alleged in the declaration, they must all be proved (*s*), even although they were upon the bill at the time of acceptance (*t*). The hand-writing of the first indorser must be proved, although he was the drawer (*u*), and although his name was on the bill at the time of acceptance (*v*); and therefore the indorsee of a bill payable to a fictitious payee cannot recover against the acceptor, unless he can prove that the acceptor knew that the payee was fictitious, or that the money found its way into his hands (*x*).

Proof that the indorsement is in the hand-writing of another person of the same name with the payee is not sufficient, for it is a forgery, and a title to the bill cannot be derived through the medium of forgery (*y*). Neither can an indorsee recover where it appears that the first indorsement (through which he must derive his title) was made upon an usurious consideration (*z*). But where the defendant accepted bills drawn in fictitious names, and it was shown that the hand-writing of the supposed drawer and

fide indorser with his own name. *Cruchley* v. *Clarance*, 2 M. & S. 90. *Attwood* v. *Griffin*, 1 Ry. & M. 425. *Edie* v. *East India Company*, Burr. 1216. A party to whom the bill is indorsed, for the purpose of procuring payment, may sue, although he is indebted to the indorsee, although no authority be given to bring the action. *Adams* v. *Oakes*, 6 C. & P. 70. Or the indorser may sue. *Stovern* v. *Butt*, 2 C. & M. 416. So an indorsee by way of gift may sue an acceptor for value. *Heydon* v. *Thompson*, 3 N. & M. 319. No indorsement is admitted by the acceptance. *Smith* v. *Chester*, 1 T. R. 654. Although the indorsement was on the bill at the time of the acceptance. *Bosanquet* v. *Anderson*, 6 Esp. C. 43. Where a bill is drawn and indorsed by procuration, the acceptance admits only the drawing, not the procuration. *Robinson* v. *Yarrow*, 7 Taunt. 455. See *Hankey* v. *Wilson*, *infra*, 219 (*k*); and see *Bosanquet* v. *Anderson*, 6 Esp. C. 43, where Lord Ellenborough held, that though a drawee accept a bill with many names upon it, they must be proved.

(*q*) See *Sidford* v. *Chambers*, 1 Starkie's C. 326.

(*r*) 1 B. & P. 658; 4 Esp. C. 210; 1 Esp. C. 180. *Smith* v. *Clarke*, Peake, 225; Bay. O. B. 48. But the intermediate indorsements must either be proved or struck out, per Abbott, C. J. *Cocks* v. *Borrodaile*, Chitty, 302, 7th edit., citing the opinion of Bayley, J. The indorsements may be struck out after the bill has been put in evidence. *Mayer* v. *Jadis*, 1 Mo. & R. 247.

(*s*) 1 T. R. 654; *Wayman* v. *Bend*, 1 Camp. 175. *Bosanquet* v. *Anderson*, 6 Esp. C. 43.

(*t*) 1 T. R. 654; 6 Esp. 43. In *Jones* v. *Radford*, 1 Camp. 83, Lord Ellenborough is stated to have held, that an indorsement in such a case by one person, in the name of himself and a supposed partner, was evidence against the acceptor after the indorsement, to prove the partnership, which was disputed at the trial; this, however, cannot be supported without going the full length of contending that the acceptance operates as an admission of the regularity of the indorsement altogether. See *Carvick* v. *Vickery*, Doug. 653.

(*u*) *Macferson* v. *Thoytes*, Peake's C. 20; Doug. 650. 653.

(*v*) 6 Esp. C. 43; 1 T. R. 654; Doug. 630; Peake's C. 225; 3 T. R. 175, 176; 4 T. R. 28.

(*x*) 1 Camp. 130; 3 Bro. 238; Co. B. L. 184, 5; 1 H. B. 313. 569. 625; Cullen, 98; *Gibson* v. *Minet and another*, 3 T. R. 481; 2 H. B. 187. 211. The plaintiff in such case may declare as on a bill payable to the bearer (3 T. R. 481; 1 H. B. 569. 625; 2 H. B. 187. 211. 288. 298); or, *semble*, as on a bill payable to the order of the drawer, or on a count stating the special circumstances. *Ibid.*

(*y*) *Mead* v. *Young*, 4 T. R. 28, by three Justices, Ld. Kenyon, C. J. *dissentiente*.

(*z*) *Lowes* v. *Mazzaredo*, 1 Starkie's C. 385.

indorser were the same, it was held that such evidence was admissible, and that a party accepting, without inquiry as to the reality of the person drawing, must be considered as undertaking to pay to the signature of the person actually drawing the bills (*a*).

Indorsement by a bankrupt.

An indorsement by a trader after his bankruptcy is good, if he has received value (*b*). An accommodation bill, payable to the order of the drawer, does not pass to the assignees, and therefore an indorsement for value after the bankruptcy will confer a right of action (*c*).

By an executor.

Where the bill was payable to a person deceased, the plaintiff may derive a title to it by proof of an indorsement by his executor or administrator (*d*).

Trustee.

Where the bill is payable to *B.* or order, for the use of *C.*, and *B.* indorses to *D.* for value, *D.* may recover on the bill, since *B.* had the legal interest, and *C.* but an equitable interest in the bill (*e*).

Proof of transfer. Indorsement by a wife.

If the property in the bill vest in a feme sole, who marries, the plaintiff must prove an indorsement by the husband (*f*), even although the husband permit her to trade as a feme sole (*g*); but where she indorses in the name of the husband, the jury may, in some instances, presume, from the particular circumstances of the case, that she was the authorised agent of the husband (*h*); and where a note was made payable to Mrs. Carter, and she indorsed it in that name, and in an action by an indorsee against the maker, the latter proved that she was the wife of *Cole*, and it was proved that when the note was presented to the defendant for payment, he had promised to pay it, it was left to the jury to presume, that the wife had authority from the husband to indorse the note in the name by which she was known to the world (*i*). Where the wife, by her husband's authority, signed and indorsed the bill in her own name, it was held sufficient to pass the interest in the bill to the indorsee, a *bonâ fide* holder (*k*).

By an infant.

It is no defence to an action against the acceptor, that an indorsement essential to the plaintiff's title was made by an infant.

An admission by an indorser of his indorsement, is not, it seems, evidence against the acceptor (*m*).

( ) *Cooper* v. *Meyer*, 10 B. & C. 468.

(*b*) *Smith* v. *Pickering*, Peake's C. 50. Where the bill is drawn payable to the order of a third person for value received, it is no variance to allege that it was for value received of the drawer. *Grant* v. *Da Costa*, 3 M. & S. 351. Value *received* in leather for value *delivered* in leather is no variance. *Jones* v. *Mars*, 2 Camp. 306. "Value received" in a note means value received from the payee. *Clayton* v. *Goslin*, 5 B. & C. 360. *Qu.* as to the indorsement of a bill by one partner after the bankruptcy of his co-partner. *Ramsbottom* v. *Cator*, 1 Starkie's C. 228.

(*c*) 1 Camp. 46; 3 East, 321; 12 East, 656.

(*d*) 3 Wilson, 4. See tit. EXECUTOR.

(*e*) *Evans* v. *Cranlington*, Carth. 5. See 2 Vent. 307.

(*f*) *Connor* v. *Martin*, Str. 516; 3 Wils. 5; *Miles* v. *Williams*, 10 Mod. 243. And the husband may sue alone, without the wife's indorsement. *M'Neilage* v. *Holloway*, 1 B. & A. 218. But see *Richards* v. *Richards*, 2 B. & Ad. 453. Where a promissory note is made payable to a married woman, the husband alone may indorse. *Mason* v. *Morgan*, 2 Ad. & Ell. 30.

(*g*) *Barlow* v. *Bishop*, 1 East, 432.

(*h*) Ibid. Vide *supra*, tit. AGENT.

(*i*) *Cotes* v. *Davis*, 1 Camp. 485.

(*k*) *Prestwich* v. *Marshall*, 7 Bing. 565; see *Cotes* v. *Davis*, 1 Camp. C. 485.

(*l*) *Taylor* v. *Croker*, 4 Esp. 187; Bayley O. B. 58; 2 B. & C. 299. Although he was the payee of the bill (*Jones* v. *Darch and others*, 4 Price, 300). Note, in that case the defendant knew that the payee, who had indorsed the bill before acceptance, was an infant. See *Williams* v. *Harrison*, Carth. 140.

(*m*) *Hemmings* v. *Robinson*, Barnes, 436; Bay. O. B. 223. But see 2 Esp. C. 647, 8. The signature of a party may, it has been said, be proved by an admission which would be evidence against the party who made it. 2 T. R. 613; 1 Esp. C. 60; 4 Esp. C. 226. *tamen qu.*

An averment that the payee by his indorsement directed the amount of the bill to be paid to *A. B.*, is satisfied by proof of an indorsement directing the payment to the order of *A. B.*, for the payment to his order is in effect a payment to him (*n*); and, conversely, an indorsement directing the payment to be made to *A. B.* may be alleged as a direction to pay to *A. B.* or order (*o*), since that is the legal import of the indorsement.

Special indorsement.

A special indorsement of a bill contains in itself an absolute transfer of a bill (*p*); but an indorsement in blank is mere *primâ facie* evidence of transfer (*q*); and therefore if *A.* the payee of a bill, indorse it in blank, and *B.* get the bill accepted, *A.* may still maintain an action on the bill, for *B.* might act either as agent or assignee, and not having filled up the indorsement, and thereby made the bill payable to himself, it is to be presumed that he acted as agent (*r*).

By delivery.

Where the bill or note is payable to the bearer, or has been indorsed in blank, *possession* is *primâ facie* evidence of delivery (*s*), and ownership (*t*). Consequently where several sue as the indorsees of a bill indorsed in blank, they are not bound to prove either that they are partners, or that the bill has been indorsed to them jointly (*u*); but where a bill specially indorsed to *K.*, was by his direction indorsed in blank, and delivered to *L. & Co.*, it was held that two of the firm of *L. & Co.* could not conjointly with a stranger support an action as indorsees of the bill, without some proof of transfer by *L. & Co.* to the plaintiffs, either by indorsement or delivery (*x*).

Transfer.

Where an indorsee of a bill recovered against a prior indorser (also an indorsee of the bill, who then brought an action against the acceptor, he was non-suited for want of a receipt for the money paid by him to the indorsee (*y*); but it would have been sufficient to show that he had paid the money.

(*n*) *Smith* v. *M'Clure*, 5 East. 476. *Fisher* v. *Pomfret*, 12 Mod. 125.

(*o*) *Acheson* v. *Fountain*, Str. 557. *More* v. *Manning*, Com. 311. *Edie* v. *East India Company*, 2 Burr. 1216. Bl. R. 295.

(*p*) *Pothier Contrat du Change*, Part I. c. 2, s. 23, 24.

(*q*) *Smith* v. *Pickering*, Peake's C. 50. *Clarke* v. *Pigott*, Salk. 126. 130.

(*r*) *Clarke* v. *Pigott*, Salk. 126. 12 Mod. 192.

(*s*) The property in bills is not transferred by mere indorsement, without delivery, which must be averred. *R.* v. *Lambton and others*, 5 Price, 442.

(*t*) *Ord* v. *Portal*, 3 Camp. 230. *King* v. *Milsom*, 2 Camp. 5. So if a bill be indorsed in blank to several, one of whom dies, and the rest sue. *Attwood* v. *Rattenbury*, 6 Moore, 570. And see *Rordamz* v. *Leach*, 1 Starkie's C. 446. *Machell* v. *Kinnear*, 1 Starkie's C. 499. But where the bill is specially indorsed to a firm, 3 Camp. 240. Or where the plaintiffs sue as assignees of a bankrupt, or in any other special capacity, they must prove an indorsement in that capacity. *Bernasconi* v. *Duke of Argyle*, 3 C. & P. 29.

(*u*) *Ord* v. *Portal*, 3 Camp. 239.

(*x*) *Machell* v. *Kinnear*, 1 Starkie's C. 499.

(*y*) *Mendez* v. *Carreroon*, Ld. Raym. 742. But this was on proof of a custom amongst merchants to produce a receipt for the money so paid; and Ld. Holt held that it would have been sufficient to prove that he had paid the money. In the above case (the record has been consulted) the plaintiff did not declare on the bill as indorsee, but specially alleged his payment of the money to the subsequent indorsee, on the default of the acceptor. Where, however, an indorser has been compelled by a subsequent indorsee to take up the bill, he may still sue as indorsee of the bill against the prior parties. See *Death* v. *Serwonters*, 1 Lut. 836; and the observations of Lawrence, J. in *Cowley* v. *Dunlop*, 7 T. R. 571, who considered the point as settled by the case *of Death* v. *Serwonters*, that the right to sue as indorser was not lost by indorsement, and that an indorser, on taking up the bill, was *remitted* to his former right to sue on the bill; and therefore that if *A.* indorsed to *B.*, and *B.* to *C.*, and *C.* to *D.*, who returned the bill to *C.*, the latter might recover as indorsee of the bill. And see *Callow* v. *Lawrence*, 3 M. & S. 97, and the case of *Pownal* v. *Ferrand*, *infra*, note (*a*). Where three persons, not partners in trade, had separately indorsed the bill for the accommodation of the drawer, and, on its being

And an indorser who takes up the bill from a subsequent indorsee, is remitted to his former rights on the bill (*z*). It has even been held that an intermediate indorser who, on actions brought by a subsequent indorse against himself, and also against the acceptor, pays part of the amount to such indorsee, may recover that sum against the acceptor as money paid to his use (*a*).

So if a party take up a bill for the honour of an indorser, he is entitled to sue all the previous parties on the bill (*b*).

Where a note was given by *A.* to *B.* to secure a debt, and was assigned by *B.* to *C.* with directions not to negotiate it, as he should want it for the purpose of settling with *A.*; it was held that *C.* could not, after a settlement between *A.* and *B.*, and without a redelivery of the note, maintain an action against *A.* (*c*).

Where the bill or note is payable to *A.* and *B.*, who are not partners, the indorsement of both must be proved (*d*).

By partners.

An indorsement by one of several partners in the partnership name will be sufficient, if the partnership be proved, for an authority may be implied (*e*). So if one partner transfer in the name which he as managing partner has occasionally used for the purposes of the firm, although no privity on the part of his partners, be proved, and although the firm whose name is thus used no longer exists (*f*).

Where the plaintiff claimed through the indorsement of *E. S.* the payee of the bill, and proved, that a person calling himself *E. S.* came to Cadiz, having the bill in his possession, and also a letter of introduction, proved to be genuine, which purported to be given to a person introduced to the writer as *E. S.*, and also another bill of exchange drawn by the writer; and also, that that person resided at Cadiz ten days, during which time he visited the plaintiff, and indorsed the bill to him, and received a letter of credit from him, it was held that this was evidence of identity, sufficient to warrant a verdict for the plaintiff (*g*).

On the dissolution of a partnership, a power given to one of the partners to receive and pay debts, does not authorize him to indorse a bill in the name of the partnership (*h*). A partner becoming bankrupt cannot give a title by indorsement (*i*).

Evidence of an offer by the defendant to give another bill supersedes the proof of an indorsement (*k*).

dishonoured, had paid in equal portions the amount to a party who had discounted it subsequently to their indorsements; held that they might strike out their indorsements, and proceed jointly as possessors of the bill against a previous indorser. *Low* v. *Copestake*, 3 Carr. & P. C. 300.

(*z*) *Supra*, note (*y*).

(*a*) *Pownall* v. *Ferrand*, 6 B. & C. 439.

(*b*) *Mertens* v. *Winnington*, 1 Esp. C. 113. He holds as an indorsee for value from the party *for* whom (not *from* whom) he takes the bill. Bayley on Bills, 146–8.

(*c*) 1 Bos. & Pull. 398.

(*d*) *Carvick*, v. *Vickery*, Doug. 653; Bay. O. B. 55.

(*e*) *Supra*, 204.

(*f*) *Williamson* v. *Johnson*, 1 B. & C. 147; 2 D. & R. 281.

(*g*) *Bulkley* v. *Butler*, 2 B. & C. 434. See *Mead* v. *Young*, 4 T. R. 28.

(*h*) *Kilgour* v. *Finlyson*, 1 H. B. 155. See *Lacy* v. *Woolcot*, 2 D. & R. 418.

(*i*) *Thomason* v. *Frere*, 10 East, 418. See *Burt* v. *Moult*, 1 C. & M. 525. *Drayton* v. *Dale*, 2 B. & C. 293.

(*k*) *Bosanquet* v. *Anderson*, 6 Esp. C. 43; 1 T. R. 654; see *Sidford* v. *Chambers*, 1 Starkie's C. 326. Where no proof was given of the hand-writing of one of the indorsers, but it appeared that the indorsement was on the bill when the defendant accepted it, and that he promised to *pay* it, Ryder, C. J., left the case to the jury, and the Court, after a verdict for the plaintiff, refused a new trial. *Hankey* v. *Wilson*, Say. 223; Bayley on Bills, 367. But where a bill was shown to the drawer, with the name of the payee indorsed upon it, and the drawer merely objected for

Proof of value.

4thly. *Value.*—The holder of a bill indorsed in blank, or payable to bearer, is not prejudiced by a defect in the title without his knowledge, but he must in general, in such case, prove that he has given *value* for the bill; and therefore it is no defence to an action on a bill or note to prove that it was *lost* by the owner, or *stolen* from him, provided the plaintiff can show that he gave a valuable consideration for it (*l*). So if the bill has been extorted by duress, the plaintiff must prove that he gave some value for it (*m*). So where the bill has been obtained from the drawer by fraud (*n*); and though value were given, the defendant may defeat the holder's claim by proof that he had *notice* of the defect (*o*).

It is, however, a question whether the plaintiff acted *bonâ fide* in taking the bill, and whether he acted with due and reasonable care and caution in doing so, where there are any circumstances sufficient to excite the suspicion of a prudent man (*p*). And though he gave value, the plaintiff cannot recover on a note, cheque or bill, which has been lost or stolen, if he take it after it has become due (*q*).

Bankers who have given acceptances for a customer beyond the cash balance in their hands, hold all collateral securities for value (*r*), and may recover against an accommodation acceptor, although the customer who had previously deposited the bill with them had it in his hands when it became due, and had agreed to deliver it up for a valuable consideration, instead of which he redelivered it to the plaintiffs (*s*). So, although they had delivered it to the payee when it became due to procure payment, and it

want of consideration, it was held that it did not supersede the necessity of proving the indorser's hand-writing. *Duncan* v. *Scott*, 1 Camp. 101.

(*l*) *Miller* v. *Race*, 1 Burr. 452. *Lawson* v. *Weston*, 4 Esp. 56. *Grant* v. *Vaughan*, 3 Burr. 1516; 1 Bl. R. 485; 2 Show. 235; 3 Salk. 126; Ld. Raym. 738. *Peacock* v. *Rhodes*, Doug. 611. *Paterson* v. *Hardacre*, 4 Taunt. 114. So bank-notes cannot be followed by the legal owners into the hands of *bonâ fide* holders for a valuable consideration without notice; and therefore where a trader, after bankruptcy and a commission, procured bank-notes in exchange for bills, and by these bank-notes, through an agent unknown to the defendants (bankers), redeemed a bill of exchange in their hands, it was held that the assignees could not recover. *Lowndes* v. *Anderson*, 13 East, 130. See also *Solomons* v. *The Bank of England*, 13 East, 135; and *supra*, tit. BANKRUPTCY.

(*m*) *Duncan* v. *Scott*, 1 Camp. 100.

(*n*) *Rees* v. *Marquis of Headfort*, 2 Camp. 574.

(*o*) See the cases above cited, note (*l*).

(*p*) *Gill* v. *Cubitt*, 3 B. & C. 466. There a discount broker discounted a bill, (stolen the night before) from a person whose features he knew, but whose name was unknown. Where a trader received from a stranger, in part-payment of goods, a bill which had been lost, the party paying it representing to the trader that he had been recommended to him by a customer of his, and directing the goods to be sent to a place not a regular booking-office; there was no evidence that the newspaper advertising the loss ever came under his view; the Judge left it to the jury to say whether the bill was received out of the ordinary course of business, and under circumstances which should have excited suspicion and inquiry; and they having found for the defendant, the acceptor, the Court, deeming it a case peculiarly for the consideration of a jury, refused a new trial. *Slater* v. *West*, 3 C. & P. 325. And see *Gill* v. *Cubitt*, 1 C. & P. 163. 487.

(*q*) *Down* v. *Halling*, 4 B. & C. 330. A cheque on a banker, lost by accident, was paid to a shopkeeper for goods, in London, five days after the date; in an action by the owner against the shopkeeper, it was held, that it was for the jury to say whether the defendant had taken the cheque under circumstances which ought to have excited the suspicion of a prudent man; it was also held that the shopkeeper having taken the cheque five days after it was due, it was sufficient for the plaintiff to prove his property in the cheque without showing how he lost it. And see *Egan* v. *Threlfall*, 5 D. & R. 326; *Beckwith* v. *Corrall*, 3 Bing. 444.

(*r*) *Bosanquet* v. *Dudman*, 1 Starkie's C. 1.

(*s*) Ibid.

remained in his hands till his bankruptcy, and then passed into the hands of his assignee (*t*).

An acceptor could not, before the new rules, by mere notice to the plaintiff, and without throwing suspicion on his title, compel him to prove *value* (*u*). According to the practice of the Court of Common Pleas, the defendant was required to give notice of his intention to call upon the plaintiff to prove that he gave value for the bill (*x*). In the King's Bench it was not necessary to give such notice, although it was usual and proper to do so (*y*). Whether such notice had or had not been given (*z*), the plaintiff, it seems, was not bound to enter upon proof of consideration as part of his original case, or until suspicion had been cast upon his title, either upon cross-examination of his witnesses (*a*), or by proof on the part of the defendant (*b*). Effect of notice to prove value.

An indorsee cannot recover against the acceptor, costs incurred by him in an action on the bill against him, there being no privity of contract between them (*c*).

Secondly, where the liability is of a secondary and conditional nature, and is consequent upon the default of the maker of a note or acceptor of a bill, that is, where the action is brought. Secondary liability.

1st. By the payee against the drawer of a bill. 2dly. By an indorsee against the drawer or indorser of a bill, or against the indorser of a promissory note. Payee against the drawer.

(*t*) *Bruce* v. *Hurley*, 1 Starkie's C. 23.

(*u*) *Reynolds* v. *Chettle*, 2 Camp. 596.

(*x*) *Paterson* v. *Hardacre*, 4 Taunt. 11.

(*y*) In an action by an indorsee against the acceptor of an accommodation-bill, no notice to dispute the consideration is necessary. *Mann* v. *Lent*, 1 Mo. & M. 240. *Wyatt* v. *Campbell*, 1 Mo. & M. 80. *Semble*, in all cases of no consideration given, the holder must prove value. Ib. *Sharpe* v. *Bailey*, 8 B. & C. 44. In an action on a note which has been stolen, it is incumbent on the plaintiff to prove that he gave full value for it. *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208. Nor can he recover if he had notice of the fact before he paid value. Ib. And notice to a party who presents the note for payment, and to whom the note has been remitted by a foreign merchant for payment, is notice to the party, a foreign merchant, who remits it. Ib. *S.* being indebted to a firm in which he was partner, gave a note in the name of another firm, in which he was also a partner, in discharge of his individual debt; the payees indorsed it over, and the indorsees sued the parties who appeared to be makers; held that this note was made in fraud of *S.'s* partner in the second firm, and could not be enforced against him by the payees, and that at all events, under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. Held also, Parke, J. *dissentiente*, that in all cases where, from defect of consideration, the original payee cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or prior indorsee, though he may have had no notice that such proof will be called for. *Heath* v. *Sansom*, 2 B. & Ad. 291.

(*z*) A contrary course was adopted by Ld. Ellenborough (*Delauney* v. *Mitchell*, 1 Starkie's C. 439); but the later practice appears to be more convenient, since it frequently happens that the defendant is unable to impeach the plaintiff's title, and then the proof of consideration becomes unnecessary.

(*a*) Where notice had been given to prove the consideration given for a note, and a witness had been cross-examined in order to disprove the consideration, it was held that the plaintiff was bound to give evidence of consideration as part of his case in chief, and that he could not give such evidence in reply. *Whitlocke* v. *Underwood*, 3 D. & R. 356. *Delauney* v. *Mitchell*, 1 Starkie's C. 439.

(*b*) *Reynolds* v. *Chettle*, 2 Camp. 596. *Paterson* v. *Hardacre*, 4 Taunt. 114. *Humbert* v. *Ruding*, Chitty on Bills, 512. In an action by a third indorser against the acceptor it is not sufficient for the defendant to show no value given as between the drawer and first indorsee, or upon the subsequent indorsements, without showing no value as between himself and the drawer. *Whitaker* v. *Edwards*, 1 Ad. & Ell. 638. Notice to dispute had been given.

(*c*) *Dawson* v. *Morgan*, 9 B. & C. 618.

1st. By the payee against the drawer of a bill: Here the plaintiff must prove (*d*), 1st, The drawing of the bill. 2dly, Due presentment. 3dly, The drawee's or acceptor's default. 4thly, Notice, or facts which excuse the want of notice, to the drawer; and in some cases, 5thly, A protest.

Drawing of the bill.

1st. The drawing of the bill is usually established by proof of the drawer's hand-writing, or by proof of the drawing in his name by an authorized agent. Where there are several drawers, it must be proved that they all signed the bill, or gave authority for the drawing of it in their joint names (*e*).

Proof of presentment.

2dly. Presentment (*f*). As the liability of the drawer or indorser is of a secondary nature only, for he undertakes to pay the amount upon the default of the maker or acceptor, it is necessary to aver and prove that due diligence has been used for the purpose of procuring payment from the maker or acceptor (*g*); and here it is to be observed, that an allegation of due presentment, and a refusal to pay, will not be satisfied by evidence that the maker or acceptor could not be found when the note or bill was due (*h*).

Duly presented means presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the party from doing it within the regular time (*i*).

For payment.

A presentment may be either for acceptance or payment. Where the bill is payable at a certain date a presentment for payment must be proved to have been made on the last day of grace, whether the bill be an inland or foreign one (*k*).

Where the bill is dishonoured for nonpayment a previous acceptance, though alleged, need not be proved (*l*).

A bill payable at a banker's must be presented within the usual banking-hours (*m*); but where the bill is payable at the house of a private tradesman, the presentment need not be made within the banking-hours. In such

(*d*) As to the production of the bill, vide *supra*, 202.

(*e*) Vide *supra*, Proof of Acceptance, 203. *Qu.* whether one who draws a bill in the name of a firm, and of which he is not a member, without authority, is liable as drawer. *Wilson* v. *Barthrop*, 2 M. & W. 863.

(*f*) Where it is ambiguous on the face of an instrument whether it be a bill of exchange or promissory note, the payee may treat it as either, and presentment is unnecessary. *Edis* v. *Bury*, 6 B. & C. 433. *Gray* v. *Milner*, 8 Taunt. 739. *Allan* v. *Mawson*, 4 Camp. 115. *Shuttleworth* v. *Stevens*, 1 Camp. 407. Presentment for acceptance is not necessary except in cases of bills payable within a limited time after sight. Bayley on Bills, 182. But in case of presentment and dishonour, notice must be given. *Goodall* v. *Dolly*, 1 T. R. 712.

(*g*) 2 Burr. 677; 2 H. B. 565.

(*h*) *Leeson* v. *Pigott*, cited Bayley O. B. 187.

(*i*) Per Lord Ellenborough, *Patience* v. *Townly*, 2 Smith, 224.

(*k*) 4 T. R. 152. *Tassel* v. *Lewis*, Ld. Raymond, 743. *Anderton* v. *Beck*, 16 East, 248. Days of grace are not allowed where the bill is payable on demand (Chitty, 146). A cheque received on one day should be presented for payment on the next day. 2 Camp. 537. Where a bill was drawn at *C.*, in Newfoundland, on the 12th August, in duplicate, from which place there was a daily post to St. John's, and a post-office packet from thence to England three times a week, and the voyage about 18 days, and the bill was not presented for acceptance until the 16th November, and was dishonoured when due, and the jury found a verdict for the defendant, the Court refused to disturb it. *Straker* v. *Graham*, 4 M. & W. 721.

(*l*) Either in an action against the drawee or an indorsee, for the fact is not essential to the defendant's legal liability. *Tanner* v. *Bean*, 4 B. & C. 312. Contra, *Jones* v. *Morgan*, 2 Camp. 407.

(*m*) *Parker* v. *Gordon*, 7 East, 385. *Elford* v. *Teed*, 1 M. & S. 28. And it will not be inferred from the circumstance of the bill being presented by a notary, that it had before been duly presented within banking-hours. Ibid.

case it has been held that a presentment at eight in the evening is not unseasonable (*n*); and a presentment at any time in the day or evening is sufficient, if an answer be given by an authorized person (*o*). Proof of presentment. Time of.

Where the bill is payable at *sight*, or within a certain time after, it must be presented within a *reasonable* time (*p*).

No precise rule has been laid down defining the limits allowed for presentment in such cases, the courts have cautiously avoided the fixing any certain time even in respect of an inland bill; and it has been said that no precise rule can be laid down upon the subject (*q*). The question of reasonable time in this, as in all other cases, appears to be a mixed question of law and of fact (*r*); but in the late case of *Fry* v. *Hill*, the court seem to have considered it to be a question for the jury. It has been held, however, that the plaintiff is not guilty of laches in sending a foreign bill, payable after sight, into circulation before acceptance (*s*), and in keeping it in circulation without acceptance, so long as the respective holders found convenient.

A cheque payable on demand need not be presented till the day after that on which it is given; it is sufficient to send it for presentment by the next day's post (*t*).

Where a bill is accepted payable at a particular place (*u*), the allegation Place of.

(*n*) 2 Camp. 527. And see *Triggs* v. *Newnham*, 1 C. & P. 631.

(*o*) *Garnett* v. *Woodcock*, 1 Starkie's C. 475; 6 M. & S. 44. See also *Henry* v. *Lee*, 2 Ch. 124; *Whitaker* v. *Bank of England*, 1 C. M. & R. 744; 6 C. & P. 700.

(*p*) *Muilman* v. *D'Equino*, 2 H. B. 565. And see *Darbishire* v. *Parker*, 6 East, 3; 2 H. B. 565. See *Fry* v. *Hill*, 7 Taunt. 397. *Semble*, presentment on the fourth day in London, when drawn at the distance of twenty miles from London, is within a reasonable time. Ibid. And see *Goupy* v. *Harden*, 7 Taunt. 159. It is not unreasonable to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay cannot of course be allowed), as part of the circulating medium of the country. *Shute* v. *Robins*, M. & M. 133. The question in such case is, whether, looking at the situation and interests of both drawer and holder, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance, or putting it into circulation. *Mellish* v. *Rawdon*, 9 Bing. 416. In the case of *Moule* v. *Brown*, 4 Bing. N. C. 267, it appeared that a cheque drawn by *F.* on a banker at Bath, was cashed for the defendant by a branch of the N. W. bank at Malmesbury, on Tuesday, March 28; the same day it was forwarded to the principal N. W. bank at Melksham, twelve miles from Bath; on Friday the 21st it was presented at Bath, and dishonoured. The Court held, that the presentment was not in time to give the N. W. bank a claim against the defendant. Tindal, J. in delivering judgment, said, "The result of the cases from *Richford* v. *Ridge*, 2 Camp. 539, to *Baddington* v. *Schleucher*, 4 B. & Ad. 752, is that the plaintiff receiving a cheque has till the following day to present it, where there are the ordinary means of doing so. Here the plaintiffs resided in a post-town, and if they had remitted the cheque to Bath by the next day's post, it would have been presented on Thursday; if there was any sufficient cause for not pursuing that course, it is on them to show it, but I think on the whole of the facts, they have been guilty of laches."

(*q*) Per Eyre, C. J. *Muilman* v. *D'Equino*, 2 H. B. 565; and per Heath, J. and Gibbs, C. J. *Goupy* v. *Harden*, 7 Taunt. 159.

(*r*) *Darbishire* v. *Parker*, 6 East, 3. See the rule, *infra*, p. 226.

(*s*) *Goupy* v. *Harden*, 7 Taunt. 159, in an action by the indorsee against the indorser; and in *Muilman* v. *D'Equino*, 2 H. B. 565. *Whitaker* v. *Bank of England*, 1 C. M. & R. 744; 6 C. & P. 700.

(*t*) *Fry* v. *Hill*, 7 Taunt. 397; and see the rule *Williams* v. *Smith*, 2 B. & A. 497, and *infra*, p. 226.

(*u*) A note in the margin mentioning a place where payable, need not be averred in the declaration, nor need the bill be proved to have been presented there for payment, it being treated as a memorandum only, and not as part of the contract. *Williams* v. *Waring*, 10 B. & C. 2. It is sufficient that the bill is presented at the place where it is made payable, notwithstanding the drawee may die before it becomes due, and his representatives may be ignorant of the existence of the bill. *Philpot* v. *Bryant*, 3 C. & P. 244. A foreign bill, upon being presented to the drawees at their place of residence at *L.*, is refused acceptance; the defendants, the correspondents of the payees, who had indorsed it,

and proof that the bill was presented at that place is sufficient, without showing a presentment to the acceptor himself. For although the statute 1 & 2 G. 4, c. 77, has provided that the acceptor *may* be called on elsewhere, notwithstanding the limitation in his acceptance, yet it is not compulsory on the holder to go elsewhere (*x*).

If the presentment be at the place mentioned in the acceptance, proof of the acceptor's hand-writing is essential, otherwise it would not appear that the place mentioned in the acceptance was appointed by him (*y*).

If a holder of a bill payable after sight keep it without either presenting it or putting it into circulation, he is guilty of laches, and cannot recover (*z*).

Presentment, where.

Proof of presentment of a bill to a banker's clerk at the clearing-house, is sufficient (*a*). If the bill has been accepted by the agent of the drawee, who is abroad, it must be presented to that agent for payment (*b*).

Where the acceptor is dead, presentment must be made to his executor or administrator, and if there be none, at the house of the deceased (*c*). If the bill be payable at a particular place it is not necessary to present it to the executor (*d*).

If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker (*e*). Where a note was made payable at the house of *C.*, who was the banker of *A.*, and in the course of business was indorsed to *C*, it was held that it was unnecessary to make any demand upon the maker (*f*). If the maker or acceptor be dead, the note or bill should be presented to his representative, if he lives within a reasonable distance (*g*).

Presentment at a banker's must be within banking-hours, in other cases must be at a reasonable hour; presentment between seven and eight in the evening is reasonable (*h*).

accepted it in the terms, "accepted under protest for honour of *L. & Co.*, and will be paid for their account if regularly protested and refused when due;" held, that as under such special acceptance there could not be a refusal to pay unless there was a presentment and demand of payment, it was the duty of the plaintiffs to present it to the drawees on the day it became due, and at the place where they resided, no other being designated in the bill, and that it was properly protested for non-payment at *L.*, the usage of merchants being excluded by the terms of the special acceptance. *Mitchell* v. *Baring*, 10 B. & C. 4.

(*x*) *De Bergareche* v. *Pillin*, 3 Bing. 476. And see *Hawkey* v. *Borwick*, 4 Bing. 135. *Turner* v. *Hayden*, 4 B. & C. 2; Bayley on Bills, 178. Whether the house be mentioned in the bill or note, or in the margin, or in the acceptance only, that is the proper place of presentment. See *Macintosh* v. *Hayden*, My. & Mo. 362. Under an allegation that the bill was duly presented, without stating an acceptance, the plaintiff may prove a presentment at the place mentioned in the acceptance. *Parks* v. *Edge*, 1 C. & M. 429.

(*y*) *Sedgwick* v. *Jager*, 6 C. & P. 199.

(*z*) 2 H. B. 565.

(*a*) *Reynolds* v. *Chettle*, 2 Camp. 595. *Harris* v. *Parker*, 3 Tyr. 370.

(*b*) *Phillips* v. *Astling and others*, 2 Taunt. 206.

(*c*) Molloy, b. 2, c. 10, s. 34. Chitty on Bills, 317.

(*d*) *Philpott* v. *Briant*, 3 C. & P. 244.

(*e*) *Saunderson* v. *Judge*, 2 H. B. 509. *Boyes* v. *Howe*, 5 Taunt. 30. Where the bill was taken to the house of which the drawer was described in the bill, and the party was informed by a woman in the passage that the drawer was gone, and it was shown by the defendant that the woman was a lodger, and that the drawer having quitted the premises, no one had heard of the message so communicated, it was held to be evidence from which the jury might infer that she was an inmate, and that the presentment was sufficient. *Buxton* v. *Jones*, 1 M. & G. 83.

(*f*) *Saunderson* v. *Judge*, 2 H. B. 509. In that case the note was made payable at the bankers merely by means of a memorandum indorsed at the foot; and the court were of opinion that the averment of a presentment according to that note was unnecessary.

(*g*) Bayley, O. B. 95.

(*h*) *Wilkins* v. *Jadis*, 2 B. & Ad. 188; 2 M. & M. 141. *Barclay* v. *Bayley*, Camp. 527.

An allegation of the presentment of a bill to *P. P.* (the bill having been accepted by *P. P.*, No. 6, Budge Row,) is proved by showing that the holder went to No. 6, Budge Row, and found it shut up, no one being there (*i*).

See the statute 6 & 7 W. 4, c. 58, as to a bill accepted *supra* protest for honour.

Proof of dishonour.

3dly. The *default* of the drawee or acceptor.—Where a bill is payable so many days after sight, the plaintiff must prove a presentment for acceptance (*k*). But in other cases it is sufficient to prove a presentment for payment when the bill becomes due, and a refusal to pay (*l*); and if a previous acceptance be unnecessarily alleged, it need not be proved (*m*). It is sufficient to prove a presentment for acceptance, and a refusal to accept at any time before the bill becomes due, for upon the dishonour the drawer becomes liable (*n*) immediately. It is also sufficient to show that the drawee refused to accept according to the form of the bill; and evidence is inadmissible for the purpose of proving that the mode of payment proposed would have been equivalent to a payment according to the terms of the bill (*o*). The plaintiff must prove that the refusal came from the defendant; it is not sufficient therefore to produce a witness who went to the drawee's residence, and was there told by *some one* that the bill would not be honoured (*p*).

Notice—General rule.

4thly. Notice to the drawer (*q*).- The general rule is that the plaintiff must prove that he has used due diligence in giving notice of the default; and whether due diligence has been used is usually a question of *law*, but dependent on facts, such as the situation of the parties, their places of abode, and the facility of communication (*r*).

By whom.

It is sufficient to prove that the defendant had due notice from any party to the bill (*s*). If the drawer receive due notice from his own indorsee, he is liable to a subsequent indorsee, from whom he received no direct notice (*t*).

(*i*) *Hine* v. *Allely*, 4 B. & Ad. 624.

(*k*) Chitty, O. B. 122.

(*l*) B. N. P. 269. *Bright* v. *Purrier*, 3 East, 483. *Ballingalls* v. *Gloster*, 3 East, 481. See *Macarty* v. *Barrow*, Str. 949.

(*m*) *Tanner* v. *Bean*, 4 B. & C. 312, *contra*, *Jones* v. *Morgan*, 2 Camp. 474.

(*n*) B. N. P. 269. *Bright* v. *Purrier*, 3 East, 483. *Ballingalls* v. *Gloster*, 3 East, 481. See *Macarty* v. *Barrow*, Str. 949.

(*o*) *Boehm* v. *Garcias*, 4 Camp. C. 425.

(*p*) *Cheek* v. *Roper*, 5 Esp. C. 175.

(*q*) *Dagglish* v. *Weatherby*, 2 Bl. R. 747. Notice to the acceptor in an action against the drawer of a bill, payable at a particular place, is unnecessary. *Edwards* v. *Dick*, 4 B. & A. 212.

(*r*) See *Darbyshire* v. *Parker*, 6 East, 3; 2 Camp. 602. *Tindal* v. *Brown*, 1 T. R. 167. But see Lord Kenyon's opinion in *Hilton* v. *Shepherd*, 6 East, 14. n.; and see the ordinary rule, *infra*, n. (*a*). By the st. 7 & 8 G. 4, c. 15, s. 1, where bills of exchange becoming due on the day preceding Good Friday or Christmas-day are dishonoured, notice thereof may be given on the day after such Good Friday, &c. sec. 2. Bills of exchange becoming due on fast or thanksgiving days, to be payable on the day next preceding such fast or thanksgiving day. sec. 3. Good Friday, Christmas-day, as regards bills of exchange, to be treated as the Lord's Day. A party who receives notice on a Sunday, Good Friday, or Christmas-day, is in the same situation as if it had not reached him till the next day. *Bray* v. *Hadwen*, 5 M. & S. 68. A Jew is not obliged to forward a bill on the day of a grand religious festival. *Lindo* v. *Unsworth*, 2 Camp. 602. If notice be, in fact, given before action brought, although not at the proper time, yet proof of having used diligence will satisfy the allegation of notice having been given. *Harris* v. *Richardson*, 4 C. & P. 52.

(*s*) 2 Camp. 177. *Rosher* v. *Kieran*, 4 Camp 87. *Shaw* v. *Croft*, 2 Camp. 373. *Wilson* v. *Swabey*, 1 Starkie's C. 34. *Jamieson* v. *Swinton*, 2 Camp. 373. *Gunson* v. *Metz*, 1 B. & C. 193. *Chapman* v. *Keane*, 3 Ad. & Ell. 607. But see *ex parte Barclay*, 7 Ves. jun. 598; and *Tindal* v. *Brown*, 1 T. R. 167. In that case time had been given to the maker of the note. A notice given by one not a party to the bill is insufficient. *Stewart* v. *Kennett*, 2 Camp. 177.

(*t*) *Shaw* v. *Croft*, 2 Camp. 373.

Proof of dishonour.

A bill indorsed in blank having been left at an attorney's office to be presented by him, was on presentation dishonoured; a letter written by the attorney to the drawer was held to be a sufficient notice of dishonour, although he did not state on whose behalf he applied (*u*).

Upon the guarantee of the price of goods to be paid for by bill, it was held that notice of dishonour should be given both to the drawer and to the party who guaranteed the payment, unless both were bankrupts (*x*).

Notice should be given to all whom the holder means to sue; if he give notice only to an intermediate party, it will not be sufficient as to a prior party unless he has otherwise received due notice (*y*).

Time of.

Notice of dishonour may be given immediately on the refusal to pay, without waiting to see whether the bill will be taken up in the course of the day (*z*). The general rule as to time, is, that if the parties live in the same town, notice shall be given the next day; if in different places, by the next day's post (*a*). Where the holder received notice of the dishonour on Sunday, notice by him by Tuesday's post was held to be sufficient (*b*). Where the dishonour was on Saturday at nine, the notice to the plaintiff on Monday, at Knightsbridge, by his banker, and notice by the plaintiff to

(*u*) *Woodthorpe* v. *Lawes*, 2 M. & W. 109.

(*x*) 2 Taunt. 206.

(*y*) Bayley on Bills, 209. Notice to the drawer's attorney is not sufficient. *Croft* v. *Smith*, 1 M. & S. 554. Where the drawee is dead, notice is to be given to his executors or administrators. Where a bankrupt has left his house, notice should be left there, and with the messenger when he is in possession. *Ex parte Johnson*, 1 Mont. & Ayr. 622. Where an indorsee was abroad, but had a house in England, and the notice was sent to his house, and the bill was shown to his wife, it was held to be sufficient. *Cromwell* v. *Hynroe*, 2 Esp. C. 511. *Honsego* v. *Cowne*, 2 M. & W. 348.

(*z*) 3 Camp. 193. And see *Wright* v. *Shawcross*, 2 B. & A. 501.

(*a*) *Williams* v. *Smith*, 2 B. & A. 496, where it was held that notice of the dishonour of bills must be given, or presentment made, by the post on the day following that on which the party receives the bills, or notice of the dishonour; and the Court said, that if it were to be the next practicable post, difficult questions of fact would often be raised, and uncertainty would arise, from peculiar local situations. Where, therefore, country bank notes were received on Friday, and transmitted partly by the Saturday and partly by the Sunday's post, so that both were received in London on Monday, and were presented on Tuesday and dishonoured, the Court held that the holder had not been guilty of laches, although he had received the notes several hours before the post went off on Friday. *Ibid.* And see *Tindal* v. *Brown*, 1 T. R. 167; *Puckford* v. *Maxwell*, 6 T. R. 52; and *Wright* v. *Shawcross*, 2 B. & A. 501. It has been doubted whether it is sufficient that the drawer should have had notice in as many days as there are intermediate indorsers between himself and the plaintiff. Lord Ellenborough ruled in the negative in *Marsh* v. *Maxwell*, 2 Camp. 210; and the same point was decided in *Turner* v. *Leach*, 4 B. & A. 451. See *M'Queen* v. *Farquhar*, 11 Ves. 478; and *infra*, 234. Where there is a post on the day when the party receives notice, and none on the following day, it is sufficient to send notice on the third day. *Geill* v. *Jeremy*, M. & M. 61. Notice on the day on which the bill becomes due is not too soon. *Burridge* v. *Manners*, 3 Camp. 193. Unless the acceptor afterwards, and on the same day, pays the bill. *Hartley* v. *Case*, 1 C. & P. 556. A party receiving notice of dishonour need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it on that day, and there is no post on the day following. *Geill* v. *Jeremy*, 1 M. & M. 61. A bill drawn by bankers in the country on their correspondents in town, payable after sight, is indorsed to the traveller of the plaintiffs on their account; he transmits it to them after an interval of a week, and they, two days afterwards, send it for acceptance, which is refused, the drawer having become a bankrupt; if the bill had been sent by the traveller to his employers on the receipt, they would have been able to have got it accepted before the bankruptcy. Held, that there was no laches in the traveller or his employers. *Shute* v. *Robins*, 1 M. & M. 133.

An averment of notice is satisfied by proof of notice within a reasonable time, without stating the special circumstances which render earlier notice unnecessary. *Firth* v. *Thrush*, 8 B. & C. 387. *Sharp* v. *Bayley*, 9 B. & C. 44.

(*b*) *Wright* v. *Shawcross*, 2 B. & A. 501.

the indorsee in Tottenham-court-road on Tuesday, it was held to be sufficient (*c*). Notice by a letter put into the two-penny post-office after five o'clock in the afternoon of the day after that on which the party knew of the dishonour, was held to be insufficient (*d*); but where the letter in the usual course, would reach the defendant on the evening of the day following that on which the bill was dishonoured, it was held to be sufficient, although the parties resided within a short distance of each other (*e*). Where notice was given to a Jewish indorser on the 8th, which was a great Jewish festival, it was held that it was not necessary for him to give notice by the general post till the 9th (*f*). Where the indorsee, living in Holborn, gave notice to the indorser, living at Islington, by nine the next night, it was held to be reasonable notice (*g*). Time of notice.

A bill was received by a traveller for the plaintiff, who transmitted it to his principal; the bill being dishonoured, the latter wrote to his traveller to inquire from whom he received it, and on receiving the requisite information gave notice to the defendants, and it was held to be sufficient (*h*).

An attorney who is employed to discover the residence of a party to a bill, has on discovery made, as in the case of a banker, a day to consult his employer, and it is sufficient if he forward the information to him on the succeeding day (*i*).

Where a bill is dishonoured abroad, notice by the first *direct* and *regular* mode of conveyance, whether it be an English or a foreign ship, is sufficient; the holder is not bound to send such notice by the accidental, though earlier, conveyance, of a foreign ship (*k*).

It is not necessary to prove a notice in writing (*l*). It is sufficient to prove a reasonable endeavour to give notice, as by sending an agent to the drawer's country house, who used his endeavours to give the notice (*m*). Manner of the notice.

To prove a notice, it is sufficient to show that a letter, announcing the dishonour, and directed to the defendant (*n*), was put into the proper post-office (*o*), or that such a letter was left at the defendant's house (*p*). By the post.

(*c*) *Haynes* v. *Birks*, 3 B. & P. 599.

(*d*) 2 Camp. 108; Bay. 125. *Scott* v. *Lifford*, 9 East, 347; and see *Langdale* v. *Trimmer*, 15 East, 291.

(*e*) *Hilton* v. *Fairclough*, 2 Camp. 633.

(*f*) Ibid. 602.

(*g*) 2 Taunt. 224; and see *Hilton* v. *Shepherd*, 6 East, 14, n. Where there were five indorsers, *A. B. C. D. E.* all living near London, notice of dishonour on the same day to *E.*, and on the next to *D.*, was held to be sufficient.

(*h*) *Baldwin* v. *Richardson*, 1 B. & C. 245.

(*i*) *Firth* v. *Thrush*, 8 B. & C. 387.

(*k*) *Muilman* v. *D'Eguino*, 2 H. B. 565.

(*l*) *Cross* v. *Smith*, 1 M. & S. 545. *Housego* v. *Cowne*, 2 M. & W 348. *Phillips* v. *Gould*, 8 C. & P. 335. Notice to the drawers by sending to their counting-house during the hours of business on two successive days, knocking there and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door being locked, is sufficient, without leaving notice in writing or sending by the post, although some of the drawers live at a small distance from the place. *Woodthorpe* v. *Lomas*, 2 M. & W. 109.

(*m*) As where such agent went to the drawer's counting-house on two successive days, during hours of business, knocked there, and made sufficient noise to be heard by persons within, and waited there several minutes, the inner door being locked. *Cross* v. *Smith*, 1 M. & S. 545.

(*n*) Notice to an indorser, addressed, '*Mr. Haynes, Bristol,*' was held to be too general. *Walter* v. *Haynes*, 1 R. & M. 149. It is otherwise in an action against the drawer of a bill dated generally. Where the bill was dated *Manchester*, Abbott, C. J. held that it was sufficient to direct a letter to the drawer, 'at Manchester,' generally. *Mann* v. *Moors*, R. & M. 249. So where a party drew a bill, dating it generally London. *Clarke* v. *Sharpe*, 3 M. & W. 166.

(*o*) Pothier, 148; Bay. 119; 2 H. Bl. *Scott* v. *Lifford*, 9 East, 347; 1 Camp. 246. *Saunderson* v. *Judge*, 2 H. B. 509.

(*p*) 1 Esp. C. 5.

Notice by a letter put into the twopenny post, has been deemed to be sufficient, although the parties lived within a short distance of each other (*q*); but it should appear that the letter was put into the receiving-house in sufficient time to be delivered to the party, according to the course of the post, within the time of legal notice (*r*). And in the case of a foreign bill also, the delivery of a letter at the post-office has been held to be sufficient evidence of notice (*s*). Where there is no post, it is sufficient to prove that notice was sent by the ordinary mode of conveyance (*t*).

Where a bill was indorsed in Jamaica by *A.*, who remained there after the dishonour of the bill, but whose usual residence was in England, it was held that proof of notice of the dishonour left at his residence in England was sufficient (*u*). Proof that the letter containing notice was delivered to the person in whose house the defendant lodged, for the defendant, and was next morning thrown into the plaintiff's house, was held to be presumptive evidence of notice (*x*). It is insufficient to prove that notice was given on one of two days, where the notice on the latter day would not be in time; for the plaintiff is bound to show that he has given proper notice (*y*). It seems to have been doubted whether parol evidence of the contents of the letter announcing the dishonour be admissible, unless notice to produce the letter be first proved (*z*). It has since been held, upon a conference of all the Judges, that it is unnecessary to give such notice (*a*).

Where a notice sent to the drawer of a bill arrives too late in consequence of misdirection, it is a question for the jury whether the holder has used due diligence (*b*).

Contents of notice.

A notice is good although it be accompanied by an intimation that the holders had reason to believe that a friend of the acceptor's would take up the bill in a few days, and that they would hold the bill (to save expense), till the end of the week, unless they heard from the drawers to the contrary (*c*). No particular form of notice is requisite; the object in giving

(*q*) *Hilton* v. *Fairclough*, 2 Camp. 633. *Scott* v. *Lifford*, 9 East, 347; 1 Camp. 246.

(*r*) *Smith* v. *Mullett*, 2 Camp. 208. *Hilton* v. *Fairclough*, 2 Camp. 633.

(*s*) 2 H. Bla. 599; 6 East, 3, 9; 7 East, 385; 3 Esp. C. 54.

(*t*) Bayley, O. B. 128.

(*u*) 2 Esp. C. 561.

(*x*) *Stedman* v. *Gooch*, 1 Esp. C. 3.

(*y*) Per Ld. Ellenborough, C. J. in *Lawson* v. *Sherwood*, 1 Starkie's C. 314. Where it was proved that duplicate notices had been written, and that a letter had been sent to the drawer the same day, and that notice had been given to the defendant to produce this letter, it was held to be evidence of notice of dishonour (Ibid. and afterwards by the Court of K. B.) But in *Hetherington* v. *Kemp*, (4 Camp. 193), it is said to have been held, that it is not sufficient to show that notice was written by a merchant in his counting-house, and laid upon his table, from which, in the course of business, all letters would be carried to the post-office.

(*z*) In *Langdon* v. *Hulls*, 3 Esp. C. 157. *Shaw* v. *Markham*, Peake's C. 165, such proof was held to be necessary. In *Acland* v. *Pearce*, 2 Camp. 601, Le Blanc, J. admitted secondary evidence without proof of notice. It is sufficient to prove a duplicate of the notice (*Philipson* v. *Chase*, 2 Camp. 110; *Roberts* v. *Bradshaw*, 1 Starkie's C. 28; S. P. *King* v. *Beaumont*, 3 B. & B. 228). Where the plaintiff's clerk stated that a letter containing the notice was sent by the post on a Thursday morning, but had no recollection whether it was put in by himself or another clerk, it was held to be insufficient *Hawkes* v. *Salter*, 4 Bing. 715.

(*a*) *Swain* v. *Lewis*, 2 C. M. & R. 263. And notice to produce such notice is unnecessary. *Ib.* But notice is necessary to warrant the reading of letters, to prove the dishonour of bills, other than those on which the action is brought. *Lunauze* v. *Palmer*, M. & M. 31.

(*b*) *Siggers* v. *Brown*, 1 Mo. & R. 520. Where the delay arose from the bill having been sent to a wrong person, and the mistake arose from the indistinctness of the drawer's writing on the bill, it was held that he was not discharged. *Howitt* v. *Thompson*, 1 Mo. & R 548.

(*c*) *Forster* v. *Jourdison*, 16 East, 105.

notice is to apprize the party that the holder intends to require payment from him, and to enable him to pursue his remedy against any other party who may in turn be liable to him (*d*).

Where the bill has been drawn by several, who are partners, a notice to one is a notice to all (*e*).

The plaintiff, in excuse of his laches in not giving notice, may prove (*f*) that the drawer had no effects in the hands of the acceptor to answer the bill, either at the time of drawing, or when the bill became due (*g*); for the

Facts in excuse.

(*d*) *Tindal* v. *Brown*, 1 T. R. 170. The notice, however, must be such as to show what the bill is, and that payment has been refused. A letter containing merely a demand of payment, without even stating that the bill was ever accepted, is insufficient. And see *Margeson* v. *Coble*, 2 Chitty's R. 365. *Hartley* v. *Case*, 4 B. & C. 339; 6 D. & R. 505; where notice was given on the day when the bill became payable, but did not explicitly state the fact of dishonour, the answer being "no effects, tub that they probably should have them in the course of the day," the notice was held to be insufficient. *Hartley* v. *Case*, 1 C. & P. 555. Although a notice of dishonour does not require all the formality of a protest, yet it must in express terms, or by necessary implication, inform the party that the bill has in fact been dishonoured: where the notice to an indorsee was contained in a letter from the attornies of the holder, stating only that the bill bearing the indorsement of the defendant had been put into their hands, with directions to take legal measures unless immediately paid; it was held not to amount to a notice of dishonour. *Solarte* v. *Palmer*, 7 Bing. 530. A note from the holder's attorney, "A bill for 50 *l.*, drawn on and bearing your indorsement, has been put into our hands by *A. B.*, with directions to take legal measures for the recovery thereof unless immediately paid," is insufficient. *Solarte* v. *Palmer*, 7 Bing. 530; 1 Bing. N. C. 194; 2 Clark & F. 93. So where the notice was that the bill in question had been returned unpaid, coupled with a demand of payment. *Boulton* v. *Welch*, 3 Bing. N. C. 688. But in the case of *Grugeon* v. *Smith*, where the notice was, "Your bill, due this day, has been returned with charges, to which we request your immediate attention," Patteson, J. and afterwards the court above, held the notice to be sufficient. And this case was afterwards approved of in that of *Hedger* v. *Stevenson*, 2 M. & W. 799. In the latter case the notice in substance was, that the promissory note indorsed by the defendant had been returned unpaid, and requesting a remittance. In *Phillips* v. *Gould*, 8 C. & P. 365, a notice that the bill "in question, indorsed by you (the defendant), lies at my office due and unpaid," was held to be insufficient. Notice of dishonour in a letter in the terms, "*S & Co.* inform *P.* (the defendant) that *B.*'s acceptance, 100 *l.* is not paid; as indorsee, *P.* is called upon to pay the money, which will be expected immediately," is insufficient. *Strange* v. *Price*, 2 Perr. & D. 278, and 10 Ad. & Ell. 125; supporting *Solarte* v. *Palmer*, 1 Bing. N. C. 194. Although it need not be expressly stated, it ought to appear by necessary inference that the bill is due. Where the notice was in the terms, "*D.*'s acceptance for 100 *l.*, drawn and indorsed by you, has been presented and returned, and now remains unpaid," was held to be sufficient. *Cook* v. *French*, 10 Ad. & Ell. 131. A letter to the defendant, the indorser of a bill, dated ——, in the terms, "Sir, the bill for 100 *l.*, drawn by *R.* and accepted by *S.*, and bearing your indorsement, has been presented to the acceptor for payment and returned dishonoured, and now lies overdue and unpaid with me, as above, of which I hereby give you notice," was held sufficient notice of dishonour, as conveying all the requisite information. *Lewis* v. *Gompertz*, 6 M. & W. 399. And see *Hedger* v. *Steavenson*, 2 M. & W. 799. A letter in the terms, "This is to inform you that the bill I took of you, 100 *l.*, is not took up, and 4 *s.* 6 *d.* expense, and the money I must pay immediately," was held to be an insufficient notice of dishonour. *Messenger* v. *Southey*, 1 Man. & Gr. 76; 1 Sc. N. S. 180.

(*e*) *Porthouse* v. *Parker*, 1 Camp. 82.

(*f*) But the excuse for not giving due notice must appear on the face of the declaration; still, if the parties be in privity, as where an action is brought by the payee of a bill against the drawer, the plaintiff may recover on the account stated. Per Abbott, L. C. J. Guildh. Sitt. after M. T. 1826. Where there is express averment of notice of dishonour, proof of mere knowledge is insufficient, and if there be facts amounting to a waiver they should be set forth; held also, that a statement that in case of certain events, the party would pay part of the money on the bills the day they fell due, was not an admission of a present debt sufficient to support the count on an account stated. *Burgh* v. *Legge*, 5 Mees. & W. 418; and 7 Dowl. 814.

(*g*) If the drawer of a bill have no effects in the hands of the drawee at the time of drawing the bill and of its maturity, and have no reason to expect that it will be paid, it is not necessary to present the

drawer was guilty of fraud in drawing on one who had no effects to answer the call (*h*); and an acceptor is competent to prove the fact (*i*); and a protest is unnecessary to charge the drawer of a foreign bill where the drawee had no effects of the drawer in his hands, although the drawer entertained reasonable expectations that the bill would be accepted (*k*).

Deeds deposited by the drawer in the hands of the drawee, for the purpose of raising money, are not effects, it seems, for this purpose (*l*).

Absence from home on account of the dangerous illness of the party's wife has been held to be no excuse for not giving notice (*m*).

An acknowledgment by the drawer that the bill would come back to him, has been held to supersede the necessity of notice (*n*).

Where the plaintiff received a bill in payment of goods, which turned out worth nothing for want of a sufficient stamp, and was never paid, it was held that the defendant from whom he received it was not entitled to any notice of dishonour (*o*).

A declaration by the drawee when the bill is presented, as to the want of effects of the drawer in his hands, is evidence of the fact, because he is for that purpose the agent of the drawer; but a subsequent declaration is not admissible (*p*). The plaintiff may also show, in excuse for want of notice, that he was ignorant of the drawer's place of abode, and that he has used due diligence to discover it (*q*).

Proof to excuse want of notice.

In the case of *Phipson* v. *Kneller* (*r*), the drawer, a few days before the bill became due, stated to the holder that he had no regular place of residence, but that he would call and inquire whether the bill had been paid by the acceptor, and Ld. Ellenborough held that he was not entitled to notice of dishonour. Notice by the drawer to the drawee before the bill becomes due, not to pay it, dispenses with notice of dishonour, but not with the duty of presentment for payment (*s*). The plaintiff cannot go into general evidence to show that the defendant in the particular instance has suffered no prejudice from the want of notice, for this would lead to inquiries of too complicated and indefinite a nature (*t*). Where one of the drawers is also

bill at maturity; and the drawer will be liable, although the bill be not presented till two days after, and is then refused. For P. C. the same reason applies to want of presentment as to want of dishonour, and therefore the same rule ought to prevail with regard to want of effects operating as an excuse. *Terry* v. *Parke*, 6 Ad. & Ell. 502; and see *Bickerdike* v. *Bollman*, 1 T. R. 405. *Rogers* v. *Stephens*, 2 T. R. 713. *Clegg* v. *Cotton*, 1 Bos. & Pull. 652; 3 Bos. & Pull. 239. 242. Per Chambre, J. in *Clegg* v. *Cotton*, the ground of this rule is the fraud of the drawer. *Claridge* v. *Dalton*, 4 M. & S. 226. But where it was clear that the drawee lent his name in the expectation that a third party, who was indebted to him, would provide funds for the payment of the bill when due; held, that he was entitled to notice. *Lafitte* v. *Slater*, 6 Bing. 623. The Court considering the case of *Bickerdike* v. *Bollman*, 1 T. R. 405, as an excepted case, and not to be extended. See also *Rucker* v. *Hillier*, 16 East, 45. Where the drawer made a bill payable at his own house, held that it was properly left to the jury as evidence of its being an accommodation-bill, and rendering notice of dishonour unnecessary. *Sharp* v. *Bailey*, 9 B. & C. 44.

(*h*) See *Spooner* v *Gardiner*, 1 R. & M. 84.

(*i*) 1 Esp. R. 332. *Walwyn* v. *St. Quintin*, 2 Esp. R. 515; Peake's L. Ev.

(*k*) 2 Camp. 310. *Legge* v. *Thorpe*, 12 East, 171. 177.

(*l*) *Walwyn* v. *St. Quintin*, 1 B. & P. 651; and see *Legge* v. *Thorpe*, 12 East, 171.

(*m*) *Turner* v. *Leach*, Chitty, O. B. 212, 7th Ed. *cor.* Ld. Ellenborough, C. J.; but see *Hilton* v. *Shepherd*, 6 East, 15.

(*n*) *Brett* v. *Levett*, 13 East, 213; but *qu.*

(*o*) *Cundy* v. *Marriott*, 1 B. & Ad. 696.

(*p*) *Prideaux* v. *Collier*, 2 Starkie's C. 57. *Pickin* v. *Graham*, 1 C. & M. 725.

(*q*) *Phipson* v. *Kneller*, 1 Starkie's C. 116.

(*r*) 1 Starkie's C. 116; 1 Camp. 285.

(*s*) *Hill* v. *Heap*, 1 D. & R. 57. (N. P. C.) 57.

(*t*) *Rogers* v. *Stephens*, 2 T. R. 718. *Dennis* v. *Morrice*, 2 Esp. C. 158.

the acceptor of the bill, notice is unnecessary (*u*). But it is necessary where the party draws the bill with a *bonâ fide* reasonable expectation that he shall have assets in the hands of the drawee, having shipped goods on his own account, and which were on their way to the drawee, although the goods had not come to the hands of the drawee when the bill was presented for acceptance (*x*). So, where acceptances were made on the faith of consignments of goods which had not been received, on the ground of fair mercantile agreements (*y*), or where there are fluctuating accounts between the drawer and drawee (*z*); or where at the time of drawing a foreign bill, the drawee has effects of the drawer in his hands, although they are taken out before the bill becomes due (*a*); or where the drawee has effects of the drawer in his hands at any time whilst the bill is running (*b*).

Or where the bill is drawn in the fair and reasonable expectation, that in the ordinary course of mercantile transactions it will be accepted or paid (*c*). And in general, notice must be given in all cases where the drawer would have any remedy over against a third person (*d*).

It has been held, that notice is not dispensed with although the drawer and drawee have agreed that the former should take up the bill (*e*), or, although the drawer of a bill, destroyed by accident, refuse to give a new bill according to the statute (*f*); or although the drawee be a bankrupt or insolvent (*g*); or although the drawee has previously informed the drawer of his inability to pay, and has paid him money towards the taking up the bill (*h*); or although the drawer had no effects in the hands of the acceptor, but has given acceptances still outstanding for the accommodation of the acceptor (*i*); or although the drawer become bankrupt and abscond before the bill becomes due, the house being still kept open by the assignee under the commission (*k*); or although the plaintiff be able to show that the drawer was not damnified by the want of notice (*l*); or although the party knew of the dishonour. But although mere knowledge is insufficient without *notice*, yet proof that the drawer of a bill knew two days after its maturity that it was unpaid in the hands of a particular indorsee, and that he objected to paying

(*u*) 12 East, 317.

(*x*) *Rucker* v. *Hillier*, 16 East, 43. *Claridge* v. *Dalton*, 4 M. & S. 226.

(*y*) Per Eyre, C. J. 1 B. & P. 652.

(*z*) Semble, *Blackhan* v. *Doren*, 2 Camp. 503. *Brown* v. *Maffey*, 15 East, 221. And see *Legge* v. *Thorpe*, 12 East, 171.

(*a*) *Orr and others* v. *Maginnis*, 7 East, 359.

(*b*) *Hammond* v. *Dufresne*, 3 Camp. 145. *Thackray* v. *Blackett*, 3 Camp. 164. So if the drawer has effects in the hands of the drawee, although to less amount than the bill. *Thackray* v. *Blackett*, 3 Camp. 164. Or although the drawer is indebted to the drawee in a greater amount than those effects. *Blackhan* v. *Doren*, 2 Camp. 503.

(*c*) *Claridge* v. *Dalton*, 4 M. & S. 231. See *France* v. *Lucy*, R. & M. 342.

(*d*) As where a bill is drawn for the accommodation of an indorsee. *Cory* v. *Scott*, 3 B. & A. 623. *Norton* v. *Pickering*, 8 B. & C. 610.

(*e*) 1 Esp. 333; 2 H. B. 607; 11 East, 114; 15 East, 216.

(*f*) 9 & 10 Will. 3, c. 17.

(*g*) *Esdaile* v. *Sowerby*, 11 East, 114. *Bowes* v. *Howe*, 5 Taunt. 30; *Thackray* v. *Blackett*, 3 Camp. 164. *Russell* v. *Langstaffe*, Doug. 514. But see *Brett* v. *Levett*, 13 East, 213. Note, it was there held that an acknowledgment after his bankruptcy by the drawer, that the bill would be paid, superseded the proof of notice.

(*h*) *Baker* v. *Birch*, 3 Camp. 107. But such sum may be recovered by the holder, as money had and received by the drawer to his use.

(*i*) *Spooner* v. *Gardiner*, 1 R. & M. 84.

(*k*) *Rohde* v. *Procter*, 4 B. & C. 517. It is insufficient to show that the chance of obtaining any thing by way of remedy once was hopeless, that the persons against whom the remedy would apply were insolvent or bankrupt, or had absconded, for parties are entitled to have that chance offered them; the law, which is founded on the usage and custom of merchants, says they are discharged, *Ibid*; and see *Cory* v. *Scott*, 3 Bert. 619.

(*l*) *Dennis* v. *Morris*, 3 Esp. 158. But see Poth. p. 1, c. 5, n. 157.

it on the ground of its having been obtained by fraud, has been held to be evidence for the consideration of the jury of the defendant having received notice (*m*).

The necessity of proving due notice is superseded by evidence of part-payment, or other admission on the part of the defendant (with a knowledge of the facts), of his liability on the bill (*n*).

Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, it is sufficient to prove the dishonour of that bill, without proving notice of the dishonour of the substituted bill (*o*).

Proof of protest.

5thly. In the case of a foreign bill a *protest* is necessary (*p*), for it is part of the custom of merchants (*q*); the mere proof of noting the bill for non-acceptance, without a protest, is insufficient to charge the drawer (*r*). Where the drawer resides abroad, the notice of the non-acceptance should be accompanied by a copy, or some other memorial of the protest, for otherwise he cannot know of the protesting (*s*). But a copy of the protest is not necessary (*t*). But if he resides here, although at the time of the dishonour he be abroad, or if he has returned to this country previous to the dishonour of the bill, notice of dishonour is sufficient, for he can make inquiry as to the protest (*u*). Such protest should be made out by a notary public, if there be one in the neighbourhood, if not, by an inhabitant of the place where it is made, in the presence of two witnesses (*x*). The bill should be noted on the day of refusal, but the protest may be drawn up afterwards.

In the case of an inland bill, it is unnecessary to prove a protest (*y*), except, perhaps, for the purpose of recovering special damages or costs, occasioned by the non-acceptance or non-payment (*z*). Such a protest cannot be made until after the bill has become due (*a*). The protest is proved

(*m*) *Wilkins* v. *Jadis*, 1 Mo. & R. 41.

(*n*) Vide *infra*, 237. A letter written six days after the drawer should in due course have received notice of dishonour, containing ambiguous expressions respecting the non-payment of the bill, is evidence to go to a jury of regular notice. *Booth* v. *Jacobs*, 3 Nev. & M. 351. A declaration by a defendant in reference to his defence, that the plaintiff had not sent the letter to him in time, is not evidence to go to a jury of notice of dishonour. Per Ld. Denman, *Braithwaite* v. *Colman*, 4 Nev. & M. 654.

(*o*) *Bishop* v. *Rowe*, 3 M. & S. 362.

(*p*) *Gale* v. *Walsh*, 5 T. R 239. But see *Legge* v. *Thorpe*, 12 East, 171; and see 7 East, 359, where notice was held to be unnecessary where it appeared that the drawer had no effects in the hands of the drawee at the time, nor any fluctuating balance of assets between them unascertained, which might have afforded probable ground of belief to the drawer that the bill would be honoured.

(*q*) 4 T. R. 174; 5 T R. 230; B. N. P. 272; 6 Mod. 80; Salk. 134; 12 Mod. 345; Ld. Ray. 993. A bill protested for non-acceptance need not be protested for non-payment. See *Price* v. *Dandell*, Chitty, O. B. 309. *De la Torre* v. *Barclay*, 1 Starkie's C. 7. But see *Orr* v. *Maginnis*, 7 East, 359. The noting of a bill is a proceeding unknown to the law as distinguished from the protest. 4 T. R. 170. The protest must be made on the last day of grace. 4 T. R. 174.

(*r*) 2 T. R. 713. The use of noting is, that it should be done on the day of the refusal, in order that a formal protest may afterwards be drawn. See *Chaters* v. *Bell*, 4 Esp. 48; Sel. 312.

(*s*) *Goostrey* v. *Mead*, B. N. P. 271. Bayley on Bills, 118. *Cromwell* v. *Hynson*, 2 Esp. C. 211.

(*t*) *Goodman* v. *Harvey*, 4 Ad. & Ell. 870.

(*u*) *Cromwell* v. *Hynson*, 2 Esp. C. 511. *Robins* v. *Gibson*, 1 M. & S. 237; 3 Camp. 335.

(*x*) Bayley, O. B. 118; B. N. P. 272. *Chaters* v. *Bell*, 4 Esp. 48; Sel. 379.

(*y*) *Windle* v. *Andrews*, 2 B. & A. 696.

(*z*) Bay. O. B. 121. *Brough* v. *Parkins*, Ld. Raym. 992; 6 Mod. 80; Salk. 131. *Harris* v. *Benson*, Str. 910; Skinn. 272; 4 T. R. 75. 170; Ca. Temp. Hardw. 74. *Lumley* v. *Palmer*, Ann. 78. Interest is recoverable, although there be no protest. 2 Starkie's C. 425. *Qu.* whether if in the case of an inland bill, a protest be alleged, it must not be proved? *Boulager* v. *Talleyrand*, 2 Esp. C. 550.

(*a*) See 9 & 10 Will. 3, c. 17, s. 1, which directs a protest in case of the non-payment of inland bills to the amount of 5*l.* and upwards for value received, payable at a certain number of days, weeks, and

by the mere production (*b*), and will be presumed from a subsequent part-payment of the bill, or promise to pay it, in the case of a foreign bill (*c*). The presentment of a foreign bill in this country must be proved, as in the case of an inland bill (*d*). The necessity of proving a protest is superseded by proof of an admission by the defendant of his liability (*e*).

Indorsee v. Drawer.

An indorsee in an action against the drawer must prove (*f*), 1st. The drawing of the bill. 2dly. Due presentment. 3dly. The drawee's or acceptor's default. 4thly. Notice of the dishonour. 5thly. Title in himself by indorsement. 6thly. In the case of a foreign bill, a protest. The proofs, therefore, seem to be similar to those in the preceding class, except as to proving the title by indorsement, the proofs of which have been already partially considered (*g*); but some additional observations as to proof of notice, which are applicable to this case, will be subsequently made in considering the evidence in an action by an indorsee against an indorser.

Proof of indorsement. By agent.

Where the indorsement is by an agent, proof of the agent's authority must be given (*h*); and if the principal expressly enjoin the agent not to indorse a bill, which he delivers to him in order to procure it to be discounted, he will not be bound by an indorsement by the agent (*i*); but in the absence of any direction as to indorsing the bill, if the agent in fact indorse it, and the principal afterwards promise to pay the bill, it is strong evidence of authority to the agent (*k*).

Indorsee v. Indorser.

Every indorser of a bill of exchange is to be regarded as a new drawer (*l*). Hence, the same proofs are for the most part applicable, as in the last class of cases (*m*). The plaintiff must prove, 1st. The indorsement by the defendant, which amounts to an admission of the drawing, and of the previous indorsements (*n*). 2dly. Due presentment. 3dly. The refusal to accept or pay. 4thly. Due notice to the defendant, or of facts in excuse. 5thly. Title in himself by indorsement; and, 6thly. In the case of a foreign bill, a protest.

months from the date, and accepted by the underwriters of the acceptor, to be made after the expiration of three days after the bill shall become due. The stat. 3 & 4 Ann. c. 9, s. 4, extends these provisions to cases where the drawee refuses to accept. By 3 & 4 Ann. c. 9, s. 6, no such protest is necessary either in the case of non-acceptance or non-payment, unless the bill be expressed to be for value received, and be drawn for the payment of 20*l.* sterling or more. The first of these statutes does not apply to bills payable after sight.

(*b*) 12 Mod. 345; per Holt, C. J. Bay. O. B. 226. A protest made in England ought, it is said, to be proved by the notary who made it and subscribing witness, if any. Chitty on Bills, 405, 7th Ed.

(*c*) Bay. O. B. 221. *Gibbon* v. *Coggon*, 2 Camp. 188. *Taylor* v. *Jones*, 2 Camp. 105.

(*d*) *Chesmer* v. *Noyes*, 4 Camp. 129.

(*e*) Vide *infra*, 237.

(*f*) The indorsement, unless traversed, will be taken as admitted. In an action by the indorsee against the drawer it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due, replication that the bill was not indorsed to the plaintiff after it became due, but was indorsed to and taken and received by the plaintiff before it became due; and it was held to be sufficient for the plaintiff to put in the bill, and that it was not incumbent on him to show that the bill was indorsed to him before it became due. *Parkin* v. *Moore*, 7 C. & P. 408.

(*g*) In the case of an indorsee against the acceptor. *Supra*, 214.

(*h*) See tit. AGENT.

(*i*) *Fenn* v. *Harrison*, 3 T. R. 757. And a promise to pay the bill would be a mere *nudum pactum*. *Ibid.*

(*k*) *Fenn* v. *Harrison*, 4 T. R. 177.

(*l*) But the indorsee of a note cannot declare against his indorser as maker, even when the latter has indorsed the note, not payable or indorsed to him, so that the indorsee cannot sue the maker. *Gwinnne* v. *Herbert*, 5 Ad. & Ell. 436.

(*m*) 1 Show. 495; 1 Str. 479; 2 Burr. 674; 3 East, 482.

(*n*) The admission is conclusive. *Lambert* v. *Oakes*, 1 Ld. Ray. 443. It admits the ability and signature of all intermediate indorsers. *Critchlow* v. *Parry*, 2 Camp. 182. An acceptance, although stated, need not be proved. *Tanner* v.

Indorsement.

1st. Proof of the defendant's indorsement (*o*) is conclusive evidence of the hand-writing of the drawer, and of that of all the prior indorsees (*p*), although the bill be forged. The subsequent indorsements must be proved as alleged in the declaration. An admission by the defendant of his liability supersedes the necessity of proving subsequent indorsements (*q*). If the bill be payable to *A.* or bearer, and *A.* deliver it for money without indorsing it, it is a sale by *A.* and he is not liable on the bill (*r*). An indorsee cannot recover against an indorser, on proof that he took the bill when due to the acceptor, who had absconded with it (*s*), although the defendant had promised to pay the bill if produced (*t*).

Presentment. Refusal. Notice.

2dly, The presentment, and 3dly, The dishonour, must be proved, as in an action against the drawer (*u*); and 4thly, The proofs of due notice of the dishonour to the drawer of a bill, apply for the most part to the proofs of notice to an indorser (*x*). It is not necessary to prove any demand on the drawer or prior indorsers, or to give any notice to them, since the undertaking is to pay on the default of the acceptor; and the very existence of the drawer or prior indorsers is immaterial (*y*). The rule as to notice, by an indorsee to an indorser or drawer, is, that reasonable notice shall be given, and what is reasonable notice seems to be a question of law, the rule in regard to which has already been stated (*z*). What has been said as to the notice from the payee to the drawer, applies for the most part to notice by an indorsee to an indorser (*a*). There are, however, some considerations which are peculiar to the present case; for where there are several previous indorsers, the indorsee may, by giving notice, proceed against any or all of them, as well as against the drawer. The general rule is, that each indorser is bound to give notice within a day after he has received notice (*b*).

Bear, 4 B. & C. 312. *Park* v. *Edge*, 1 C. & M. 420. No demand from the drawer or any previous indorsee is necessary. *Bromley* v. *Frazier*, 1 Str. 441.

(*o*) An indorsement in pencil is sufficient. *Geary* v. *Physic*, 5 B. & C. 234.

(*p*) Salk. 127. *Lambert* v. *Oakes*, Ld. Raym. 443. Peake's L. E. 221. Although stated without necessity, *Ibid.* and *Critchlow* v. *Parry*, 2 Camp. 282. *Chaters* v. *Bell*, 4 Esp. C. 210.

(*q*) *Sidford* v. *Chambers*, 1 Starkie's C. 320.

(*r*) Per Holt, C. J. *Gov. & Co. of the Bank of England* v. *Newman*, Ld. Raym. 442.

(*s*) *Powell* v. *Roach*, 6 Esp. 76; 12 Mod. 310; 1 Show. 164; Holt, 118.

(*t*) *Ibid.* And see 1 Taunt. 153.

(*u*) *Supra*, 221. An action lies by the indorsee against the indorser immediately upon non-acceptance. *Ballingalls* v. *Gloster*, 3 East, 481.

(*x*) *Supra*, 225. Notice to the indorsee of a bill of the dishonour of a bill *drawn* by him is insufficient. *Beauchamp* v. *Cash*, 1 D. & R. (N. P. C.) 3. *A.* draws a bill on *B.* for the accommodation of *C.*, who indorses it for value to *D.*; neither *A.* nor *C.* have effects in the hands of *B.*, yet *B.* is entitled to notice. *Norton* v. *Pickering*, 8 B. & C. 610; see *Cory* v. *Scott*, 3 B. & Ad. 619. Where bankers paid a bill purporting to be the acceptance of a customer, but on the following day, having discovered the acceptance to be a forgery, gave notice to the party whom they had paid, and required him to repay the money; it was held, that the holder of a bill being entitled to know, on the day it becomes due, whether it is an honoured or dishonoured bill, that he may, if he thinks fit, take steps on that day against the parties to the bill; the parties who pay the bill ought not, by any negligence in satisfying themselves whether the acceptance is genuine or not, to deprive the holder of that right; the bankers having therefore suffered him to retain the money during the whole of that day, they could not recover it back. *Cocks* v. *Masterman*, 9 B. & C. 902.

(*y*) See Ld. Mansfield's observations, 2 Burr. 675. So in the case of a cheque, 2 Camp. 537.

(*z*) *Supra*, 226. *Darbishire* v. *Parker*, 5 East, 10, 11, 12. But see *Hilton* v. *Shepherd*, 6 East, 14, n.

(*a*) *Vide Supra*, 226.

(*b*) *Turner* v. *Leach*, 4 B. & A. 451. An indorser who pays the bill after laches by a subsequent indorsee cannot recover against a former indorser, although had successive notices been given the defendant would not have received earlier notice. *Ibid*, and per Ld. Ellenborough, in *Marsh* v. *Maxwell*, 2 Camp. 210. Where, after due diligence to ascertain the abode of an

Where a bill passed through the hands of five persons, *A. B. C. D.* and *E.*, all of whom lived in or near London, and the bill being dishonoured, the holder on the same day gave notice to *E.*, who on the next day gave notice to *D.*, and he on the same day to *A.*, the Court were of opinion that due diligence had been used (*c*). Proof of notice.

But the holder of a bill has not as many days as there are indorsers, but each indorser has his own day, and whether the holder proceed against the indorser or the drawer, notice must be given within the same time (*d*).

Where the bill when it becomes due is in the hands of the bankers of the indorsee, and is presented by them, notice to him by the next day's post, and by him to a previous indorser by the next day's post after that, is sufficient.

Where the holder had deposited a bill indorsed in blank with his bankers in London, which was presented by them at two o'clock on the afternoon of Saturday (when due), and being dishonoured, was noted, and presented again between nine and ten in the evening by a notary, and on the Monday the bankers informed the holder at Knightsbridge of the dishonour, and he the same day gave notice to the indorser in the Tottenham-court-road, the notice was held to be sufficient (*e*).

Where a bill due on the 25th, was presented on that day by the banker of the holder at another banking-house in London, and dishonoured, but a doubt being entertained whether it had not been presented too early on that day, it was presented again on the 26th, and again dishonoured, and was returned to the holder on the same day, who sent notice of the dishonour to the indorser in the country on the 27th, it was held to be sufficient (*f*).

The plaintiff may prove in excuse (*g*) for not giving notice, that the indorser gave no consideration for the note, and knew the maker to be insolvent (*h*): That the defendant, the payee of the note, had no effects in the hands of the maker (*i*): That the indorsee was ignorant of the indorser's place of abode (*k*); and then it is question of fact, whether he used due diligence to discover it (*l*). He ought to show that he has made diligent but ineffectual inquiry in places where the indorser was likely to be found (*m*): Excuse for want of notice.

indorser, it was not discovered until a month after the bill became due, when it was communicated to the attorney of the holder; held, that as he had a right to take a day to communicate it to his client, notice on the following day was sufficient: and the notice being legal and valid, held that evidence of the circumstances under which it was given was sufficient to support the allegation in the declaration that notice was given according to the legal effect. *Firth* v. *Thrush*, 8 B. & C. 387. And see *Bateman* v. *Joseph*, 12 East, 433; and *Baldwin* v. *Richardson*, 1 B. & C. 245.

(*c*) *Hilton* v. *Shepherd*, 6 East, 14, n.

(*d*) *Dobree* v. *Eastwood*, 3 C. & P. 250.

(*e*) *Haynes* v. *Birkes*, 3 B. & P. 599.

(*f*) *Langdale* v. *Trimmer*, 15 East, 291.

(*g*) It seems that the excuse for want of notice should be alleged on the face of the declaration, *vide supra*, and *Cory* v. *Scott*, 3 B. & Ad. 619. But the general principle on which notice is excused is, that the party must have known that the bill when presented would not be paid. This is in effect to substitute *knowledge* for actual *notice*. *Qu.* therefore, whether when the want of effects in the hands of the acceptor is the excuse for not giving notice to the drawer, such excuse need be alleged specially, for the drawer has notice in effect.

(*h*) *De Berdt* v. *Atkinson*, 2 H. B. 336; and see *Sisson* v. *Tomlinson*, 1 Sel. N. P. 328, 7th ed. But a mere accommodation indorsee is entitled to notice. *Smith* v. *Becket*, 13 East, 187. *Secus*, in an action against the drawer of a bill accepted for his accommodation, for the drawer is the real debtor, and cannot be hurt by want of notice.

(*i*) 1 Esp. 302. See 13 East, 187; Bay. 136.

(*k*) 12 East, 433; 3 Esp. R. 240.

(*l*) *Bateman* v. *Joseph*, 12 East, 433; 3 Esp. R. 240. And see *Goodall* v. *Dolley*, 1 T. R. 712.

(*m*) Inquiry at the place where the bill was payable for the residence of the in-

Excuse for want of notice.

That the defendant afterwards promised to pay the bill (*n*); and a promise made to a subsequent indorsee is evidence for this purpose (*o*).

It is no defence to an action by a *bonâ fide* indorsee without knowledge that the bill had already been dishonoured, and no notice given (*p*).

One who indorses a bill without consideration, but without fraud, is entitled to notice, although the acceptor is a fictitious person (*q*). So where the transaction arises out of various dealings for the accommodation of the acceptor (*r*).

It is no excuse in an action against an indorser to show that the drawee has no effects of the drawer in his hands (*s*), or that the payee (the indorser) gave no consideration to the maker of a note (*t*); or that there was an understanding that the note was not to be put in suit; or that the payee and indorser of a promissory note knew that *D.*, at whose house the note was made payable, had no effects of the maker in his hands, and requested *D.* to send it to him that he might pay it (*u*); that the payee and indorser of the bill had received notice from the drawer that he would not pay the bill (*x*); that the indorsee being ignorant of the laches in the holder, paid the bill (*y*); that the indorsers had full knowledge of the bankruptcy of the drawer and of the acceptor before and at the time when the bill became due (*z*); that the indorsement was lent to the maker of a note, to enable the maker to raise money from the plaintiffs, who were bankers, and agreed to advance the money thereon for six months, and had renewed their advances at the end of six months, without the knowledge of the indorser (*a*). So, where a bill was drawn and indorsed by several indorsers for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, a prior indorser, it was held that he was entitled to notice of the dishonour, in order to enable him (if he had no remedy on the bill) to call immediately upon the last indorser, to whom he had lent his indorsement, and who had received the amount of the bill (*b*). So in the case of an indorsee, without consideration but without fraud, of a bill, the drawer and acceptor of which are fictitious persons (*c*). Proof of notice will be rendered unnecessary by

dorser, was held to be insufficient. *Beveridge* v. *Burgess*, 3 Camp. 262. Inquiry should be made from other parties to the bill or note, and of persons of the same name. Bayley on Bills, 229, citing *Beveridge* v. *Burgess*. It is said in one case to have been held to be sufficient, on a promissory note being dishonoured, to make inquiry at the maker's for the residence of the payee. *Harris* v. *Derrick*, Wight. 76. Calling on the last two indorsers, on the day after the bill became due, to know where the drawer lived, and on his not being in the way, calling again the next day, and then giving him notice, is (*semble*) sufficient. *Browning* v. *Kinnear*, Gow. 81.

(*n*) *Vide infra*, 237.

(*o*) *Potter* v. *Rayworth*, 13 East, 417.

(*p*) *Dunn* v. *O'Keefe*, 5 M. & S. 282.

(*q*) *Leach* v. *Hewit*, 4 Taunt. 731.

(*r*) *Ex parte Heath*, 2 Ves. & B. 240; 2 Rose, 141.

(*s*) *Goodall* v. *Dolley*, 1 T. R. 712; Peake's C. 202. *Wilkes* v. *Jacks*, Peake's C. 202. And see *Sisson* v. *Tomlinson*, Sel. N. P. 324. *Brown* v. *Maffey*, 15 East, 216; where the defendant had indorsed for the accommodation of a subsequent indorser, but did not know that the acceptor had no effects of the drawer in his hands.

(*t*) *Free* v. *Hawkins*, 1 Holt's C. 550, by Gibbs, C. J.

(*u*) *Nicholson* v. *Gouthit*, 2 H. B. 609. *A.* being insolvent, *B.* as a security indorsed a note made by *A.* payable to *B.* at the house of *D.* for a debt due from *A.* to *C.* *B.* being informed that *D.* had no effects of *A.*'s in his hands, desires *D.* to send the note to him, and says he will pay it, having then a fund in his hands for that purpose; the note was not presented at *D.*'s house till three days after it was due; and it was held that it was discharged.

(*x*) 1 T. R. 171.

(*y*) *Roscow* v. *Hardy*, 12 East, 434.

(*z*) *Esdaile* v. *Sowerby*, 11 East, 114.

(*a*) *Smith* v. *Beckett*, 13 East, 187.

(*b*) *Brown and others* v. *Maffey*, 15 East, 216. Bayley, O. B. 137; Peake's C. 202. And see *Cory* v. *Scott*, 3 B. & A. 619.

(*c*) *Leach* v. *Hewitt*, 4 Taunt. 731.

evidence of a promise to pay on the part of the defendant (*d*). But it seems that an express promise is necessary, in order to discharge an indorser who has not had notice (*e*).

6thly. The proof of a protest has already been considered (*f*).

If an acceptance of the bill be stated unnecessarily, it need not be proved (*g*).—Such are the detailed proofs in these cases. Variance.

It is a general rule, that an admission (*h*) of the party's liability on the bill, made with a knowledge of the facts, will supersede the necessity of the usual regular proof in detail. Such an admission operates as *presumptive* evidence that all things have been *rite-acta*, or perhaps, in some cases, even still more strongly as a *waiver* by the party of an irregularity as to presentment, notice, or protest (*i*), of which he actually was, or may be presumed to have been cognizant. These admissions consist either in part-payment, which is the strongest of all, or in asking for time, or in an express promise to pay the bill, or in other declarations, or conduct by which the party plainly acknowledges his liability (*k*). Presumptive evidence.

An agreement between the drawer and first indorser, stating the bill to be then over-due, and dishonoured, and stipulating for payment by weekly instalments, admits notice of the dishonour (*l*).

In an action against an acceptor, notice by his attorney to produce all papers relating to a bill, described as the bill in question, and as accepted by the said defendant, is *primâ facie* evidence of acceptance (*m*).

Part-payment of the amount of the bill by the drawer raises a presumption that he has received due notice of the acceptor's default (*n*).

(*d*) *Wilkes* v. *Jacks*, Peake's C. 202.

(*e*) *Borrodaile* v. *Lowe*, 4 Taunt. 93.

(*f*) *Supra*, 232.

(*g*) *Supra*, 213.

(*h*) The whole of the admission must, according to the general rule, be taken. Where the defendant said, "I do not mean to insist upon the want of notice, but I am only bound to pay you 70*l*.," the bill being for 200*l*., Abbott, C. J., held that the plaintiff could not recover more than 70*l*. *Fletcher* v. *Froggatt*, 2 C. & P. 270. Assumpsit by the indorsee against acceptor, plea that the defendant did not accept the bill *modo et formâ*, but generally, and it appeared that the acceptance had been, without his knowledge, altered by the addition of payment at a particular banker's, where, when presented, it was dishonoured, and on application to the defendant he denied having accepted it payable there, but was always ready to pay at his own place of residence; held, not to amount to an acknowledgment of a subsisting debt to entitle the plaintiff to recover on an account stated. *Calvert* v. *Baker*, 4 M. & W. 417; and 7 Dowl. (P. C.) 17.

(*i*) *Gibbon* v. *Coggon*, 2 Camp. 188; 2 T. R. 713; 6 East, 16. 231; 13 East, 417; *Wood* v. *Brown*, 1 Starkie's C. 217; Peake's C. 202. Where the defendant agreed to join with three others in several notes to the plaintiff to secure a debt; but after he had signed one refused, and never did in fact sign; and upon the first note becoming due the defendant, upon being applied to, offered a security; it was held, that it was for the jury to say whether he was cognizant of the refusal of the party to sign, and whether, by offering such security, he intended to waive the objection as to all the notes; as if he did, and obtained time in consequence, he was liable, otherwise not. *Leaf* v. *Gibbs*, 4 C. & P. 466.

(*k*) See *Jones* v. *Morgan*, 2 Camp. 474. *Vaughan* v. *Fuller*, 2 Str. 1246; and tit. ADMISSIONS. An admission by one of several partners is evidence against the rest. *Hodenpyl* v. *Vingerhoed*, Chitty on Bills, 489, 5th ed.; Roscoe on Evidence, 207. *Sangster* v. *Mazzaredo*, 1 Starkie's C. 161. But an admission by one of several acceptors, not parties, is not evidence against the rest. *Gray* v. *Palmer*, 1 Esp. C. 135. In an action by the indorsee against the maker, and issue on the fact of presentment, a promise by the defendant, after the note became due, to pay, was held to be a sufficient admission of the presentment having been duly made. *Croxon* v. *Worthen*, 5 M. & W. 5.

(*l*) *Gunson* v. *Metz*, 1 B. & C. 193; 2 D. & R. 334.

(*m*) *Holt* v. *Squires*, R. & M. 282.

(*n*) An offer to give another bill supersedes the proof of indorsement. *Bosanquet* v. *Anderson*, 6 Esp. 43. An admission by the defendant that the hand-writing to a promissory note is his, will be sufficient proof in the case of an unattested note, although it was made pending a treaty for a compromise. *Waldridge* v. *Kennison*, 1 Esp. C. 43.

Presumptive evidence.

An acceptor, who has credited or adopted the acceptance by an acknowledgment of his hand-writing, or by paying other similar bills, cannot afterwards insist that the alleged acceptance is a forgery (*o*). But the merely desiring the holder of the bill to call again does not exclude him from such a defence (*p*)

Where the declaration alleged a due presentment of the bill for payment, which had been drawn and accepted for the accommodation of the indorser, and the bill was not presented till after banking hours, when the answer was given "no effects," an application by the indorser, after declaration filed, for further time, was held to be evidence of the waver of the objection, with notice of the fact of which he had the means of informing himself (*q*). So where the drawer, knowing that time had been given by the holder to the acceptor, but supposing that he was still liable on the bill, in default of the acceptor, said, three months after the bill was due, that he was liable, and if the acceptor did not pay it, he would, it was held that he was bound by the promise (*r*). Where, however, a promise to pay has been made in ignorance of material facts, such as the holder's laches, it will not supersede the necessity or the usual proof of notice (*s*).

Where the indorsee of an inland bill presented it before it was due, for acceptance, and it was refused on the 4th of November, and the indorsee on the 6th of January following, (the bill expiring on the 11th of January,) gave notice generally of the dishonour of the bill, but without specifying the time or circumstances of the presentment, whereupon the defendants, the drawers, being ignorant of the circumstances, made a proposal the next day to pay the bill by instalments, it was held that they had not waved

(*o*) *Leach* v. *Buchanan*, 4 Esp. C. 226. *Barber* v. *Gingell*, 3 Esp. C. 60.

(*p*) *Barber* v. *Gingell*, 3 Esp. C. 60. And see tit. ADMISSIONS.

(*q*) *Greenway* v. *Hindley*, 4 Camp. 52. It operates as a *waver* of the want of notice (*Rogers* v. *Stephens*, 2 T. R. 713; Peake's C. 202; 6 East, 231; 13 East, 417); and where, on demand made, the drawer answered that the bill must be paid, it was held to be equivalent to a promise to pay; *Ibid.*; and see *Lundie* v *Robertson*, 7 East, 231. The drawer on the first application promised the plaintiff that he would pay the bill if he would call again; upon a second application, he said that he had not had regular notice, but that as the debt was justly due he would pay the bill (and see *Haddock* v. *Bury*, 7 East, 236, n.; *Gibbons* v. *Coggan*, 2 Camp. 188; *Taylor* v. *Jones*, 2 Camp. 105). A waver by a drawer may be implied, but *qu.* whether a waver by an indorsee must not be express. 4 Taunt. 93. In an action by an indorsee against a previous, but not immediate indorser, the defendant, on the bill being shown, said, "my affairs are deranged, I cannot take it up now, but I will do something in a fortnight," it was held to be sufficient on the account stated. *Wagstaff* v. *Boardman*, K. B. Hil. 1827. A letter written by the drawer, stating that the bill had been accepted for his accommodation, and would be paid, dispenses with notice. *Wood* v. *Brown*, 1 Starkie's C. 217. But a letter written by an indorser who had been applied to for payment after several days laches, informing the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered him (the defendant) to be unsafe, to return the bill to a prior indorser, was held to be no such waver of the laches, and promise to pay, as would entitle the plaintiff to recover. *Borrodaile* v. *Lowe*, 4 Taunt. 93. So where the drawer said, "If I am bound to pay it, I will." *Dennis* v. *Morris*, 3 Esp. C. 158. So where he merely offered to compromise. *Cuming* v. *French*, 2 Camp. 106. And see *Brett* v. *Levett*, 13 East, 213, *supra*. The drawer of a bill being applied to for payment, said, "If the acceptor does not pay I must; but exhaust all your influence with the acceptor first;" and afterwards directed the applicant to raise the money on the lives of himself and the acceptor, it was held that the admission was not conclusive evidence of the defendant's having received or waved notice of the dishonour of the bill. *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229.

(*r*) *Stevens* v. *Lynch*, 12 East, 38.

(*s*) *Goodall* v. *Dolly*, 1 T. R. 712. *Blizard* v. *Hirst*, 5 Burr. 2670. 4 Taunt. 93. *Pickin* v. *Graham*, 1 C. & M. 725. 3 Tyr. 923.

the notice (*t*). So a promise made by the defendant when arrested, and when he is ignorant of the facts, will not be a waver (*u*).

Where the defendant, being a foreigner, on being applied to to take up the bill, said, "I am not acquainted with your laws; if I am bound to pay it, I will," it was held that the declaration did not supersede the necessity of proving notice (*x*).

A promise by one of several indorsers who are not partners is not evidence against the other indorsers (*y*). It has been said, that where an indorser has promised to pay the bill, payment must still be demanded before the action is brought (*z*); this, however, appears to be unnecessary.

A promise is binding although made under ignorance of the law (*a*).

An offer to pay part by way of compromise, and made for the purpose o buying peace, is not admissible in evidence (*b*); and a mere offer to compromise is no waver of the want of notice (*c*).

III. Where the liability is consequent on the defendant's own default, as where, 1st, the drawer brings an action against the acceptor, or 2dly, the acceptor against the drawer. 1st. By the drawer against the acceptor (*d*); the plaintiff must prove,

Collateral liability.

Drawer v. Acceptor.

1st. The acceptance of the bill by the defendant, which is *primâ facie* evidence that he has effects of the drawer in his hands (*e*).

2dly. Presentment to the acceptor, and the refusal by him to pay the bill.

3dly. The payment of the bill by the plaintiff, the drawer.

The indorsement of a general receipt on the bill *primâ facie* imports *payment* by the acceptor, although the bill be produced by the drawer; for it is rather to be presumed that the bill was delivered to him by the acceptor, on a settlement of accounts (*f*); and therefore the plaintiff should prove a payment to the holder by himself (*g*).

4thly. That the acceptor has effects of the drawer in his hands; of this fact the acceptance is *primâ facie* evidence (*h*). The bankruptcy of the acceptor is no defence against the drawer, who has paid the bill since the bankruptcy (*i*).

The acceptor of an accommodation bill in an action against the drawer, must prove, 1st. The drawing of the bill by the defendant (*k*), by proof of

Acceptor v. Drawer.

(*t*) 1 T. R. 712. 2 H. B. 336.

(*u*) *Rouse* v. *Redwood*, 1 Esp. C. 155; 4 Taunt. 93.

(*x*) *Dennis* v. *Morrice*, 3 Esp. C. 158.

(*y*) 1 Barnes, 317; 1 Esp. C. 15.

(*z*) *Brown* v. *Macdermot*, 5 Esp. C. 265, *tamen. qu.*

(*a*) 12 East, 38; vide *supra*, 87.

(*b*) B. N. P. 236.

(*c*) *Cumming* v. *French*, 2 Camp. 106.

(*d*) The drawer may recover against the acceptor, having effects of the drawer in his hands, in his own name, without assignment from the payee.

(*e*) *Vere* v. *Lewis*, 3 T. R. 183. If *A.* & *B.* exchange acceptances, the one is a consideration for the other, each is liable on his own acceptance as an absolute debt; the engagement is not of a conditional nature for mutual indemnity, but constitutes at once an absolute debt on each part. Consequently either may prove the acceptance of the other as a debt under a commission of bankrupt against him previous to the payment of either acceptance. *Rolfe* v. *Caslon*, 2 H. B. 570. *A.*, on the bankruptcy of *B.*, will be compelled to pay the bill drawn by him, as well as the one accepted by him after the bankruptcy of *B.*; he cannot afterwards recover against *B.*, as on an implied contract to indemnify him. Per Lawrence, J. in *Cowley* v. *Dunlop*, 7 T. R. 567.

(*f*) *Scholey* v. *Walsby*, Peake's C. 24. So where an indorsee having been obliged to take up the bill, declares specially against the acceptor. *Mendez* v. *Carreroon*; Ld. Raym. 742.

(*g*) Peake's C. 26; Peake's L. E. 221.

(*h*) 10 Mod. 36, 37. *Parminter* v. *Simmons*, 1 Wils. 185; 3 T. R. 183; 3 East, 169; 3 Wils. 18.

(*i*) *Mead* v. *Braham*, 3 M. & S. 91.

(*k*) *Vide supra*, 222.

his hand-writing. 2dly. He must rebut the usual presumption of consideration, by evidence showing the absence of it. 3dly. Payment of the bill by himself (*l*), or execution against his person (*m*). The mere production of the bill will not afford even *primâ facie* evidence of payment, without showing that the bill has been in circulation since the acceptance; and payment is not to be presumed from a receipt indorsed on the bill, except it be in the hand-writing of some person entitled to demand payment (*n*).

Damages. In order to prove the particular amount of damage which the plaintiff has sustained, the course of exchange, and the liability of the defendant to pay re-exchange, are questions for the jury (*o*). Interest is recoverable from the day when the bill became due to the day of signing judgment (*p*).

Interest. Where a sum is payable on a promissory note by instalments, and the whole is to become due on the first default, interest becomes due on the first default (*q*); and it is recoverable, although not stated in the particulars (*r*). Interest may be recovered against the drawer of an *inland* bill, without proof of a protest (*s*).

Where an accommodation acceptor was sued by a *bonâ fide* holder it was held that as he ought to have paid it when demanded, he could not recover the costs against the party to whom he had lent his acceptance (*t*).

An indorsee having received part of the contents from the drawer, cannot recover more than the residue from the acceptor (*u*).

The acceptor of a bill payable in England is liable only to the sum payable, and 5 per cent interest (*x*).

In an action on a foreign note payable in the currency of this country, interest is to be calculated according to the state of exchange at the time of the demand of payment (*y*).

Where a bill drawn on a party in a foreign country, after having been negotiated through another foreign country, is refused payment by the drawee, such payment being prohibited by the law of the country where he resides, the drawer is liable for the *whole* of the re-exchange between the different countries (*z*).

Where a foreign bill is dishonoured here for non-acceptance, and the plaintiff is allowed a per-centage in the name of damages, it seems that he is to recover interest from the day of payment only, and not from the time

(*l*) *Taylor* v. *Higgins*, 3 East, 169; 3 Wils. 18. In the latter case the count must be special. Where *A.*, according to the ordinary course of dealing with *B.*, accepts bills for him, having funds of *B.*'s in his hands, and *B.* being bankrupt, *A.* compounded his acceptances with the holders for less than their amount, it was held, that in the account between *A.* and the assignees of *B.*, *A.* was entitled to charge the full amount. *Stonehouse* v. *Read*, 3 B. & C. 669; 5 D. & R. 603.

(*m*) *Ibid.*

(*n*) *Pfiel* v. *Vanbatenburg*, 2 Camp. 439.

(*o*) *De Tastet & others* v. *Baring & others*, 2 Camp. 65; 11 East, 265; 2 H. B. 378; 2 B. & P. 335; Ambler, 634.

(*p*) *Robinson* v. *Bland*, 2 T. R. 58; 2 Burr. 1077.

(*q*) 4 Esp. C. 147.

(*r*) Ibid.

(*s*) *Windle* v. *Andrews*, 2 Starkie's C. 425. Where a bill is accepted payable at a particular place, although it is unnecessary to show a presentment at such place, in order to entitle the party to recover the principal sum, yet it is to recover interest. *Phillips* v. *Franklin*, 1 Gow's C. 196. A note payable at a particular time carries interest after that time, and it ought not to be left to the discretion of the jury, unless the nonpayment has been occasioned by the fault of the plaintiff. *Laing* v. *Stone*, 2 M. & Ry. 561.

(*t*) *Roach* v. *Thompson*, 1 M. & M. 487.

(*u*) *Bacon* v. *Searles*, 1 H. B. 88.

(*x*) *Woolsey* v. *Crawford*, 2 Camp. 445.

(*y*) *Pollard* v. *Herries*, 3 B. & P. 335. *Mellish* v. *Simeon*, 2 H. B. 378. But see *Houriet* v. *Morris*, 3 Camp. 303.

(*z*) *Ibid.*

of non-acceptance (*a*); but where there is no allowance for damages, he is to recover interest from the time of dishonour for non-acceptance (*b*).

Where a bill is made payable with interest, it is to be calculated from the date of the bill (*c*).

A plaintiff is entitled to recover the whole amount, although as to part he is only a trustee (*d*).

Defence.

The rules of Hilary Term, 4 Will., declare that in all actions on bills of exchange and promissory notes (*e*) the plea of *non assumpsit* shall be inadmissible, and that in such actions a plea in denial must traverse some matter of fact, *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of the dishonour of the bill or note. The defendant in support of a plea, according to these rules, on which issue is taken, may show, 1st, no contract, or an insufficient one in point of law (*f*); 2dly, that the bill or note has been altered (*g*), (and in some instances) no consideration; or, 3dly, illegality or fraud; 4thly, that the plaintiff has no title by transfer to sue upon the bill; 5thly, that the bill has been released or satisfied; 6thly, discharge by laches, or giving time, or by waver; 7thly, that it was an accommodation bill, &c. and indorsed after it became due; 8thly, that it is improperly stamped; 9thly, that it has been altered.

That the defendant, in point of fact, or of law, *did not contract* to pay the bill, as, that the defendant is an infant (*h*), or a feme covert (*i*). But an acceptor cannot set up the infancy or coverture of the drawer as a defence (*k*); nor can an indorsee defend himself by showing that the bill was drawn by a feme covert upon her husband, who indorsed it over (*l*). So he may show that one of the plaintiffs promised jointly with the defendants (*m*).

Proof to impeach the contract.

If a bill has been accepted by one of several partners in the name of all the copartners, the others being sued may prove fraud in defence, and show that the bill concerned the acceptor only in his private and individual capacity (*n*). But where several persons trade together under different firms, it is not competent for one partner to show that the bill was drawn in respect of a firm in which he had no interest (*o*).

Collateral evidence.

It seems to be a general rule, that no extrinsic evidence is admissible to vary the contract apparent on the bill; as to show that the defendant did not accept the bill upon his own private account, but upon that of his prin-

(*a*) *Gantt* v. *Mackenzie*, 3 Camp. 51.

(*b*) *Harrison* v. *Dickson*, 3 Camp. 52.

(*c*) *Doman* v. *Dibden*, 1 R & M. 381.

(*d*) *Reid* v. *Furnival*, 1 C. & M. 538.

(*e*) Yet if an executor declare on a bill or note payable to his testator, laying a promise to him, the promise may still be denied by *non assumpsit*. *Timmins* v. *Platt*, 2 M. & M. 720.

(*f*) It is a good defence to show that the plaintiff, who sues on a bill accepted by a company, is himself a member of that company. *Neale* v. *Turtonville*, Bingh. 149. In an action by an indorsee against acceptor, to prove the forgery by the drawer of the acceptance, the same evidence only is admissible as would have been so in the case of an indictment for forgery. *Griffiths* v. *Payne*, 3 P. & D. 107.

(*g*) An alteration of a bill of exchange after acceptance may be taken advantage of under a plea that the defendant did not accept the bill. *Cock* v. *Coxwell*, 2 C. M. & R. 291. See as to alterations, the cases cited below, in reference to the proper stamp on a bill or note.

(*h*) Carth. 160. *Ingledew* v. *Douglas*, 2 Starkie's C. 36.

(*i*) 1 East, 432.

(*k*) 4 Esp. C. 187. Per Ld. Harkwicke, *Haly* v. *Lane*, 2 Atk. 181, 2.

(*l*) 2 Atk. 181, 2.

(*m*) *Mainwaring* v. *Newman*, 2 B. & P. 120. Note, the objection was taken in this case by special demurrer, vide *supra*, note (*f*).

(*n*) *Pinkney* v. *Hall*, Salk. 126, vide *supra*, 205.

(*o*) *Baker* v. *Charlton*, Peake, S. C. 80.

cipal (*p*); or, that at the time of making the note, the plaintiff had agreed to take a renewal of the note in lieu of payment (*q*).

The acceptor cannot give in evidence a parol understanding that the drawer was not to demand payment on the bill in case he could reimburse himself out of other funds (*r*). So the plaintiff cannot be permitted to prove in excuse for not giving notice of dishonour, a parol agreement that the amount was not to be demanded until the estates of the drawer (for whose benefit the bill had been given) had been sold (*s*).

Want of consideration*.

A bill of exchange or promissory note expressed to be for value received is presumed to have been made upon a good consideration (*t*); but the failure of consideration may sometimes be proved as a defence against the payee of a bill although it would be no defence against a *bonâ fide* indorsee for value (*u*). As between the original parties to the bill, the *total failure* of consideration may be set up as a defence (*x*). It may be shown, that the

(*p*) Str. 955; Cas. T. Hardw. 1.

(*q*) *Hoare* v. *Graham*, 3 Camp. 57. See *Snowball* v. *Vicars*, Bunb. 175; *Moller* v. *Living*, 4 Taunt. 102. *infra*, tit. PAROL EVIDENCE.

(*r*) *Campbell* v. *Hodgson*, 1 Gow. 74.

(*s*) *Free* v. *Hawkins*, 1 Moore, 535; and see *Hoare* v. *Graham*, 3 Camp. 535; 4 Taunt. 731.

(*t*) The presumption of consideration may be rebutted by evidence. Where a note expressed to be for value received was given to a boy only nine years old, whose father was living, the donor being in a state of imbecility, and not far from his death, it was a question for the jury whether it was given upon any *legal* consideration. Gratitude to the father, or affection to the son, is not, it seems, a sufficient consideration, and such a note is not good as a *donatio mortis causâ*. *Holliday* v. *Atkinson*, 5 B. & C. 501. A cross-acceptance, with an exchange of securities, is a good consideration for a note. 1 Camp. 179; 3 East, 72; Co. B. L. 178, 510; Bayley, O. B. 205. *Cowley* v. *Dunlop*, 7 T. R. 571; and see *Buckler* v. *Buttivant*, 3 East, 72; *Ex parte Walker*, 4 Ves. 373.

(*u*) 2 T. R. 71; Com. 43. *Morris* v. *Lee*, Bayley on Bills, 397. *Snelling* v. *Brigge*, B. N. P. 274. *Puget de Bras* v. *Forbes*, 1 Esp. C. 117, Where, by the course of trade a bill was to be given by the drawer before the consideration was paid, and before payment the payee's agent became bankrupt, it was held that the payee could not recover against the drawer. Ibid. and see 1 Str. 674.

(*x*) 7 T. R. 121. Even although the defendant has promised to pay the bill, if no proof of payment be given within a specific time which is elapsed. *Elmes* v. *Wills*, 1 H. B. 64. Where the defendant accepted bills for goods supplied on a contract "to be of good quality and moderate price," held that it was no answer to the action on the bills that the goods turned out to be of inferior quality, and that the defendant had paid to the plaintiff much beyond what they sold for; in an action for the price, the value only can be recovered; but in an action upon the security, the party holding it is entitled to recover, unless there has been a total failure of consideration. *Obbard* v. *Beetham*, 1 M. & M. 483. Even the forcible re-taking of goods, two months after the sale, is no defence to an action on a bill given for the price of goods. *Stephens* v. *Wilkinson*, 2 B. & Ad. 320. So it is no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such estate had never been conveyed. *Spiller* v. *Westlake*, 2 B. & Ad. 155. Held also, Parke, J. *dissentiente*, that in all cases where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. *Heath* v. *Sansom & Evans*, 2 B. & Ad. 291. In *assumpsit* on a bill accepted by the defendant, plea, stating a contract for certain work and payment in part by money, and the residue by the bill, averring the insufficiency of the work done, and that the money paid exceeded the value thereof; held, on motion for judgment *non obstante vered.* that the plea was bad, as showing only a partial failure of consideration for the money and the bill, alike applicable to both. *Trickey* v. *Larne*, 6 M. & W. 278; 8 Dowl. (P. C.) 174.

As to notice that the party relies on this defence, vide *supra*, 221.

Want of consideration.

contract on which the bill was given is *wholly* rescinded, where it is entire; or, that it has been *partially* rescinded, where it consists of divisible parts (*y*).

Where a note was given by the defendant as an apprentice fee with his son, and the indentures were void for want of a stamp under the statute 8 Anne, it was held that the plaintiff could not recover, although he had maintained the defendant's son for a time (*z*); and in some cases, as between the original parties, the defendant may show what consideration was really given for the bill, and the plaintiff cannot recover more (*a*).

Where the defendant accepted a bill in consideration of partnership, and broke off the treaty, it was held that the plaintiff could recover no more than compensated the injury actually sustained (*b*). In order, however, to reduce the demand, the acceptor must prove a failure to a certain liquidated amount. It is now completely settled, that a partial failure which may be the subject of an action for unliquidated damages, and which leaves the whole of the contract still open and unrescinded, cannot be inquired into in an action on the bill or note (*c*), as, that the goods delivered are of bad quality (*d*); and in general, a party who has given a bill of exchange for the amount of a tradesman's bill, is precluded from the disputing the reasonableness of the charges (*e*).

Where the defendant having possession of the premises, gave a bill as a consideration for a lease, which the plaintiff refused to execute, it was held that the refusal constituted no defence to the action (*f*); but where a *partial* failure arises from fraud it is a defence to the action (*g*). Thus, where the bill is given for the price of goods fraudulently sold under a warranty, the breach of warranty is a bar to an action on the bill, if the defendant has tendered back the goods (*h*).

The failure of consideration is no defence against an indorsee for value (*i*); neither is it any defence against a *bonâ fide* indorsee for value, that the bill was an accommodation bill, and that he knew it to be such (*k*).

(*y*) Bayley on Bills, 236. *Barber* v. *Backhouse*, Peake's C. 61; where, in an action by the payee against the acceptor of a bill, the defendant paid part of the money into court, and proved that there was no consideration for the residue, the jury, under the direction of Lord Kenyon, found for the defendant.

(*z*) 7 T. R. 121.

(*a*) *Darnell* v. *Williams*, 2 Starkie's C. 166. And see *Wiffen* v. *Roberts*, 1 Esp. C. 261. He may show that it was accepted for value as to part, and as an accommodation bill as to the residue. 2 Starkie's C. 166.

(*b*) Peake's C. 216.

(*c*) *Morgan* v. *Richardson*, 1 Camp. R. 40, n.; 2 Camp. R. 346. *Fleming* v. *Simpson*, 1 Camp. R. 40, n. *Moggridge* v. *Jones*, 14 East, 486; 3 Camp. C. 38; Bayley, O. B. 235. *Day* v. *Nix*, 9 Moore, 159. See also *Gascoyne* v. *Smith*, 1 M. & Y. 338. Where the indorsee of a note for which the consideration was the transfer of a ship, was held to be entitled to recover, although the transfer was void for non-compliance with the Registry Acts, there being evidence to show that the defendant had been in possession for two years.

(*d*) *Morgan* v. *Richardson*, 7 East, 483; 3 Smith, 487; 1 Camp. 40; Camp. 346; 1 Esp. 159. *Moggridge* v. *Jones*, 3 Camp. 38; 14 East, 86. *Tyers* v. *Gwynne*, 2 Camp. 346.

(*e*) 1 Esp. C. 159. 201. *Solomon* v. *Turner*, 1 Starkie's C. 51.

(*f*) 3 Camp. 38; 14 East, 484. *Moggridge* v. *Jones*, 3 Camp. 38.

(*g*) 2 Taunt. 2. *Ledger* v. *Ewer*, Peake's C. 216. *Fleming* v. *Simpson*, 1 Camp. 40. *Secus*, where a purchaser who has given the bill in payment does not repudiate the contract. *Arnulf* v. *Bamford*, 3 Starkie's C. 175.

(*h*) *Lewis* v. *Clay*, 2 Taunt. 2. The jury found for the plaintiff; but the court granted a new trial, on the ground of fraud. And see *Solomon* v. *Turner*, 1 Starkie's C. 51.

(*i*) *Boehm* v. *Sterling*, 7 T. R. 423. Even although it was indorsed over after it was due, the drawers (the defendants) having issued it nine months after the date.

(*k*) *Smith* v. *Knox*, 3 Esp. 46. But it would be otherwise if he knew that the bill was drawn for a particular purpose, 3 Esp. 46. And see *Charles* v. *Marsden*, 1

Want of consideration.

It is no defence to an action by an indorsee against the acceptor, that the drawer of a bill, payable to his own order, had committed a secret act of bankruptcy, and that the assignees under the commission had withdrawn from the defendant a lease, pledged by the drawer to him as a security against the acceptance (*l*). If the indorsee knew that the bill was an accommodation bill, he can recover no more than the value he has paid; but if the bill was made upon a good consideration, he may recover the whole; and if he has not paid full value for it, he is a trustee for the indorser in respect of the surplus (*m*).

Where no consideration was given for the bill originally, or where it has been obtained by fraud or duress; it is, as has been seen, incumbent on the plaintiff to prove that he gave value for the bill (*n*). And though the bill was drawn on a good consideration, yet if it was afterwards lost or stolen, and afterwards came into the hands of an indorsee for value, yet it would be a good defence to show that he took it *malâ fides* with a knowledge of the circumstances; or even under circumstances which ought to have excited his suspicion as to the title of the party from whom he received it (*o*).

As the law presumes a bill to have been made on a good consideration, when the issue is joined on a replication that there was a consideration for the bill (*p*) to a plea that there was no consideration (*q*), the proof lies on the defendant (*r*). But where, to a general plea of no consideration, the plaintiff pleads some particular consideration, concluding with a verification which the defendant traverses, the plaintiff, by his form of pleading, takes, as it seems, the burthen of proof upon himself (*s*); unless, however, it thus appear from the form of pleading that the plaintiff meant to rely on the particular consideration alleged, and not simply to deny the truth of the plea, the proof of consideration will still, it seems, be incumbent on the defendant (*t*).

Action by an indorsee against the acceptor, plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give nor the defendant receive any consideration for his accepting or paying the bill, that the drawer indorsed to the plaintiff without any consideration, and that the plaintiff held the bill without consideration, and it was held that it was not incumbent on the plaintiff to begin and prove that he gave value for

Taunt. 224; *Fentum* v. *Pocock*, 5 Taunt. 193; and per Eldon, C. *Bank of Ireland* v. *Beresford*, 6 Dow, 237.

(*l*) *Arden* v. *Watkins*, 3 East, 317.

(*m*) *Wiffen* v. *Roberts*, 1 Esp. 261.

(*n*) *Supra*, 220.

(*o*) *Supra*, 1b. Co-executors cannot recover as *bonâ fide* holders for valuable consideration without notice, where one of them has notice though in a different capacity, that the bill was accepted for accommodation. —— v. *Adams*, 1 Younge, 117.

(*p*) Such a replication is good on special demurrer. *Prescott* v. *Long*, 1 Mo. & R. 382, (*n*).

(*q*) Such a plea is bad on special demurrer. *Stoughton* v. *Earl of Kilmorey*, 2 C. M. & R. 72; *Mills* v. *Oddy*, 1b. 103.

(*r*) *Lucy* v. *Forrester*, 2 C. M. & R. 59. *Batley* v. *Catterall*, 1 Mo. & R. 379 *Percival* v. *Framplin*, 2 C. M. & R. 180. In a similar case, *Morgan* v *Cresswell*, 1 Mo. & R 180, n, the plaintiff was nonsuited, but the court set aside the nonsuit. *Ib.*

(*s*) *Batley* v. *Catterall*, 1 Mo. & R. 379. In which case Alderson B. stated that he had so ruled in a previous case.

(*t*) *Lowe* v. *Burrows*, 1 Mo. & R. 381. 4 N. & M. 366. There, to a general plea of no consideration, the plaintiff replied that the defendant did receive consideration for the said acceptance, *videlicet* two cows sold and delivered by the plaintiff to the defendant, and concluded to the country. Ld. Denman held that proof of consideration lay on the defendant, the replication being in substance a traverse of the plea, the *videlicet* and conclusion to the country, showing that the words under the *videlicet* were not meant as introductory of new matter, and the Court refused a new trial.

the bill, but that it is otherwise when the title of the plaintiff is impeached on the ground of fraud, duress, or of the bills having been lost or stolen (*a*). In an action by an indorsee against the acceptor, it is not sufficient in order to prove no consideration, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, to enable the action to be brought by the indorsee, upon the understanding that the money should be divided between one of the indorsees and the drawer; the want of consideration between the defendant and the drawer must be proved (*x*). Want of consideration.

The declarations of a former holder are not evidence to prove want of consideration (*y*), unless the title of the plaintiff be identical with that of the party who made the declaration, as where he took the bill from him after it became due (*z*), or sues as agent of the declarant (*a*).

As against an original party to the bill or note, the defendant may give the *illegality* of the consideration in evidence in bar of the action (*b*). And so he may as against an indorsee who was privy to the illegal transaction (*c*). But no illegality between the original parties will affect an indorsee (except under the statutes against gaming and usury) (*d*), unless he had notice (*e*) of Illegality.

(*u*) *Mills* v. *Barber*, 1 M. & W. 425. In *Edwards* v. *Groves*, 2 M. & W. 642, which was an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration, replication, that the note was indorsed to the plaintiff without notice of the illegality, and for a good consideration, on which issue was joined, and it was held that the illegality was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration in the first instance, but that in order to do so, the defendant ought to have proved the illegality by evidence. Upon a traverse of the indorsement of an accommodation bill to the plaintiff after it was due, it is for the defendant to begin and show that the bill when indorsed was due. *Lewis* v. *Lady Parker*, 4 Add. & Ell. 838.

(*x*) *Whitaker* v. *Edmonds*, 1 Ad & Ell. 638, 1 Mo. & R. 366.

(*y*) *Smith* v. *De Wruntz*, Ry. & M. 212. *Shaw* v. *Broom*, 4 D. & R. 730. *Beauchamp* v. *Parry*, 1 B. & Ad. 89. *Barough* v. *White*, 4 B. & C. 325.

(*z*) See the observations of Parke, B. *infra*, 261, note (*y*), *Benson* v. *Marshall*, cited 4 D. & R. 732.

(*a*) *Benstead* v *Levy*, 1 B. & Ad. 89; 1 Mo. & R. 138

(*b*) As where the bill had been accepted in a smuggling transaction. 1 Camp. C. 383. A bill given to a creditor to induce him to sign a certificate of a bankrupt is void in whosesoever hands it may be, and whatever the consideration given by the holder; but if given merely to keep him from taking steps to oppose the bankrupt in obtaining it, it will be good in the hands of a holder for value without notice *Birch* v *Jarvis*, 3 C. & P 379. See Bankrupt Act, s 125 A bill given for a wager exceeding 10*l*, although on a legal horse-race, is nevertheless void, even in the hands of an innocent indorsee *Shillito* v. *Thode*, 7 Bing. 405. See 16 C. 2, c. 7. 1. 8. Where a bill was given by the acceptor to the drawer for "difference in consols," it was held that the Court could not say that it necessarily meant illegal differences; and even if paid, it was available in the hands of a *bonâ fide* indorsee without notice, *Day* v *Stuart*, 6 Bing. 109, and 3 M. & P. 384. So a bill drawn by the broker for stock-jobbing differences, paid by him for the defendant, is not absolutely void, and the amount may be recovered by an innocent indorsee. *Greenland* v. *Dyer*, 2 M. & Ry. 122. Where the bill was dated on a Sunday, the Court, in the absence of evidence, would not presume the acceptance to have been written on that day, and even if it had, such an act would not be an act of ordinary calling within the st 29 C 2. c 7. *Begbie* v. *Levy*, 1 Cr. & J 180. See Assumpsit.

(*c*) 1 Esp. C. 389; 2 Esp. C. 589.

(*d*) And now even such securities are (by st. 5 & 6 W 4, c. 41, s. 1) not to be void, but to be deemed to have been given for an illegal consideration.

(*e*) Doug. 632 *Wyatt* v. *Bulmer*, 2 Esp C. 389. *Strongitharm* v *Lukyn*, 1 Esp. C. 389. *Dagnall* v. *Wigley*, 11 East, 43, where a broker got the bill discounted for illegal brokerage An agreement between a petitioning creditor who has sued out a fiat in bankruptcy, and the bankrupt, for abandoning the prosecution, and the bankrupt's acceptance of a bill is void, *inter partes*. *Davis* v. *Holding*, 1 M. & M. 159. Where a statute prohibits a thing to be done, and does not expressly avoid the securities affected by the illegality, it is an

Illegality.

the illegality, or took the bill after it become due, from one who had notice (*f*). The question of *malâ fides* in such cases is usually a question of fact for the consideration of the jury (*g*).

Where a bill is given for the differences in a stock-jobbing transaction, an indorsee who is *privy* to the transaction cannot recover (*h*). Where the payee of such a bill indorsed it after it was due, it was held that the indorsee could not recover (*i*). Where part of the consideration is illegal, the bill is void for the whole (*k*).

Illegality of consideration.

In an action by an indorsee against the maker of a note, letters from the payee to the maker, proved to be contemporaneous with the making of the note, have been held to be evidence (*l*) to prove that it was illegal in its creation.

By the stat. 5 & 6 Will. 4, c. 41, s. 2, so much of the provisions of the stat. 16 Car. 2, c. 7; 9 Ann. c. 14 (*m*); 12 Ann. stat. 2, c. 16 (*n*); 45 Geo. 3, c. 72; 58 Geo. 3, c. 93 (*o*); 6 Geo. 4, c. 16, as enacts that any note, bill, or mortgage shall be absolutely void (in respect of gaming, usurious (*p*) and some other illegal transactions) is repealed, and every such note, bill, or mortgage is to be taken to have been made, drawn, accepted, given, or executed for an illegal consideration. An innocent holder of a bill accepted to secure a gaming debt might before the 5 & 6 Will. 4, c. 41, recover against the drawer or indorser; the construction of the stat. (9 Anne, c. 14) was, that such a security should not be used to enforce payment from the loser (*q*); but no illegality of this nature, after an indorsement in blank, will prejudice an innocent indorsee (*r*).

By 2 & 3 Vic. c. 37, bills and notes at less than 12 months' date, above 10 *l.*, are not to be affected by the usury laws (*s*).

available security unless the illegality appears on the face of the instrument, or unless the holder has notice. *Broughton* v. *Manchester Waterworks*, 3 B. & A. 10.

(*f*) Doug. 632.

(*g*) Per Lord Mansfield, Doug. 632. Although gross negligence be evidence of *mala fides*, it is not equivalent to it, and ought not to be left so to a jury. *Goodman* v. *Harvy*, 4 Ad. & Ell. 870. See *Crooke* v. *Jadis*, 6 C. & P. 191. *Foster* v. *Pearson*, 1 C. M. & R. 855. *Backhouse* v. *Harrison*, 3 Nev. & M. 388.

(*h*) *Steers* v. *Lashley*, 6 T. R. 61; 7 T. R. 630. Time bargains in foreign funds are not within the provisions of the stat. 7 G. 2, c. 28, nor are they illegal at common law. *Elsworth* v. *Cole*, 2 M. & W. 31.

(*i*) 7 T. R. 630. *Brown* v. *Turner*, 2 Esp. C. 631.

(*k*) 2 Burr. 1003. *Scott* v. *Gilmore*, 3 Taunt. 226. *Cruikshanks* v. *Rose*, 1 Mo. & R. 101.

(*l*) *Kent* v. *Bowen*, 1 Camp. 177. *Walsh* v. *Stockdale, cor.* Abbott, J. Guildhall Sitt. after Trin. Term, 1818.

(*m*) As to gaming securities.

(*n*) See tit. USURY. The mere negotiation of a bill by a broker at exorbitant brokerage, the broker advancing no money himself, and being no party to the bill, did not avoid the bill. *Dagnall* v. *Wigley*, 11 East, 43.

(*o*) This stat. enacted that no bill, &c. though the consideration was usurious, should be void in the hands of a *bonâ fide* indorsee who had paid value for it. It did not extend to one who took an usurious bill in payment of an antecedent debt, although without notice. *Vallance* v. *Siddel*, 6 Ad. & Ell. 932. But a *bonâ fide* indorsee might recover upon it. *Wyatt* v. *Campbell*, Chitty's Stat. 181, n. M. & M. 80.

(*p*) See *Lowe* v. *Waller*, Doug. 735. *Lowes* v. *Mazzaredo*, 1 Starkie's C. 385. *Chapman* v. *Black*, 2 B. & A. 589. *Parr* v. *Eliason*, 1 East, 92; *Daniel* v. *Cartony*, 1 Esp. C. 274.

(*q*) *Edwards* v. *Dick*, 4 B. & A. 212. In the case of *Bowyer* v. *Bampton*, (Str. 1155) the action was brought against the loser.

(*r*) See *Parr* v. *Eliason*, 3 Esp. 210; 1 East, 92. *Daniel* v. *Cartony*, 1 Esp. C. 274, *i. e.* if he does not by his declaration claim title through an usurious indorsement. See *Lowes* v. *Mazzaredo*, 1 Starkie's C. 385.

(*s*) The exemption by 58 Geo. 3, c. 93, of bills and notes given for usurious con-

Illegality of consideration.

It has been held, that as between the original parties to the bill, the plaintiff could not recover where the consideration was money lent to the defendant, to obtain the liberation of the parties, and the ransom of the defendant's ship, contrary to the stat. 45 Geo. 3, c. 72 (*x*); the sale of spirituous liquors in less quantities than 20*s.* value, although part of the consideration was also money lent (*y*); the executing a composition-deed, where the note or bill was given to secure a fraudulent preference over the other creditors (*z*); an illegal binding of an (*a*) apprentice for want of inserting the premium in the indentures (*b*).

A substituted bill, unless it be relieved from an illegality to which the original was liable, is open to the same objection, although it be given to a *bonâ fide* indorsee for value (*c*). But a security for no more than the principal and legal interest being substituted for an usurious bond or bill, is binding (*d*).

Where the *bonâ fide* indorsee of a bill delivered it up to the payee, who informed him that the acceptance was forged, and received in place of it a bill on the defendant, it was held that the plaintiff might recover on the latter bill, though accepted by the defendant without consideration, unless it could be proved that the plaintiff had compounded a felony (*e*).

A note given to officers of Excise for the amount of penalties in which the defendant had been convicted, the conduct of the officer having been sanctioned by the commissioners, was held to be legal (*f*); so was a note given by the defendant who had been convicted of a misdemeanor at the quarter sessions, for which the parish officers had been bound over to prosecute, under the 32 Geo. 3, c. 57, and which was considered by the court in adjusting the *quantum* of punishment (*g*). So where the note was given to procure the discharge of a receiver appointed by the Court of Chancery, in custody

sideration in the hands of innocent holders, was confined to the cases where such holders discount or *pay* a valuable consideration for such bills, and not where they receive them (although innocently) in satisfaction of an antecedent debt; the provisions of 3 & 4 Will. 4, c. 98, are not confined merely to bills drawn for a time certain, not having more than three months to run, but apply also to such as are payable on demand. *Vallance* v. *Siddel*, 6 Ad. & Ell. 932.

(*x*) *Webb* v. *Brooke*, 3 Taunt. 6.

(*y*) *Scott* v. *Gillmore*, 3 Taunt. 226. See *Witham* v. *Lee*, 4 Esp. 264.

(*z*) *Cockshott* v. *Bennett*, 2 T. R. 763. Recognized by Ld. Ellendorough in *Steinman* v. *Magnus*, 11 East, 390. *Middleton* v. *Lord Onslow*, 1 P. Wms. 768. *Jackson* v. *Lomas*, 4 T. R. 166. So if the stipulation were not for a larger sum, but for better security. *Leicester* v. *Rose*, 4 East, 372.

(*a*) Although the plaintiff had maintained the apprentice till he absconded. The stat. 8 Ann. c. 9, avoids such indentures. (*Jackson* v. *Warwick*, 7 T. R. 121.) *Aliter*, if the indentures be merely voidable, the binding being for less than seven years. *Grant* v. *Welchman*, 16 East, 207.

(*b*) For other instances, see above, 49. 71. It seems to have been held, in some cases, that a bill or note might be enforced which had been substituted for a bill, or given as a security for a debt which could not have been enforced. See *Witham* v. *Lee*, 4 Esp. C. 264; 3 Camp. 9, n. where the bill had been given for liquors contrary to 24 Geo. 2, c. 40, s. 12. But see 2 B. & P. 375. Although a bill drawn abroad in favour of an alien enemy cannot be enforced, it will be a good consideration for a subsequent promise in time of peace. *Duhammel* v. *Pickering*, 2 Starkie's C. 90. And see *Antoine* v. *Morshead*, 6 Taunt. 237.

(*c*) *Chapman* v. *Black*, 2 B. & A. 588.

(*d*) *Barnes* v. *Hedley*, 2 Taunt. 184. *Wicks* v *Gogerly*, R. & M. 123. *Preston* v. *Jackson*, 2 Starkie's C. 238. So if where part of the consideration being illegal, and part legal, two securities are substituted, and the giver manifest his election to ascribe the illegal claim to one he will be liable on the other. *Habrey* v. *Richardson*; *Bayley on Bills*, 59.

(*e*) *Wallace* v. *Hardacre*, 1 Camp. 45. And see *Harding* v. *Cooper*, 1 Starkie's C. 467.

(*f*) *Pilkington* v. *Green*, 2 B. & P. 151. See also *Sugars* v. *Brinkworth*, 4 Camp. 46.

(*g*) *Beeley* v. *Wingfield*, 11 East, 46; 2 Wils. 341; 2 Esp. C. 643; 5 East, 294.

Illegality of consideration.

under the warrant of a Chancellor for not accounting, being for the amount of the debt and costs (*h*). So where the note was given by a friend of a debtor, to secure 5*s.* in the pound, in consideration that the plaintiff would sue out a commission of bankrupt against the debtor (*i*). But as between the original parties to the bill, it is a defence to show that it was procured by fraud (*k*); and such a defence is also available against any indorsee with notice of the fraud (*l*); but not against a *bonâ fide* indorsee for value (*m*).

An agreement to forego a prosecution for a misdemeanor is illegal (*n*). But the plaintiff may recover on a bill given by the defendant for the costs of a civil suit, although the plaintiff has also instituted a prosecution against the defendant which is afterwards abandoned, unless it be distinctly proved that the abandonment was part of the consideration for the bill (*o*).

A declaration by an indorser, not proved to be the agent of the plaintiff, is inadmissable to prove usury (*p*).

Fraud.

If the consideration involve a fraud upon a third person, the plaintiff cannot recover. *A.* as a friend of the defendant agreed to give the plaintiff 70 *l.* for certain goods on account of the defendant; a note given by the defendant to the plaintiff without the knowledge of *A.* to secure an additional sum cannot be enforced (*q*).

Want of title in plaintiff.

The defendant may also prove in bar the want of title in the plaintiff; as, that one of the parties through whom the plaintiff claims had no legal right or authority to transfer the bill. In an action by the indorsee of a bill against the acceptor, the latter may prove the bankruptcy of the payee previous to the indorsement (*r*).

In an action by the indorsee against the drawer, a plea alleging that the plaintiff was never a *bonâ fide* holder for a good consideration does not admit proof of *fraud*, the *mala fides* not being sufficiently alleged (*s*).

Satisfaction.

The defendant may, under the proper issue, give evidence to show that the bill has been discharged by *payment* or other satisfaction (*t*), or by the *assent* or *laches* of the holder (*u*).

(*h*) *Brett* v. *Close*, 16 East, 203. Although only one of the parties to the suit assented to the discharge.

(*i*) *Fry* v. *Malcolm*, 5 Taunt. 117. *Bryant* v. *Christie*, 1 Starkie's C. 329.

(*k*) *Ledger* v. *Ewer*, Peake, 216; 2 Taunt. 24.

(*l*) *Ibid.*

(*m*) *Ibid.* See 13 East, 182. *Williams* v. *Thomas*, 6 Esp. C. 16.

(*n*) *Harding* v. *Cooper*, 1 Starkie's C. 467. In *Collins* v. *Blantern*, 2 Wils. 341, it was held that the compounding an indictment for perjury was a great offence, and that whether it was between the parties to the action (on a bond) or strangers, was immaterial.

(*o*) *Ibid.*

(*p*) *Bassett* v. *Dodgin*, 10 Bing. 40. To establish such a defence usury must be distinctly proved. *Ib.*

(*q*) *Jackson* v. *Duchaire*, 3 T. R. 551. On issue taken on a plea of no consideration (which is demurable) the defendant may shew that the bill was void *ab initio* for fraud. *Mills* v. *Oddy*, 2 C. M. & R. 103.

(*r*) 2 Esp. C. 611; 3 East, 322. But a bill payable to the order of the drawer, and accepted for his accommodation, does not pass to the assignees; and therefore an indorsement for value after the bankruptcy gives a right of action. *Watson* v. *Hardacre*, 1 Camp. 46. 173; 3 East, 321; 12 East, 656. See above, title by transfer.

(*s*) *Utber* v. *Rich*, 2 P. & D. 579. Where in trover for a bill the defendant pleaded that the plaintiff indorsed it in blank, and that the party who became the holder pledged it with the defendant as a security for a debt; replication, that at the time the defendant received it, he knew that the party had no authority to pledge it; held good. *Hilton* v. *Swan*, 5 Bing. N. C. 413.

(*t*) In *assumpsit* by holder against a prior indorsee of a note; plea, that the

(*u*) Where a promissory note has been received in satisfaction of a bill sued upon, a replication of the non-payment of the note, is no answer to the plea. *Sard* v. *Rhodes*, 1 M. & W. 153. See note (*l*). *post.*

Satisfaction.

The acceptor may prove in bar that the holder has received satisfaction from the drawer (*x*); after payment by the drawer (who is not also the payee), the bill is no longer negotiable (*y*); and if a bill be paid, and re-issued after maturity, the holder cannot recover (*z*); but a promissory note paid and re-issued before maturity is available in the hands of a *bonâ fide* holder, without notice (*a*). If the drawer, who is also payee of a bill, take it up, he may indorse it over after it is due, without a fresh stamp (*b*); but it is otherwise where the bill is made payable to a third person (*c*). After twenty years, it is to be presumed that a promissory note or bill of exchange has been satisfied (*d*); and such a presumption may be left to a jury after the lapse of a much shorter period, although the Statute of Limitations has not been pleaded. The holder of a bill gives in a blank schedule under an insolvent act: this is not conclusive evidence to discharge the acceptor (*e*). Satisfaction to one of two parties is satisfaction to both (*f*). The payment of part by the acceptor to the payee, cannot be set up as a defence by the acceptor against an indorsee, without notice (*g*). The holder may sue a prior indorser, although he has taken in execution and discharged a subsequent one (*h*); and an acceptor sued by the holder, and discharged under an insolvent act, is still liable to the drawer (*i*).

Where a defendant gave his acceptance as a security for the acceptances of a third person, but allowed his own acceptance to remain, knowing that the former acceptances had been paid by means of fresh acceptances, it was held that it must be presumed that he allowed his acceptance to remain as a security for such fresh acceptances (*k*).

A composition with the acceptor, and the taking a third person's note as a security for the composition-money, operate as a satisfaction of the bill (*l*).

note was drawn for a debt, and indorsed by the defendant expressly as a security for the debt, and that such debt had been paid and the note delivered back to the party ultimately liable; held, on general demurrer, that the facts stated in the plea sufficiently showed that the note had been satisfied, and by the Stamp Act no longer negotiable. *Bartrum* v. *Caddy*, 1 P. & D. 207. And see *Freakley* v. *Fox*, 9 B. & C. 130; and *Thorogood* v. *Clarke*, 2 Starkie's C. 251. No presumption will, it seems, be drawn as to payment or satisfaction of a bill from the mere lapse of 20 years, unless the Statute of Limitations be pleaded. *Du Belloiz* v. *Lord Waterpark*, 1 D. & R. 17.

(*x*) 12 East, 317; 1 H. B. 89, n. Either wholly or in part, for the holder can recover the residue only from the acceptor. *Bacon* v. *Searles*, 1 H. B. 88. *Pearson* v. *Dunlop*, Cowp. 571.

(*y*) *Beck* v. *Robley*, 1 H. B. 89. But see the explanation of this doctrine in *Callow* v. *Lawrence*, 3 M. & S. 95.

(*z*) 3 Camp. 194. As to re-issuing notes, see 48 Geo. 3, c. 149, s. 13.

(*a*) 3 Camp. 149. *Beck* v. *Robley*, 1 H. B. 89; Bayley, O. B. 66.

(*b*) *Callow* v. *Lawrence*, 3 M. & S. 95.

(*c*) *Beck* v. *Robley*, 1 H. B. 89, n.

(*d*) *Duffield* v. *Creed*, 5 Esp. C. 52.

(*e*) 3 Camp. 13.

(*f*) *Jacaud* v. *French*, 12 East, 317. *Ellison* v. *Dezell*, 1 Sel. N. P. 172.

(*g*) *Cooper* v. *Davies*, 1 Esp. 463; 1 Camp. 35; Doug. 235. But see 2 Camp. 185. Although the holder has taken security from another party, or discharged him out of execution. 3 Esp. 46; 2 Bl. 1235; 2 B. & P. 62. *A.* makes a note in favour of *B.* without consideration, which *B.* indorses to *C.*, with notice: *B.* becomes bankrupt, *C.* takes a dividend under the commission, and covenants not to sue *B.*; *A.* is still liable on the note (*Mullett* v. *Thomson*, 5 Esp. C. 178,) *sed quære*, for the discharge of the principal discharges the surety.

(*h*) *Hayling* v. *Mulhall*, 2 Bl. R. 1523. *English* v. *Darley*, 2 B. & P. 62. So he may sue the drawer, after having taken the acceptor in execution, who has been discharged under the Lords Act. *Macdonald* v. *Bovington*, 4 T. R. 825. And the drawer may still recover from the acceptor, for the being taken in execution is no satisfaction as between the drawer and acceptor. *Ibid*; and see 12 East, 317.

(*i*) 4 T. R. 825; 2 B. & P. 61.

(*k*) *Woodroffe* v. *Hayne*, 1 Carr. & P. 600.

(*l*) *Lewis* v. *Jones*, 4 B. & C. 513. *Perfect* v. *Musgrave*, 6 Price, 111.

The taking the separate notes of one of three partners after a dissolution of partnership, under an agreement by deed with one partner, the holder strictly reserving his right as against all three, and retaining possession of the bills, does not, in the event of the new bills turning out to be unproductive, exclude the holder from his remedy against the other partners (*m*), although the separate bills have been from time to time renewed.

In *assumpsit* by the indorsee against maker; the plea alleged the making of a former note for the accommodation of the drawer and indorsement to the plaintiff, and that the indorsement of the note in the declaration was made and given to take up the former note, and had been paid; held, that the former allegation was surplusage, and that the defendant was not bound to produce the former note, nor give any evidence in support of that allegation (*n*).

Release. Where in *assumpsit* against the maker of a joint and several note, the defendant pleaded a release to one of the joint makers, replication, that the release was given at the defendant's request, and in consideration thereof the defendant promised to pay as if no release had been given, held bad, as setting up a parol contract to avoid the release (*o*).

Prior parties are not discharged by a release to subsequent parties (*p*). It will be seen that an acceptor cannot be discharged without proof of express assent by the holder (*q*).

Where a bill has been renewed, and a warrant of attorney given to enter up judgment, the new security is no defence, unless judgment has been entered up (*r*); and it is no defence to an action on the first bill that the second is outstanding (*s*).

The acceptor who has paid the amount under a forged indorsement is still liable to the supposed indorser (*t*). A tender of the amount after the day of payment is not available (*u*).

Discharge by laches. It has been seen, that where the action is brought against a drawer or indorser of a bill, it is incumbent on the plaintiff to prove that due diligence has been used in making presentment of the bill and giving notice of default. But an acceptor is not discharged by the neglect of the holder to present the bill (*x*).

Where a party accepted a bill payable at his bankers, it was held that he was not discharged by the neglect of the holder to present it for several months after it had become due, although the bankers had funds of the acceptor in their hands, and in the meantime became bankrupts (*y*).

Giving time, &c. The giving time to the principal (*z*) in general discharges the surety;

(*m*) *Bedford* v. *Deakin*, 2 B. & A. 210.

(*n*) *Shearm* v. *Burnard*, 2 P. & D. 365. And see further as to surplusage, *Fitzgerald* v. *Williams*, 6 Bing. N. C. 60.

(*o*) *Brooks* v. *Stuart*, 1 P. & D. 615; 10 Ad. & Ell. 854.

(*p*) *Smith* v. *Knox*, 3 Esp. C. 46; 2 Bl. 1235. *Carstairs* v. *Rolleston*, 5 Taunt. 551; 1 Marsh. 207, where it was held, on demurrer, that a release by the holder to the payee of an accommodation note did not discharge the maker, the holder not having notice of the want of consideration.

(*q*) Vide *infra*, 252.

(*r*) *Norris* v. *Aylett*, 2 Camp. 329; 3 East, 251.

(*s*) 3 East, 251; 5 T. R. 513.

(*t*) *Cheap* v. *Harley*, 3 T. R. 127. *Smith* v. *Sheppard*, Sel. Cas. 243.

(*u*) *Hume* v. *Peploe*, 8 East, 168; 5 Ves. 350.

(*x*) *Farquhar* v. *Southey*, 1 M. & M. 14.

(*y*) *Sebag* v. *Abitbol*, 1 Starkie's C. 70.

(*z*) The principle as to indorsees is, that if the holder give time to a prior indorser, and then sue a subsequent one, he in effect breaks his faith with the former. Per Ld. Eldon, *English* v. *Darley*, 2 B. & P. 61. But it seems that the time must be given in such a way as to preclude the party who gives it from suing for that time. Time given to a subsequent indorser does not discharge a prior indorser. Giving time to the acceptor after judgment against

hence it is a good defence by a drawer or indorser of a bill to show that the holder has given time to the acceptor of a bill or maker of a note (*a*), or has compounded with him (*b*), or has taken a renewed bill from him (although the indorser afterwards approve of it) (*c*), or any other security (*d*); but if the drawer or indorser consent to this, he is not discharged (*e*), and consequently evidence of assent may be adduced in reply to such evidence on the part of the defendant (*f*). Evidence of the mere forbearance to sue the acceptor is not sufficient (*g*). Where a party on the face of a note is liable as a principal, it is not competent to him to prove his liability only as surety (*h*). Giving time, &c.

him does not discharge the drawer. *Pole* v. *Ford*, 2 Ch. 125. Where the acceptor gave a second bill after the dishonour of the first, it was held to be a mere collateral security which did not discharge the drawer. *Pring* v. *Clarkson*, 1 B. &. C. 14; 2 D. & R. 78.

(*a*) 3 B. & P. 366; 2 Ves. jun. 540. *Nisbet* v. *Smith*, 2 Bro. C. C. 579; 2 B. & P. 61. *Ex parte Smith*, 3 Bro. C. C. 1. *Tindal* v. *Brown*, 1 T. R. 107; 2 T. R. 186. Even although the drawer had no effects in the hands of the acceptor. *Gould* v. *Robson*, 8 East, 567. Where time is given to the principal without communication with the surety, the latter is discharged, the creditor has made a new contract. See *Boultbee* v. *Stubbs*, 18 Ves. 20. Forbearance to sue the acceptor after protest and notice does not discharge the drawer. *Walwyn* v. *St. Quintin*, 1 B. & P. 652. *Aliter*, if the forbearance be before protest, or if the holder take security from the acceptor after protest. *Ibid.* A conditional agreement to give time to the acceptor on his paying part, which condition is not fully performed, does not discharge the indorsees. *Badnall* v. *Samuel*, 4 Price, 174. A bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, without any communication with him respecting the first; the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill *was merely a collateral security*, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. *Pring* v. *Clarkson*, 1 B. & C. 14. See also *Adams* v. *Bingley*, 1 M. & W. 192. The taking a cognovit from the acceptor, by which the time of obtaining judgment against him is not deferred, will not discharge the drawer. *Jay* v. *Warren*, 1 C. & P. 532. *Price* v. *Edmonds*, 10 B. & C. 579. *Lee* v. *Levi*, 4 B. & C. 390.

(*b*) *Ex parte Smith*, Co. B. L. 6th edit. 168; 3 B. C. C. 1.

(*c*) 2 Camp. 179. And see *Gould* v. *Robson*, 8 East, 576. There the holder, after taking part payment from the acceptor, took another acceptance, payable at a future date; it was agreed that the holder should keep the original bill as a security, but the indorser, who was no party to the agreement, was held to be discharged. See also *English* v. *Darley*, 2 B. & P. 61. *Hull* v. *Pitfield*, 1 Wils. 48. *Dillon* v. *Rimmer*, 1 Bing. 100. *Kendrick* v. *Lomax*, 2 C. & J. 405. Where on the defendant's asking for time on an acceptance, he gave another bill for the same amount, the plaintiff telling him that something was due for interest, and continuing to hold the first bill, the second being paid when due, it was held that the plaintiff was entitled to recover interest on the first bill. *Lumley* v. *Musgrove*, 4 Bing. 9.

(*d*) 2 B. & P. 60, per Ld. Eldon. But where an indorsee commenced actions against the acceptor and indorser, and without the privity of the latter took from the acceptor a warrant of attorney for debt and costs, it was held, that as the fact could not have been pleaded generally in bar, it was inadmissible under the general issue. *Lee* v. *Levi*, 4 B. & C. 390; 6 D. & R. 475.

(*e*) *Clarke* v. *Devlin*, 3 B. & P. 363. And see *Withall* v. *Masterman*, 2 Camp. 178. So in case of a promise to pay the bill after notice that time has been given. *Stevens* v. *Lynch*, 12 East, 38.

(*f*) 1 B. & P. 419; 10 East. 34; 11 Ves. jun. 411; 8 East, 576; 2 Esp. C. 515; 1 B. & P. 652; *supra*, note (*e*).

(*g*) *Walwyn* v. *St. Quintin*, 1 B. & P. 652. *English* v. *Darley*, 2 B. & P. 62, 3 Price, 533.

(*h*) *Price* v. *Edmunds*, 10 B. & C. 578. And see *Fentum* v. *Pococke*, 5 Taunt. 192. *Raygit* v. *Axmore*, 4 Taunt. 730. *Kerrison* v. *Cooke*, 3 Camp. 362. The case of *Laxton* v. *Peat*, 2 Camp. 185, in which Lord Ellenborough ruled that in the case of a bill for the accommodation of the drawer, a holder, knowing the fact, who gave time to the drawer, discharged the acceptor, seems therefore to have been over-ruled. And see *Harrison* v. *Courtald*, 3 B. & Ad. 36. *Nicholls* v. *Norris*, *Ib.* 41. The drawer is not discharged by giving time to an accommodation acceptor, *Collott* v. *Haigh*, 3 Camp. 281. Nor by

Waver.

An acceptance is *primâ facie* evidence of the acceptor's having in his hands effects of the drawer sufficient to answer the amount of the bill; he is the principal debtor, and primarily liable to all parties, and cannot be discharged but by express agreement (*i*).

A complete acceptance may, in some instances, be waved by an *express* agreement to consider the acceptance at an end. *Walpole*, being the holder of a bill accepted by *Pulteney*, agreed to consider his acceptance as at an end, and wrote in his bill-book, "Mr. *Pulteney's* acceptance at an end." *Walpole* kept the bill three years without calling upon *Pulteney*, and then brought his action; the jury found for the plaintiff, but the Court of Exchequer granted a new trial, and the jury then found for the defendant (*k*).

The indorsees of a bill knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer, from the produce of which they expected payment, said, at a meeting of the acceptor's creditors, that they looked to the drawer, and should not come upon the acceptors, in consequence of which the latter assigned their property for the benefit of their creditors, and paid them 15*s.* in the pound. The drawer's goods turned out to be of little value, and the indorsees sued the acceptors; and Lord Ellenborough said, that if the plaintiffs' language amounted to an unconditional renunciation of all claim upon the acceptors, the latter were discharged; if only to a conditional promise not to resort to the acceptors, if they were satisfied elsewhere, they were not discharged; and the jury found for the plaintiffs (*l*).

Black arrested *Peele* as acceptor of a bill drawn by *Dallas*, but his attorney, on finding that the bill was for the accommodation of *Dallas*, took a security from *Dallas*, and sent word to *Peele*, that he had settled with *Dallas*, and that he (*Peele*) need give himself no farther trouble; *Dallas* became bankrupt, and *Black* sued *Peele*; but it was held, that as *Black* had in express words discharged *Peele* no action could be maintained (*m*). It is, however, to be observed, that a mere agreement, without proof of consideration, not to sue the acceptor, will not discharge him unless he be a surety for the drawer (*n*). But a verbal agreement by the indorsee at the time of the indorsement to him, that he should sue the acceptor only, was held to be a good bar to an action brought against the party by the indorsee (*o*).

The defendant may show that the plaintiff has received the whole of the consideration for the defendant's acceptance of the bill, for that is a waver of the acceptance in point of law (*p*); as, where the whole of the consideration was the consignment of goods to the defendant, and the policy of insurance upon them, and the plaintiff, the holder of the bill, signed a memorandum, stating that the defendant had refused to accept the bill, and

giving time to the acceptor where the latter is the agent of the drawer. *Clarke v. Noel*, 3 Camp. 411.

(*i*) *Vere* v. *Lewis*, 3 T. R. 182.

(*k*) *Walpole* v. *Pulteney*, cited Doug. 236, 237. 248, 249.

(*l*) *Whatly* v. *Tricker*, 1 Camp. 35.

(*m*) *Black* v. *Peele*, cited Doug. 236; see also, *Mason* v. *Hunt*, Doug. 284. 297. and *Dingwall* v. *Dunster*, Doug. 235. 247. *A. & Co.* having accepted a bill for *B.*'s accommodation, paid it into the hands of his banker without notice, who retained it in his possession several years, charging interest, but never debiting him with the amount of the bill. During this time they became bankers to *A. & Co.* but gave them no notice. The balance of *B.*'s account was always against him, that of *A. & Co.* in their favour, but seldom to the amount to the bill. Held that *A. & Co.* were not discharged unless the jury could infer an express agreement to discharge, or an express renunciation. *Farquhar* v. *Southey*, 1 M. & M. 14.

(*n*) *Parker* v. *Leigh*, 2 Starkie's C. 228. It was so held in *Wilson* v. *Smith*, on demurrer, K. B. Trin. T. 58 Geo. 3.

(*o*) *Pike* v *Strut*, 1 M. & M. 226.

(*p*) Doug. 284. 297; Bay. 91.

that he the plaintiff accepted the bill of lading and policy, and undertook to apply the proceeds in payment of the bill (*q*). Waver.

If the holder of the bill receive part of the money from the drawer, and take a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it is for the jury to say whether this is not a waver of the acceptance; but it is said, that it ought to be left to them with strong observations to show that it is (*r*). No neglect to call on the acceptor, or indulgence given to the other parties, will be evidence of a waver, so as to discharge the acceptor (*s*).

The acceptor of a bill for the accommodation of the drawer is not discharged by giving time to the drawer (*t*).

The payee and holder of a promissory note appointed the maker his executor; and is was held that it was a discharge of the note, and that an indorsement could not give a third person the right of action (*u*).

It is no defence that the indorsement was made after an action had been commenced by the indorser (*x*). Indorsement after due.

The defendant, by proof that the bill was indorsed to the plaintiff after it became due, places the plaintiff in the situation of the indorser, and may give any evidence in bar of the plaintiff's claim which would have defeated that of the indorser (*y*); and therefore, an indorsee for value by the payee, after the bill has become due, cannot recover against the acceptor of an accommodation bill (*z*); but if the holder before the bill became due, could have recovered, so also may the indorsee of the bill indorsed after it has become due (*a*). But if the drawer of a cheque issue it long after the date, a *bonâ fide* holder for value without notice may recover against the drawer, although the consideration for which the drawer delivered the bill has failed (*b*).

(*q*) *Mason* v. *Hunt*, Doug. 284.

(*r*) *Eliis* v. *Galindo*, B. R. Mich. 24 Geo. 3, cited Doug. 270; Bayley, O. B. 91, *quære*.

(*s*) *Dingwall* v. *Dunster*, Doug. 247; and see note (*m*), *ante*.

(*t*) *Raggit* v. *Axmore*, 4 Taunt. 730. And the taking a *cognovit* for payment by instalments, from the drawer of a bill accepted for his accommodation does not discharge the acceptor although the holder knew that it was an accommodation bill. *Fentum* v. *Pocock*, 5 Taunt. 192; and see *Bank of Ireland* v. *Beresford & others*, 6 Dow. 237; *Harrison* v. *Courtald*, 3 B. & Ad. 36; *Nicholls* v. *Norris*, ib. 41. See, on the contrary, *Laxton* v. *Peat*, 2 Camp. C. 185. *Collott* v. *Haigh*, 3 Camp. C. 281. *Hill* v. *Read*, 1 D. & R. (N. P. C.) 26. Where a bill was accepted for the accommodation of the drawer, and time was given to the acceptor, it was held that the drawer was not discharged. *Kerrison* v. *Cooke*, 3 Camp. C. 362.

(*u*) *Freakley* v. *Fox*, 9 B. & C. 130. And see *Wankford* v. *Wankford*, 1 Salk. 299; *Cheetham* v. *Ward*, 1 B. & P. 630.

(*x*) *Columbies* v. *Slim*, 2 Ch. Ca. T. M. 637; yet *qu.* if the indorsee took the bill with knowledge of the fact.

(*y*) 3 T. R. 80, and in note; 7 T. R. 431. *Good* v. *Coe*, cited in *Boehm* v. *Sterling*, 7 T. R. 427; 7 T. R. 630.

(*z*) 1 Camp. 19. *Charles* v. *Marsden*, 1 Taunt. 224.

(*a*) 1 Camp 383. But the taker of a banker's cheque for value nine months after the date, does not take it charged with the equity with which it was charged in the hands of the person from whom he received it, if he took it for value and without notice. *Boehm* v. *Sterling*, 2 Esp. C. 575; 7 T. R. 423. *Morris* v. *Lee*, Bayley on Bills, 4; 1 Taunt. 224; 3 Burr. 1516. Where the defendant gave to the husband a note payable to the wife, or order, which the husband, after it was due, indorsed to the plaintiff, held, first, that as the husband had a right to treat it as separate property, and had done so by indorsing it, no set off could be maintained by the maker in respect of a debt due by the wife *dum sola*; and, secondly, that the indorsee of the note, after it was due, was liable only to such equities as attached to the note itself, and not to claims arising out of collateral matters. *Burough* v. *Moss*, 558. See as to a promissory note payable on demand, indorsed before any demand made, *Banks* v. *Colwell*, cited in *Brown* v. *Davis*, 3 T. R. 80.

(*b*) *Boehm* v. *Sterling*, 7 T. R. 423.

If the bill be substituted for another, it is liable to the equities incident to the one in lieu of which it was given; and, therefore, where a former bill was indorsed over in breach of trust after it was due, although for a valuable consideration, it was held that the indorsee could not recover on a bill substituted for this, the defendant having received notice from the party entitled not to pay it (*c*).

Where the defendant, the acceptor of a bill, would be entitled, on a recovery by the plaintiff against him, to recover back the amount, on an agreement by the plaintiff to indemnify him, it was held that the action was not maintainable (*d*).

The want of a proper stamp may be taken advantage of under a traverse of the drawing or acceptance (*e*).

Stamp.—Alteration. An objection to a bill or note for want of a proper stamp must be taken before the bill is read.

By the stat. 31 Geo. 3, c. 25, bills and notes cannot be stamped after they are made; but if a bill properly stamped be offered in evidence, the court will not inquire when it was so stamped.

By the stat. 43 Geo. 3, c. 127, a stamp of higher value, but of the same denomination, is sufficient (*f*).

A bill or note made abroad must be stamped according to the law of the country where it is made (*g*.)

Where partners resident in Ireland, signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, and name of the drawee, and transmitted it to *B.* in England, it was held to be a bill of exchange, by relation, from the time of signing in Ireland, and that an English stamp was unnecessary (*h*).

Protest.—Alteration of bill. A protest must be stamped (*i*). Where a bill on the face of it appears to have been altered, it is for the plaintiff to show that such alteration was not improperly made (*k*).

If a complete bill be altered in a material point (*l*), after negotiation, or after it has become due (*m*), though before negotiation, a fresh stamp is

(*c*) *Lee* v. *Zagury*, 1 Moore, 556.

(*d*) *Carr* v. *Stephens*, 9 B. & C. 758. But where at the time of the defendant's lending his name to several bills as security for the acceptor, the holder stipulating not to sue the defendant on the bills, until the effects of the acceptor, which were thereby assigned to a trustee, should have been sold, and the proceeds applied in payment of the bills and expenses; but the trustee, with the knowledge and assent of the defendant, omitted to take possession of the goods, and they were seized under a commission of bankruptcy; such an undertaking by the plaintiff does not operate as a covenant not to sue, nor furnish any answer to the action against the defendant on the bills. *Lancaster* v. *Harrison*, 6 Bing. 726.

(*e*) *Dawson* v. *M'Donald*, 2 M. & W. 26. *M'Dowall* v. *Lyster*, 2 M. & W. 52. In proof of a traverse of making a cheque, the defendant may show that it was post-dated. *Field* v. *Woods*, 7 Ad. & Ell. 114.

(*f*) See *Taylor* v. *Hague*, 2 East, 414; *Farr* v. *Price*, 1 East, 55; *Chamberlain* v. *Porter*, 1 N. R. 30.

(*g*) *Alves* v. *Hodgson*, 7 T. R. 241. See *Farr* v. *Price*, 1 East, 55; *Taylor* v. *Hague*, 2 East, 414. An I O U does not require a stamp, either as a note or as a receipt (1 Esp. 426; 1 Camp. 499; Chitty, 345), *infra*, tit. STAMP.

(*h*) *Snaith* v. *Mingay*, 1 M. & S. 87.

(*i*) Sel. 312.

(*k*) *Henman* v. *Dickenson*, 5 Bing. 183, doubting the authority of *R.* v. *Cliviger*, 2 T. R. 263.

(*l*) A party to a joint and several note paid part, and signed a joint note for the residue, an alteration without his knowledge, by interlining the words *jointly and severally*, avoids the note as to him; although to a letter requesting him to pay his joint and several note, he answered that it should meet his earliest intention. *Perring* v. *Hone*, 4 Bingh. 28.

(*m*) *Bowman* v. *Nichol*, 2 Esp. 81; 5 T. R. 537. Although altered with the consent of the acceptor (Ibid.) The bill in this case was originally drawn payable

necessary. But, in general, an alteration, to correct a mistake before negotiation, and with the acquiescence of the parties, is immaterial (*n*). An alteration in the sum or date is a material alteration (*o*). So is the alteration of the word "date" into the word "sight" (*p*), or of the name of the banking-house where it is payable (*q*). So, where a promissory note on the day after the delivery to the payee, and expressed to be for value received, was altered by the addition of the words "for the good-will of a lease and trade" (*r*), the Court held that this alteration was material, because it afforded evidence of a fact which otherwise must have been proved *aliunde*, and pointed out to the holder to inquire whether the consideration had really passed. Alteration of bill.

The introduction of words after the acceptance of a bill which do not affect the responsibility of the parties, is immaterial (*s*). Thus it has been held, that the introduction of a place of payment without the knowledge of the acceptor was immaterial, since it did not alter his liability (*t*).

An exchange of acceptances is a sufficient negotiation to render a new stamp necessary (*u*); and so it is said is the delivery to the drawer of a bill drawn for his accommodation, and payable to his own order (*x*). So where a bill indorsed by the drawer was left with the drawee for acceptance, who altered the *date* before he accepted it (*y*).

Where the drawee, upon presentment of the bill for acceptance, altered it as to the time of payment, and accepted it so altered, it was held that he thereby vacated the bill as to the drawer and indorsers; but that as the holder acquiesced, it was good as against him and the acceptor (*z*).

twenty-one days after date; whilst it was in the hands of the drawer it was altered, with the consent of the acceptor, to fifty-one days after date, and again, to twenty-four days after date, after the time of payment had expired.

(*n*) *Kennerley* v. *Nash*, 1 Starkie's C. 452. *Walton* v. *Hastings*, Ibid. 215. *Jacobs* v. *Hart*, 2 Starkie's C. 45. Where the note, after being signed, but before it was given to the payee, with consent of all the parties, was altered, by erasing the words "on demand," and inserting "one month after date," and striking out the words "with interest," held, that it was to be considered as all one transaction, and not issued at the time of the alteration. *Sherrington* v. *Jermyn*, 3 C. & P. 374. So where, after an acceptance generally, it was altered with the consent of the acceptor, and whilst it remained in the drawer's hands by inserting a particular place of payment in the acceptance. *Stevens* v. *Lloyd*, 1 M. & M. 292. See also *Leykariff* v. *Ashford*, 12 Moore, 281. So an alteration in the date, according to the original intention of the parties, and to correct a mistake, does not vitiate the instrument, nor render a fresh stamp necessary; nor does a subsequent addition of a place where to be made payable in the acceptance with the acquiescence of the acceptor. *Jacob* v. *Hart*, 2 M. & S. 143. But now see 1 & 2 Geo. 4, c. 78, s. 1.

(*o*) *Cordwell* v. *Martin*, 1 Camp. 79. 180; 9 East, 190. *Master* v. *Miller*, 4 T. R. 320; 5 T. R. 367; 2 H. B. 141; 1 Anst. 225. *Trapp* v. *Spearman*, 3 Esp. 57.

(*p*) *Long* v. *Mobre*, 3 Esp. C. 155; but see 1 Taunt. 20.

(*q*) *Tidmarsh* v. *Grover*, 1 M. & S. 735.

(*r*) *Knill* v. *Williams*, 10 East, 431.

(*s*) *Marson* v. *Petit*, 1 Camp. 82, n. *Jacobs* v. *Hart*, 2 Starkie's C. 45.

(*t*) *Marson* v. *Petit*, 1 Camp. 82, n. 3 Esp. C. 57. Such an alteration would now be material, in consequence of the late decision in the House of Lords, in *Rowe* v. *Young*, *supra*, 209, and so held in *Cowie* v. *Halsall*, 4 B. & A. 197. *M'Intosh* v. *Haydon*, 1 R. & M. 362. But see *Fayle* v. *Bird*, *supra*, 209. It has since been held that an alteration of a general acceptance of a bill by the addition of a place of payment without the privity of the acceptor discharges him. *Desbrow* v. *Wetherley*, 1 Mo. & R. 438.

(*u*) *Cardwell* v. *Martin*, 1 Camp. 79. 180; 9 East, 190.

(*x*) *Calvert* v. *Roberts*, 3 Camp. 342.

(*y*) *Outhwaite* v. *Luntley*, 4 Camp. 179.

(*z*) *Paton* v. *Winter*, 1 Taunt. 420. And held that no action would lie at the suit of the holder against the acceptor for rendering the bill invalid. But see *Walton* v. *Hastings*, 1 Starkie's C. 215; 4 Camp. 223. *Long* v. *Moore*, 3 Esp. 155.

Alteration of bill.

An alteration of the bill in the hands of the payee will defeat the action of the indorser, although he was not privy to the alteration (*a*).

If a note be signed by *A.*, and in consequence of a subsequent arrangement *B.* sign the note as a surety, he is not bound without a new stamp (*b*).

Where a bill or note is void for want of a proper stamp, the plaintiff may go into evidence of the original consideration (*c*).

Where the alteration is made by consent of the parties, and *before negotiation*, a new stamp is unnecessary (*d*); as, where *A.* being indebted to *B.*, the latter drew a bill upon him at three months for the amount, and the bill being sent to *A.* for acceptance, he requested the time to be altered from three months to five, to which the drawer consented (*e*).

It is, it seems, incumbent on the plaintiff to prove that an alteration apparent on the face of the bill was made previous to negotiation (*f*).

Where the alteration is made to *correct a mistake*, and in furtherance of the intention of the parties, a new stamp is unnecessary; as where, in a bill intended to be negotiable and payable to the defendant, the drawer, the words "or order" were omitted, and the bill having been indorsed over to the plaintiff the next day, was returned by him to the drawer on the same day, and the mistake was then rectified (*g*); the jury finding upon the evidence that such was the original intention of the parties, the Court of King's Bench afterwards held that the alteration was allowable. But where a bill dated on the 1st of August, was drawn at two months date, payable to the order of the drawer, and after acceptance by the defendant was re-delivered by him to the drawer as a security for a debt, and after the latter had kept it twenty days the date was altered to the twenty-first, by the consent of the acceptor, and before the indorsement and delivery to a third person, it was held that a new stamp was necessary, since the bill was drawn according to the original intention of the parties, and was available in that form (*h*).

A bill properly stamped and put into circulation, and afterwards taken up by the drawer, may again be circulated without a new stamp. It is negotiable in *infinitum*, till it has been paid by or discharged on behalf of the acceptor (*i*); and therefore, where the drawer of a bill payable to his own order, indorsed it over to *A.*, who indorsed it to *B.*, who returned it to the drawer on payment of the amount by the latter, having first struck out his own and *A.*'s indorsement, and the drawer indorsed it to the plaintiff after

(*a*) *Master & others* v. *Miller*, 4 T. R. 320; 5 T. R. 367; 2 H. B. 141; 1 Ans. 225.

(*b*) *Clerk* v. *Blackstock*, Holt's C. 474.

(*c*) 1 East 58; 6 T. R. 52; 7 T. R. 241; 2 B. & P. 118. *Brown* v. *Watts*, 1 Taunt. 353.

(*d*) *Johnson* v. *The Duke of Marlborough*, 2 Starkie's C. 313. *Kennerley* v. *Nash*, 1 Starkie's C. 452.

(*e*) *Kennerley* v. *Nash*, 1 Starkie's C. 452.

(*f*) *Johnson* v. *The Duke of Marlborough*, 2 Starkie's C. 313; Phillipps on Evidence, 495, edit. 1824.

(*g*) *Kershaw* v. *Cox*, 3 Esp. C. 246, *cor.* Le Blanc, J. and afterwards by the Court of K. B. And see *Bathe* v. *Taylor*, 15 East, 412; *Cole* v. *Parkin*, 12 East, 471; *Brutt* v. *Picard*, 1 R. & M. 37. The remedying an accidental omission by inserting the words *or order* does not vitiate the bill. *Byron* v. *Thompson*, 3 P. & D. 71. In *assumpsit* by indorsee against acceptor, plea, that before the bill became due and was in full force and effect, the date was altered; held bad, as not alleging the alteration to have been made after acceptance. *Langton* v. *Lazarus*, 5 M. & W. 629.

(*h*) *Bathe* v. *Taylor*, 15 East, 412.

(*i*) Per Lord Ellenborough, in *Callow* v. *Lawrence*, 3 M. & S. 97. Note, this case was held to be distinguishable from that of *Beck* v. *Robley* (1 H. B. 89, in the note), for there the bill was payable not to the order of the drawer, but of a third person; and if the drawer, on taking up the bill, could have transferred it, the payee would have been wrongfully made liable.

it was due, it was held that he might recover against the acceptor without a new stamp.

In order to prove that a bill dated at Paris was drawn in England, it has been held to be insufficient to prove that the drawer was in England at the time of the date (*k*).

The drawer may prove that he tendered the amount in a reasonable time after notice of the dishonour (*l*). A tender on the day following that of the notice was held to be in time (*m*).

III. It was a general rule in criminal cases, that no one could prove that a bill drawn, accepted or indorsed in his name, was a forgery (*n*); but it seems that the rule was confined to criminal proceedings, although it has been held in a civil case that the supposed drawer of a bill was not competent to prove that he did not draw it (*o*). This anomalous rule is now defeated by the late statute. A party to a bill is competent to prove that it is void (*p*), although the contrary was once held (*q*); and a party to a bill is competent to defeat or support the action, unless he be directly interested in the event, or unless the verdict would be evidence for or against him. Competency.

The incompetency of a party to the bill results from the consideration, that if his testimony were to prevail he would stand in a better relative situation than he would do if a contrary verdict were given. In the usual and natural course of a bill *in theory*, every party to it seems to be competent. The transfer of the bill is the assignment of a debt due from the drawee to the drawer, the drawee having money of the drawer in his hands. In such a state of things, the drawer and indorsers, and drawee or acceptor, must, it seems, in general be competent, since ultimately the drawee or acceptor will be liable for the amount in case it should be recovered from any other party; and no party can either gain or lose by aiding or opposing a recovery in an action between any other parties. In *practice*, this relative situation of the parties is liable to constant disturbance; and as bills of exchange are used as the instruments of adjusting the most complicated and varied transactions, the relative situation of the parties is frequently altered. The following decisions have taken place on this subject:

In an action by an indorsee against the acceptor of a bill payable to the order of the drawer, the latter is competent to prove usury (*r*), or that the bill has been paid (*s*); but it would be otherwise if the bill were accepted Drawer.

(*k*) *Abraham* v. *Du Bois*, 4 Camp. 269.

(*l*) *Walker* v. *Barnes*, 1 Marsh, 36.

(*m*) *Ibid.*

(*n*) Unless he has been rendered competent by payment, &c. See tit. FORGERY.

(*o*) 12 Mod. 345; Holt, 297. But see tit. FORGERY.—INTEREST.

(*p*) *Walton* v. *Shelley*, 1 T. R. 296, where it was held that an indorser was not competent to prove the consideration to have been usurious.

(*q*) 7 T. R. 62; Esp. C. 332; Peake's L. Ev. 181.

(*r*) *Beard* v. *Ackerman*, 5 Esp. 119. Where the defence was a gaming consideration, the drawer was called by the defendant. It was objected that he was interested to defeat the plaintiff, being liable for treble penalties if he recovered, but not if he failed. But it was held that the witness was competent, since if the plaintiff failed the witness was liable to him: if he succeeded, the witness might deliver himself from the penalties by refunding within the time. *Habner* v. *Richardson*, Holroyd, J., 1818, Manning's Index, 327.

(*s*) *Humphrey* v. *Moxon*, Peake's C. 52. See also *Phetheon* v. *Whitmore*, Peake's C. 40. Contrà, *Adams* v. *Lingard*, Peake's C. 117. Accord. *Jordaine* v. *Lashbrook*, 7 T. R. 604. See also *Williams* v. *Keats*, 2 Starkie, 290. It is no objection that the witness is a prisoner on a charge of having forged the bill. *Barber* v. *Gingle*, 3 Esp. C. 62. In an action by the indorsee against the acceptor, the drawer is a competent witness for the plaintiff, although he state that the defendant has taken the benefit of the Insolvent Act, and that his name was inserted as a creditor in the schedule. *Cropley* v. *Corner*, 4 C. & P. 21.

Drawer. for the accommodation of the drawer, who would then be liable to the costs of the defendant, if the plaintiff succeeded (*t*). He would still be competent if he had become bankrupt and obtained his certificate (*u*).

In an action by the indorsee against the acceptor, the drawer is competent to prove the defendant's hand-writing (*x*).

Maker. A joint maker of a note is a competent witness for the plaintiff, for he stands indifferent, being liable, in the event of the plaintiff's failure, to an action at the suit of the plaintiff for the whole, with a claim on the defendant for a moiety, and in case the plaintiff should succeed, being liable to the defendant for contribution (*y*).

In an action against the indorser of a note the maker is competent to prove that the date has been altered (*z*).

But a joint maker of a promissory note is not competent to prove a plea of illegality of consideration, in an action brought against the other maker alone (*a*).

Acceptor. In an action by the holder against the drawer, the acceptor is competent to prove that he had no effects of the drawer in his hands (*b*).

An acceptor is not competent to prove for the defendant, in an action by the indorsee against the drawer, that he accepted the bill in discharge of part of a debt due from him to the plaintiff, and that it was delivered to the plaintiff on condition that if he obtained cash for it he might deduct the amount of the debt due to him from the acceptor; for he would be bound to indemnify the defendant against the costs, if the plaintiff succeeded (*c*).

Indorser. An indorser is in general a competent witness in an action by an indorsee against the drawer or acceptor, either for the plaintiff or defendant; for the plaintiff, because though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will, and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor; for the defendant, for if the plaintiff fail against the drawer or acceptor, he is entitled to recover against the indorsee (*d*). He may be called for the plaintiff to prove his own indorsement (*e*).

A payee is competent in an action by an indorsee against the acceptor, to prove that the bill was originally void for want of a proper stamp (*f*), having been made in London, although dated at Hamburgh.

(*t*) *Jones* v. *Brooke*, 4 Taunt. 464. *Hardwick* v. *Blanchard*, Gow. 113.

(*u*) In an action by the indorsee against the acceptor, the drawer is a competent witness for the latter, although he state that the defendant has taken the benefit of the Insolvent Act, and that his name is inserted as a creditor in the schedule. *Cropley* v. *Corner*, 4 C. & P. 21.

(*x*) *Dickins* v. *Prentice*, 4 Esp. C. 32. The objection in this case was, that forgery was imputed to the witness by the defendant.

(*y*) *York* v. *Blott*, 5 M. & S. 71. See Str. 35.

(*z*) *Levy* v. *Essex*, Chitty, O. B. 284; 4 Esp. 37; Peake's L. Ev. 102. And he may be called in such an action to prove a notice. *Venning* v. *Shuttleworth*, Bayley on Bills, 422. *Ashton* v. *Longes*, 1 Mo. & M. 127.

(*a*) *Slegg* v. *Phillips*, 4 B. & Ad. 852. Nor is he rendered competent by having paid half the amount of the note before action brought, the note on the face of it bearing interest, and a year's interest having been due at the time of the payment, for he is liable to contribution in respect of interest. *Ib.*

(*b*) *Staples* v. *Okines*, 1 Esp. C. 332; Peake's L. E. 154. *Legge* v. *Thorpe*, 2 Camp. 310. It has been held, that in an action against the drawer the acceptor is not a competent witness for the defendant, to prove a set-off. *Mainwaring* v. *Mytton*, 1 Starkie's C. 83. But *qu.*, and see Vol. I. p. 131. Bayley on Bills, 424, 4th ed. *Reed* v. *Furnival*, 1 C. & M. 538.

(*c*) *Edmonds* v. *Lowe*, 8 B. & C. 407.

(*d*) Bayley on Bills, 422, 4th ed.

(*e*) *Richardson* v. *Allen*, 2 Starkie's C. 334.

(*f*) 7 T. R. 601; Esp. C. 10. 85. 298. 332; Peake's C. 40. *Rich* v. *Topping*,

Indorser.

A prior indorser of a bill, in an action by an indorsee against the drawer, is competent to prove a promise to pay the bill after it became due (*g*).

The payee of a bill (drawn for his accommodation) who has indorsed it to the plaintiff, is competent, in an action against the drawer, to prove that he indorsed it for a valuable consideration; for if the plaintiff should fail, he would be liable to him to the amount of the bill; if he should succeed, he would be liable to the same amount to the defendant (*h*).

An indorsee was held to be competent, in an action by the holder against the drawer, to prove the payment by the drawer of money into his hands, to take up the bill, and that he had satisfied the bill; for he is liable, at all events, either to the holder or to the drawer for the amount of the bill (*i*). In an action against the maker of a note, an indorser is a competent witness to prove that it has been paid (*k*). But a drawer or indorser of a bill or note accepted for his accommodation is not a competent witness for the defendant in an action against the acceptor or maker; for he would be liable for the costs if the plaintiff succeeded (*l*). The st. 3 & 4 Will. 4, c. 21, makes no difference in this respect (*m*).

Peake's C. 224; Esp. C. 177. See also *Cooper* v. *Davis*, 1 Esp. C. 463.

(*g*) *Stevens* v. *Lynch*, 2 Camp. 332; 12 East, 38.

(*h*) *Shuttleworth* v. *Stevens*, 1 Camp. 407. In an action against the drawer of a bill payable to his own order, but for the accommodation of the first indorsee, since become bankrupt, the latter is a competent witness to prove notice to defendant of the dishonour, as coming to speak against his own interest; but the defendant cannot be deemed a person, surety, or liable for a debt of the bankrupt, within the 49 Geo. 3, c. 121, s. 8, so as to be barred by the certificate. *Mayer* v. *Meakin*, 1 Gow's C. 183.

(*i*) *Birt* v. *Kershaw*, 2 East, 458. The Court seems to have considered that the further liability of the witness to the drawer in respect of the costs of the action, occasioned by the neglect of the witness to pay over the money, made no difference (according to *Ilderton* v. *Atkinson*, 7 T. R. 481). It would be difficult to support, upon principle, the position, that the getting rid of a legal liability to the costs of an action did not disqualify a witness; but the decision itself may be sustained upon the consideration that, as a mere indorser, the witness was competent, and that as the mere agent of the drawer in paying the money over to the holder of the bill, he was also competent to prove such payment according to the general rule as to the competency of agents (*inf.* INTEREST). In strictness, the objection to his competency rested on his liability to the drawer for the consequences of his negligence in not having paid over the money, which was wholly independent of his being a party to the bill; if he had been a mere stranger to the bill, but employed as agent to pay over the money, the same objection might have been taken and overruled on the ground of the general competency of an agent. In assumpsit on a bill by the indorsee against the acceptor, and plea of payment, a prior indorsee was held to be a competent witness for the defendant, although on the *voir dire* he acknowledged that he received money from the defendant to pay the plaintiff the amount of the bill. 8 Ad. & Ell. 917.

(*k*) *Charrington* v. *Milner*, Peake's C. 6. *Birt* v. *Kershaw*, 2 East, 458; or that an unstamped bill dated abroad was in fact made here. *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

(*l*) *Jones* v. *Brook*, 4 Taunt. 464. *Maundrell* v. *Kennett*, 1 Camp. 408. *Bottomley* v. *Wilson*, 3 Starkie's C. 148. *Williams* v. *Keates*, Mann. Ind. WITNESS, 106. *Secus*, if he has subsequently become a bankrupt, and obtained his certificate. *Brind* v. *Bacon*, 5 Taunt. 183. For by the stat. 49 Geo. 3, c. 121, s. 8, the drawer is discharged of the costs, (vid. *infra*, SURETY,) to which he would otherwise be liable; the cases of *Maundrell* v. *Kennett*, 1 Camp. 408; *Pinkerton* v. *Adams*, 2 Esp. C. 612; were previous to the stat. See also *Scott* v. *Lifford*, 1 Camp. 249. Where *A.* and *B.* having dissolved partnership, an action was brought by the acceptor of a bill afterwards drawn in the name of the firm, and *A.* pleaded his subsequent bankruptcy and certificate, and *nol. pros.* as to him; it was held that *A.* was a competent witness for *B.* on the ground that the bill (as stated by *A.*) was drawn for his accommodation alone, and was therefore barred by the certificate. *Moody* v. *King*, 2 B. & C. 558.

One who having received a bill to get it discounted for the drawer, delivers it to the plaintiff, in payment of a debt, is not competent to prove the fact in an action against the drawer, for he would be liable to the costs if the plaintiff succeeded. *Harman* v. *Lasbrey*, Holt's C. 390.

(*m*) *Burgess* v. *Cuthill*, 6 C. & P. 282.

Indorser.

It has been said, that one whose name is on the bill as an indorser is not competent to prove that the property is in himself, and that he indorsed it to the plaintiff without consideration (*n*).

In an action against the indorser of a bill, a prior indorsee for whose accommodation the bill was indorsed by the defendant, and who has become bankrupt and obtained his certificate, is a competent witness for the defendant (*o*).

A party in prison on a charge of having forged the bill is competent to prove payment of it, in an action brought to recover it (*p*).

Partner.

Where a bill has been drawn by one partner in fraud of the rest, to pay a separate creditor, a co-partner is a competent witness for the acceptor in an action against him by the creditor, to prove the want of authority, for if the plaintiff should succeed, and the acceptor recovered against the firm, the witness would have his remedy over against the fraudulent partner (*q*); and it was held that the intervening bankruptcy of the debtor partner made no difference.

The effect of the late statute 3 & 4 Will. 4, c. 42, on cases of this description, has already been observed upon (*r*).

Declarations by holders.

In general a declaration made by a prior indorsee or holder of a bill or note is not evidence against a subsequent one, for, according to the elementary rule, he ought to be called as a witness (*s*). Such declarations are admissible upon general principles when they have any legal operation or effect on the instrument in the hands of the plaintiff, or where the plaintiff is identified in interest with the party who made the declaration (*t*).

(*n*) 1 Esp. C. 85. *Buckland* v. *Tankard*, 5 T. R. 570; B. N. P. 288. But *qu.*, for if the plaintiff recovered he would still be but a trustee for the witness. And see *Birt* v. *Kershaw*, 2 East, 458; and see *Jordaine* v. *Lashbrooke*, 7 T R. 601. An indorsee is competent to prove property in a bill to be in either of two persons. *Winlow* v. *Daniel*, 1 T. R. 298.

(*o*) *Bassett* v. *Dodgin*, 9 Bing. 653.

(*p*) 3 Esp. C. 62.

(*q*) *Ridley* v *Taylor*, 13 East, 176.

(*r*) See Vol. I. p. 127, and the cases of *Burgess* v. *Cuthill*, 6 C. & P. 282. 1 Mo. & R. 315, S. C. *Faith* v. *M'Intyre*, 7 C. & P. 44.

(*s*) A declaration by a holder, under whose indorsement the plaintiff claims, that after the bill was due the amount was settled between himself and the acceptor, is not evidence for the latter, for such holder may be called. Per Ld. Ellenborough, *Duckham* v. *Wallis*, 5 Esp. C. 251. And see *Shaw* v. *Broom*, 4 D. & R. 730; and *Smith* v. *De Wruitz*, 1 R. & M. 212. In *Pocock* v. *Billing*, 2 Bingh. 269. it was held that declarations made by a former holder of a bill after he had parted with the possession were not receivable in evidence. It is observable that in that case no circumstances appear which would have warranted the reception of the evidence, had the declarations been made during the possession of the bill. In *Collenridge* v. *Farquharson*, 1 Starkie's C. 259, where *A.* indorsed a bill to *B.* as a security for a running account, and after the bill became due *B.* indorsed it to *C.*, it was held that an entry or declaration by *B.* as to the state of the accounts was not evidence for *A.*, unless at least it was cotemporary with the indorsement to *B.* Where a note, which was alleged to have been substituted for a bill originally given for money lost at play, had been indorsed by the plaintiff, held that declarations by the payee at the time when he agreed to take the substituted note, as to the consideration of the original bill, were not admissible against the plaintiff, a third person, unless the indorsement were shown to have been made after the note became due. *Beauchamp* v. *Parry*, 1 B. & Ad. 89. In an action against the maker of a note, letters of the indorser are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable. *Clipsam* v. *O'Brien*, 1 Esp. C. 10. In the case of *Banks* v. *Colwell*, cited in *Brown* v. *Davis*, 3 T. R. 80, Buller, J. is stated to have ruled, that in an action on a note payable on demand, evidence was admissible to show that the note had been indorsed to the plaintiff a year and a half afterwards, and to impeach the consideration by showing that it had originally been given for smuggled goods. But see the observations of Bayley, J. on that case in *Barough* v. *White*, 4 B. & C. 325.

(*t*) Per Parke, J. in *Woolmery* v. *Rowe*, 1 Ad. & Ell. 116. See the observations of Parke, B. in that case on the former case

Declarations by holders.

Where the question is whether a note was originally void for usury, it seems that letters written by the payee to the maker, proved to be contemporaneous with the making of the note, are admissible to prove that it was illegal in its creation (*u*).

In an action by the indorsee against the maker of a promissory note for 100 *l.*, with interest, payable to *Arnet* or order on demand, and where there was evidence of value given by the plaintiff to *Arnet*, it was held that declarations made by *Arnet* whilst he held the note, that he gave no value to the maker, were not admissible in evidence against the plaintiff, without proof that when the plaintiff took the note he gave no consideration; for it was held that the note could not be considered as having been indorsed after it was due, and that there was evidence of value given by the plaintiff, and consequently that the plaintiff could not be considered as identified in interest with *Arnet* (*x*).

But if the plaintiff's right or interest in the bill or note be identical with that of the prior indorser; as, where the plaintiff either gave no value to such indorser or took it after it was due; it seems that declarations made by such prior indorser, whilst he was in possession of the bill, would be admissible in evidence against the plaintiff (*y*). It seems, however, that such declarations made *after the transfer* (*z*) would not be admissible unless the plaintiff sued merely as a trustee for the party making the declaration, the action being brought for his benefit and with his privity (*a*).

Effect of a bill or note in evidence.

IV. A promissory note is *primâ facie* evidence of money lent by the payee to the maker (*b*), or of a balance due from the maker to the payee upon an account stated (*c*). And the acceptance of a bill of exchange payable to the order of the drawer is *primâ facie* evidence of money had and received by the acceptor to the use of the drawer (*d*). A bill is also, it is said, evi-

of *Barough* v. *White*, *infra*, note (*y*), and the observations of Bayley, J. in the case of *Barough* v. *White*, *supra*, tit. ADMISSION. Declarations of a person who held a negotiable security under the same circumstances with the party to the action have been considered admissible against such party.

(*u*) *Kent* v. *Lowen*, 1 Camp. 177. *Walsh* v. *Stockdale*, *cor.* Abbott, J. sitt. after T. T. 1818.

(*x*) *Barough* v. *White*, 4 B. & C. 325.

(*y*) See the observations of Bayley, J. in *Barough* v. *White*, 4 B. & C. 325. And see the observations of Parke, J. in *Woolmery* v. *Rowe*, 1 Ad. & Ell. 116. In *Barough* v. *White*, the interest of the plaintiff was not identical with the interest of the payee. The declarations of a person who held a security under circumstances identical with those under which the party to the action holds it, have been considered admissible against such party; but the title of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title. In the case cited, the holder had a better title than the party had whose declarations were proposed to be proved.

(*z*) *Pocock* v. *Billing*, 2 Bing. 269, *supra*. In an action by the indorsee of a bill of exchange against the acceptor, the defendant proved that the plaintiff held the bill as indorsee from the payee for a purpose which had been satisfied, but the Court held that this did not warrant the reception of declarations made by the payee subsequent to the indorsement, to show that the bill had been accepted without consideration. K. B. Trin. T. 1824.

(*a*) *Pocock* v. *Billing*, 2 Bing. 269, *supra*, note (*s*). And see *Shaw* v. *Broom*, 4 D. & R. 730.

(*b*) *Carter* v. *Palmer*, 12 Mod. 380, per Holt, C. J.; Burr. 1525. *Clarke* v. *Martin*, Ld. Raym. 758.

(*c*) *Storey* v. *Atkins*, 2 Str. 719; B. N. P. 136, 7. *Harris* v. *Huntbach*, 1 Burr. 373. *Pawley* v. *Brown*, *cor.* Abbott, J. Devon Lent Ass. 1818.

(*d*) *Thomson* v. *Morgan*, 3 Camp. 101. *Scholey* v. *Walsby*, Peake's C. 24. Where the bill is payable to a third person, the presumption does not arise without proof of consideration, and his remedy against the acceptor is confined to the bill. Per Lawrence, J., *Cowley* v. *Dunlop*, 7 T. R. 579. And it is evidence under the account stated. Per Abbott, J., *Rhodes* v. *Gent*, 5 B. & A. 245.

Effect of a bill or note in evidence.

dence of money lent by the payee to the drawer (*e*). So it has been said, that either a bill or note is evidence of money had and received by the acceptor or maker to the use of the holder (*f*).

The theory of a bill of exchange is, that a bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer to the amount of the bill; hence it has been said that the effect of the transaction is to appropriate, by an agreement between the parties, so much property to the account of the holder of the bill (*g*). It is also said, that a bill or note is evidence of money paid by the holder to the use of the acceptor or maker (*h*). This doctrine has, however, been questioned (*i*), and it may be doubted whether the plaintiff, if he resort to the common counts, must not

When evidence on money counts.

(*e*) Bayley, O. B. 163, citing *Clerke* v. *Martin*, Ld. Raym. 758; 12 Mod. 380; Burr. 1525. *Smith* v. *Kendall*, 6 T. R. 123.

(*f*) Bayley on Bills, 287. 2 Phill. Ev. 39. But it seems from later authorities, that this position must be restricted to cases where the bill or note is attempted to be enforced against an immediate party. See below, and *Exon* v. *Russell*, 4 M. & S. 507. *Waynam* v. *Bend*, 1 Camp. 175. *Wells* v. *Girling*, Gow. 22. *Thompson* v. *Morgan*, 3 Camp. 101. *Eales* v. *Dicker*, M. & M. 324. But this, however, is too large a position. A promissory note is not evidence under the money counts in an action by the indorsee against the maker of a note. *Bentley* v. *Northouse*, 1 M. & M. 66. A party to a bill of exchange is not liable for money paid to his use by a person who takes up the bill for his honour, unless formal protest be made before payment. *Vandewall* v. *Tyrrell*, 1 M. & M. 87.

(*g*) *Vere* v. *Lewis*, 3 T. R. 182, where it was held that the acceptance of a bill payable to a fictitious payee was evidence of value received by the acceptor from the drawer, to support an action by the holder for money paid, or money had and received. But note, that the Court were of opinion that the plaintiff might recover on the second count, as on a bill payable to the bearer. The giving a bill is, as it were, an *assignment* of so much property, which becomes money had and received to the use of the holder; per Yates, J. in *Grant* v. *Vaughan*, cited 3 T. R. 182, by Lord Kenyon in giving judgment. In *Tatlock* v. *Harris*, 3 T. R. 174, where an indorsee recovered against the acceptor on a similar bill, there was proof of value received by the acceptor from an indorser. In *Dimsdale* v. *Lanchester*, 4 Esp. C. 201, Lord Ellenborough said, "Where a person puts his name to a promissory note, he thereby acknowledges that he has money in his hands of the payee of the note, and undertakes to pay it to the party legally entitled to receive it, that is, to the person who has paid for it a good consideration, and thereby become the legal holder of the note." In *Grant* v. *Vaughan*, Burr. 1516, it was held by Ld. Mansfield and the other Judges, to be clear beyond dispute that the *bonâ fide* bearer might recover against the maker as for money had and received to his use. But see *Williams* v. *Everett*, 14 East, 582; *Johnson* v. *Collings*, 1 East, 98, and *Waynam* v. *Bend*, 1 Camp. 175; where, in an action by the indorsee against the maker of a promissory note for value received, and payable to the bearer, Lord Ellenborough was of opinion that the note was not evidence under the money counts, without proof of value received by the defendant to the use of plaintiff; but the cause was not decided on this ground. See also *Hard's Case*, 1 Salk. 23; *Hodges* v. *Steward*, 1 Salk. 125; and below, note (*i*).

(*h*) Bayley, O. B. 163. *Vere* v. *Lewis*, 3 T. R. 182. *Tatlock* v. *Harris*, 3 T. R. 174.

(*i*) See *Gibson* v. *Minett*, 1 H. B. 569, where it was held that a *bonâ fide* indorsee for value might recover against the acceptor of a bill of exchange made payable to a fictitious payee, as upon a bill payable to the bearer. In that case L. C. B. Eyre, who gave his opinion in a very elaborate judgment against the decision of the Court of K. B. in favour of the plaintiff, seems to have admitted that the acceptance of a bill would be evidence of a duty as for money lent, or money had and received, upon those counts, but considered those counts to be out of the question, the finding by the special verdict being insufficient to raise the question upon these points. He said, "It has been expressly determined that a general *indebitatus assumpsit* will not lie upon a bill of exchange, but the *indebitatus assumpsit* must be for some duty, such as money lent, &c., and the bill is offered as evidence of that duty." He adds, "The presumptions of evidence which the writing affords have no application to the *assumpsit* for money paid by the payee or holder of the bill to the use of the acceptor; it must be a very special case which will support such an *assumpsit*." See also *Waynam* v. *Bend*, 1 Camp. 175; *supra*, note (*g*). At common law, if

prove that the defendant has in fact received the amount of the bill. At all events, whenever there is a doubt whether the plaintiff can recover on the special counts, it is desirable to be prepared with evidence (according to the fact) to show that the defendant has received money for the purpose of the bill. Effect of in evidence.

An action of *indebitatus assumpsit* will not lie upon the acceptance of a bill of exchange (*k*); for an acceptance is but a collateral engagement, it must be used as evidence of some duty; as money lent, or money had and received, for which an *indebitatus assumpsit* will lie (*l*). And in such case, it is but evidence, and consequently the presumption which the writing affords may be encountered, and contradicted by other evidence, and the jury are to draw the conclusion of fact, that so much money was lent, or so much money was had and received, from all the evidence in the case (*m*).

In the case of *Whitwell* v. *Bennett* (*n*), where the plaintiff, an indorsee, could not recover on the special counts by reason of variance, and it was proved that when the defendant accepted the bill (for 30 *l.*), he stated that although the drawer had not remitted the amount, he expected that he would do so, and that as he had a bill of his for 80 *l.*, which would be paid, he would take all risks upon himself, the Court held, that if the bill had been paid, the count for money had and received would have been maintainable, on the ground of the specific appropriation of the particular sum to the payment of the plaintiff's demand; but that as the action was on the bill for 30 *l.*, it was a surprise on the defendant to call for proof of the non-payment of the other bill, and therefore that payment ought not to be presumed. Resort to the common counts.

But the acknowledgment by the defendant of his acceptance of a bill of exchange is evidence on the account stated (*o*).

a promissory note was made payable to *J. S.* or bearer, the bearer could not bring an action on the note in his own name, but was obliged to sue in the name of the principal. See *Nicolson* v. *Sedgwick*, 3 Salk. 67; 1 Ld. Raym. 180; a difficulty which could not have arisen, if he could have maintained the action for money had and received.

In the case of *Were* v. *Taylor*, *cor.* Ld. Ellenborough, C. J. (cited 1 Camp. 130), where the bill was made payable to a fictitious payee, and declared on as payable to the bearer, Ld. Ellenborough said that the cases on the subject had been much doubted; and the plaintiffs failing to show that the value of the bill had been received by the defendant, were nonsuited. And in the subsequent case of *Bennett* v. *Farnell*, 1 Camp. 130, where the payee was also a fictitous person, Ld. Ellenborough said, that he would admit evidence of value having been received by the defendant; and that if the plaintiff's money had found its way into the defendant's hands, he should not be allowed to retain it, for then he had money in his hands belonging to another person, which might be recovered from him as money had and received. The plaintiff failing to prove this, was nonsuited.

(*k*) *Hard's Case*, 1 Salk. 23; and per C. B. Eyre, *Gibson* v. *Minett*, in error, 1 H. B. 602.

(*l*) Per Eyre, L. C. B., 1 H. B. 602, *supra*, note (*i*).

(*m*) Ibid.

(*n*) 3 B & P. 559.

(*o*) *Leaper* v. *Tatton*, 16 East, 420; and per Bayley, J., an acknowledgment of his acceptance, and that he has not paid it, *creates* a debt. And it was held to be sufficient to take the case out of the Statute of Limitations, although the defendant at the time said that he had been liable, but was not then liable because it was out of date. In an action by the indorsee against the acceptor, the declaration containing also the money counts, the stamp turned out to be insufficient, and the bill could not be read; but two letters were produced from the defendant, the first addressed "To the gentleman that calls with the bill," expressing his regret at not being able to take up the bill for £. 100, and desiring the holder to allow him to renew it for a month; and the second being an answer to an application by the attorney, requiring payment of the bill in favour of Mr. T. for £. 100, but not stating in whose behalf the application was made, in which the defendant stated that it was impossible he could take up the bill, but that if T. would draw at one month he should then be prepared, there being nothing in the letter acknowledging a liability to the plaintiff, nor admitting him to be the holder, it was

An indorsement of a bill or note is evidence of money lent by the indorsee to the indorser (*p*).

It has also been said that a bill is *primâ facie* evidence of money had and received by the drawer to the use of the holder, or of money paid by such holder to the use of the drawer (*q*). This, however, appears to be very questionable (*r*). And the contrary has since been ruled (*s*).

A receipt upon a bill is *primâ facie* evidence of payment by the acceptor (*t*).

If the plaintiff fail to prove the bill by reason of variance, or where the bill is void for want of a proper stamp, he may resort to the common counts if they be applicable (*u*), and there be a privity of contract between the parties, and may give evidence of the original consideration on which the note was given (*x*)

In an action by the indorsee of a bill against one who has received money from the acceptor for the purpose of taking up the bill, any defence may be set up of which the acceptor could have availed himself (*y*).

An accommodation acceptor, who defends for the drawer, may recover costs as money paid to the use of the drawer, without an undertaking in writing (*z*).

Where an acceptor of a bill, finding that he cannot discharge it, pays part to the drawer to take it up, the money is had and received to the use of the holder (*a*).

Proof of the delivery and payment of a cheque is not *primâ facie* evidence of a debt, or of a set-off, unless it be shown under what circumstances it was given (*b*).

Operation of, in payment, &c.

In general a bill of exchange or note is no satisfaction of any debt or demand for which it is given, but is only *primâ facie* evidence of payment, which renders it necessary that the party who receives it should account for it before he will be entitled to recover the consideration (*c*).

held that plaintiff was bound to show, by proof of the indorsement on the bill, that he was entitled to it, and that no proof of the indorsement, without proof also of the contents of the bill to identify with it the defendant's letter, would be sufficient; the contents of the bill were a necessary part of the plaintiff's title, and could not be looked at by the jury to ascertain that fact. *Jardine* v. *Payne*, 1 B. & Ad. 663, overruling *Bishop* v. *Chambre*, 1 Dans & Lloyd, 83. On a declaration by the payee against the acceptor, containing counts on the bill and the money counts, the defendant having paid the balance due on the bill into court on the latter counts, held that there being but that one matter in dispute, the demand in respect of the bill was discharged by such payment; but *semble*, if the only evidence in the case had been the acceptance of the bill, the plaintiff being the payee, and the bill drawn by another, he could not have recovered on the account stated. *Early* v. *Bowman*, 1 B. & A. 889.

(*p*) Bayley, O. B. 164, cites *Kessebower* v. *Sims*, MS. C.

(*q*) See the authorities cited Bayley on Bills, 163.

(*r*) *Vide supra*, p. 202, note (*i*).

(*s*) *Eales* v. *Dicker*, 1 M. & M. 324.

(*t*) Peake's C. 26. Peake's L. E. 221.

(*u*) *Alves* v. *Hodgson*, 7 T. R. 241 *Tyte* v. *Jones*, 1 East, 58; 1 Esp. C. 245; 4 T. R. 320. But he cannot, where the bill is made payable to a fictitious payee, and declared on as payable to the bearer (1 H. B. 313. 569). Neither can he where he proves a mere promise to pay, without producing the bill, or proving its destruction. *Dangerfield* v. *Wilby*, 4 Esp. C. 159.

(*x*) *Farr* v. *Price*, 1 East, 55. *Brown* v. *Watts*, 1 Taunt. 353. *Wilson* v. *Kennedy*, 1 Esp. C. 245. *Manby* v. *Peel*, 5 Esp. 121. *Wade* v. *Beasley*, 4 Esp. C. 7.

(*y*) 1 Camp. 372; Cro. J. 687; 2 Roll. R. 440.

(*z*) 1 Esp. C. 162.

(*a*) *Baker* v. *Birch*, 3 Camp. 107.

(*b*) *Aubert* v. *Walsh*, 3 Taunt. 277; 4 Taunt. 293.

(*c*) Bayley on Bills, 265; *Kearslake* v. *Morgan*, 5 T. R. 513. A bill of exchange, unless there be an agreement that it should

Effect of in payment.

If a draft or bill given in payment be dishonoured, the party receiving it may consider it as a nullity (*d*).

Formerly, where a bill was paid in discharge of a debt, but there was no contract that the taking the bill should be a discharge of the debt, it was held to be no payment, unless the creditor received the money (*e*), although the creditor had neglected to present the bill for payment, or to give notice of the dishonour. But by the stat. 4 & 5 Ann. c. 9, s. 7, the acceptance of such a bill in satisfaction of a debt shall be deemed payment to the creditor if he do not take his due course to obtain payment of it (*f*).

Where a bill has been delivered in payment, the party receiving it cannot resort to the original consideration, without either producing the bill, or showing that the defendant can no longer be liable upon it. It is not sufficient to show that the bill or note is lost (*g*), without proof that under the circumstances the defendant cannot be legally called on to pay (*h*).

The statute does not require notice to any stranger to the bill, but only to parties. If one deliver a bill to another without indorsing his name upon it, he does not subject himself to any obligation by the law of merchant *on the bill*; neither, on the other hand, is he entitled to the same advantages (*i*). If in such case the party who takes the bill take it as an absolute discharge, agreeing to run all risks in the absence of fraud, the delivery

be so, is no satisfaction of a debt; but it is otherwise of a bill accepted by the debtor, and *negotiable* per Lord Mansfield; in *Richardson* v. *Richman*, cited 5 T. R. 518; and see 10 Mod. 37. But the creditor cannot resort to the original consideration where a bill has been so accepted without showing that it has not been negotiated. *Kearslake* v. *Morgan*, 5 T. R. 513. If the purchaser of goods pay by a bill, which the vendor indorses, a judgment obtained by the indorser does not operate as satisfaction. See tit. PAYMENT, and *Tarleton* v. *Allhusen*, 2 Ad. & Ell. 32. Where the creditor received an acceptance of the debtor as payment, held that proof of its having been lost was not sufficient to render the latter liable to the debt, without going further, and showing it to be destroyed, although an indemnity was offered. *Woodford* v. *Whiteley*, 1 M. & M. 517. The vendor of goods is paid by a bill drawn by the vendee on a third person, and after acceptance alters the bill as to the time of payment; by doing so he makes the bill operate in satisfaction of the debt, and cannot afterwards recover for the goods sold. *Alderson* v. *Langdale*, 3 B. & A. 660.

(*d*) *Puckford* v. *Maxwell*, 6 T. R. 52; where a draft had been given when the defendant was arrested, it was held that he might be again arrested on the same affidavit, the draft having been dishonoured. And see *Brown* v. *Kewley*, 2 B. & P. 518. Where the dishonoured bill has been given in payment for goods, the payee may maintain an action for goods sold and delivered, although the time of credit has not expired, and although he has not returned the bill. *Hickling* v. *Hardy*, 7 Taunt. 312. *Mussen* v. *Price*, 4 East, 147.

(*e*) *Clark* v. *Mundall*, 1 Salk. 124.

(*f*) And therefore the general rule seems to be, that in all cases where a bill to which the debtor is a party is given in discharge of a debt, notice of dishonour must be given to every party sued on such bill, who on keeping the bill would be entitled to a remedy over against any other party. See *Cory* v. *Scott*, 3 B. & A. 619. A bill was drawn for the accommodation of an indorsee, and neither the indorsee nor the drawer had effects in the hands of the acceptor; it was held that in an action by a subsequent indorsee against the drawer, proof of notice was necessary; for the drawer might, on notice, have resorted to the indorsee. See *Brown* v. *Maffey*, 15 East, 216.

(*g*) See *Dangerfield* v. *Willby*, 4 Esp. C. 159. *Powell* v. *Roach*, 6 Esp. C. 76. *Williamson* v. *Clements*, 1 Taunt. 523. *Poole* v. *Smith*, Holt's C. 144. *Champion* v. *Terry*, 3 B. & B. 295. So where half the note was lost. *Mayor* v. *Johnson*, 3 Camp. 324. *Secus, semble*, where the bill is still within the plaintiff's control, though it has not been delivered up. *Hadwen* v. *Mendisabal*, 2 C. & P. 20.

(*h*) As by proof that the plaintiff, the payee of the bill accepted by the defendant for goods sold to him by the plaintiff, lost the bill previous to indorsement. *Holt* v. *Watson*, 4 Bing. 273.

(*i*) *P. C. Van Wart* v. *Woolley*, 3 A. & C. 430. *A.*, to whom *B.* was indebted for goods sold, drew a bill on *C.*, who was *B.*'s debtor, with *B.*'s consent, for the amount, which bill *C.* accepted, but afterwards dishonoured; it was held that *B.* was not entitled to notice of the dishonour. *Swinyard* v. *Bowes*, 5 M & S. 62.

Effect of in payment.

operates as an absolute discharge (*k*). But it is not to be inferred, from the mere fact of delivering a bill, that it is received in absolute discharge.

If a bill or note be delivered in payment of an antecedent debt, without indorsement by the debtor, and the creditor be guilty of laches in procuring payment or giving notice of dishonour to the debtor, the latter, it seems, will be discharged by such laches, if he may have been prejudiced by it. For if the creditor mean to repudiate the payment, he ought to apprise the debtor of his intention, and of the circumstances, as soon as he can with convenience (*l*).

If a party agree to take the notes of a third person, payable to the bearer as money, absolutely and without condition, and they are what they purport to be, they operate as a satisfaction of the debt, though the maker be insolvent; it would be otherwise if the notes were not what they purported to be, but were forged. If they be taken not absolutely and unconditionally, but merely as negotiable instruments in the ordinary course, they are taken subject to a condition that the holder will use due means to obtain payment, and then they ought to be presented for payment within a reasonable time. There is no guarantee in such case, on the part of him who passes such a note, that the maker is solvent at the time (*m*).

A distinction has been taken between the payment of a bill or note in discharge of an antecedent debt, and a delivery at the time of sale. But it is obvious that the same principle must govern both cases; each must depend on the intention of the parties. If the facts show that at the time of the

(*k*) *Swinyard* v. *Bowes*, 5 M. & S. 62.

(*l*) *Camidge* v. *Allenby*, 6 B. & C. 373. *Van Wart* v. *Woolley*, 3 B. & C. 430, and *infra* note (*m*). *Waud* v. *Evans*, 2 Lord Kenyon, 928; 2 Salk. 442; 6 Mad. 56. *Owenson* v. *Morse*, 7 T. R. 64; Str. 415, 416. 508. 550; 6 T. R. 52; 8 T. R. 451; 2 B. & P. 518. So in the case of a guarantee, in respect of goods to be paid for by a bill, although the guarantee be not a party to the bill, and therefore, although notice of the dishonour be not essential to his liability, according to the ordinary rule, yet he will be discharged by the omission of the creditor to take the necessary steps to obtain payment on the security. As in *Phillips* v. *Astling*, 2 Taunt. 206. There the drawer (the principal) and the acceptor remained solvent for many months after the bill was dishonoured, and it was not until they had become bankrupts that payment was demanded of the defendant, the guarantee. It is otherwise where the defendant has sustained no detriment by the want of presentment or notice, as in *Warrington* v. *Furbor*, 8 East, 242, where a commission of bankrupt had issued against the acceptor (the principal) before the bill became due, and *Holbrow* v. *Wilkins*, 1 B. & C. 10, where the acceptors were known to be insolvent before the bill became due, and the bill, if presented, would not have been paid.

(*m*) *Camidge* v. *Allenby*, 6 B. & C. 373. And therefore, where *A.* paid notes of the Huddersfield Bank to *B.*, at York, at three in the afternoon of the 10th, in payment for goods, the bank having stopped payment at eleven o'clock in the forenoon of the same day, but neither of the parties knew of the stoppage or of the insolvency, and *B.* neither circulated the notes, nor presented them, but afterwards required *A.* to take them back, and pay him the amount; it was held that the debt was satisfied. See also *Moore* v. *Warren*, Str. 415; *Holme* v. *Barry*, Ib., where it was laid down that if a party taking a banker's note is guilty of *laches*, he gives new credit to the banker, and the party who paid it is discharged. Where the plaintiff's servant received banker's notes in payment for cattle at a fair, fourteen miles distant from home, on Friday afternoon, and his master not being at home on his return, did not settle his accounts till Saturday evening, the bankers having stopped in the middle of the day; it was held that the master was not guilty of laches in not presenting the bills on the Saturday. *James* v. *Holditch*, 8 D. & R. 40. In *Owenson* v. *Morse*, 7 T. R. 64, *A.* agreed to buy articles of plate from *B.*, who was to get *A.*'s arms engraved on it, and the plate was delivered to an engraver for that purpose. *A.* gave in payment for the goods the notes of a banker who had then stopped payment, and in an action of trover by *A.* for the plate, it was held that *B.* might stop the goods *in transitu*, there being no delivery or payment. See also *Tapley* v. *Martens*, 8 T. R. 458; *Dangerfield* v. *Wilby*, 4 Esp. C. 159.

mutual delivery of a bill or note for a chattel, the parties intended an absolute exchange, each taking the thing delivered with all faults, the delivery of the bill in the absence of fraud must operate as a discharge; but if the bargain was not for the delivery of the bill specifically, but for a money price, and the bill was merely taken in payment of that price, there seems to be no distinction in principle between a delivery contemporaneous with the sale, and one made at a subsequent time (*n*). Effect of in payment.

Where an acceptor, in order to pay his acceptance, drew another bill which was dishonoured by the drawee, but no notice was given, it was held that the acceptor was entirely discharged (*o*).

If *A.* and *B.* exchange bills absolutely, the property is changed, and does not revest in either, although the bill which he has received is dishonoured (*p*); otherwise, when the exchange is *conditional* (*q*). But it seems, that if *B.* knew that his own bill was worthless, the whole transaction would be vitiated by the fraud, and the property in *A.*'s bill would not be altered.

Bank-notes cannot be followed by the legal owners into the hands of *bonâ fide* holders who took them in payment, without notice (*r*).

The giving a bill in payment excludes all objections to previous accounts (*s*).

For the evidence upon an indictment for forgery, see tit. FORGERY.

BILL OF EXCEPTIONS. *See* VOL. I.

BILL OF LADING.

A BILL of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight (*t*). Such instruments are negotiable by the custom of merchants (*u*), and are transferred by the shipper's indorsement (*x*); and there is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person (*y*). Effect of.

The indorsement and delivery of a bill of lading is *primâ facie* an immediate transfer of the legal interest in the cargo (*z*). And a bill of lading signed by a deceased master of a vessel for the delivery of goods to a consignee, is evidence of property in the consignee to show an insurable interest in the goods (*a*).

The bill of lading as between the original parties is merely a receipt, but not conclusive as to the quantity of the goods shipped, and may be opened by evidence of the real facts (*b*).

An assignment of the bill of lading to a third person for a valuable consideration devests the consigner's right of stoppage *in transitu* (*c*.)

(*n*) See 6 B. & C. 381, and Mr. Long's excellent Work on Sales, 286.

(*o*) *Bridges* v. *Berry*, 3 Taunt. 130. See also *Bevan* v. *Hill*, 2 Camp. 381.

(*p*) *Hornblower* v. *Proud*, 2 B. & A. 327. And see *Cowley* v. *Dunlop*, 7 T. R. 565.

(*q*) Ibid.

(*r*) *Lowndes* v. *Anderson*, 13 East, 130. *Solomons* v. *Bank of England*, Ibid. 135.

(*s*) *Knox* v. *Walley*, 1 Esp. C. 159; 9 Mod. 23.

(*t*) Per Ld. Loughborough, 1 H. B. 358.

(*u*) 5 T. R. 683. *Lickbarrow* v. *Mason*.

(*x*) *Lickbarrow* v. *Mason*, 2 T. R. 63. *Haille* v. *Smith*, 1 B. & P. 564.

(*y*) 2 T. R. 63.

(*z*) 1 T. R. 215, 216. *Hibbert* v. *Carter*, T. R. 745.

(*a*) *Haddow* v. *Parry*, 3 Taunt. 305.

(*b*) *Bates* v. *Todd*, 2 M. & M. 106.

(*c*) *Lickbarrow* v. *Mason*, 2 T. R. 63. 5 T. R. 367. 683. *Secus*, where a bill of lading is assigned by the vendee to his factor, although he has drawn upon him to the amount of the consignment, it being

BILL OF PARTICULARS. *See* PARTICULARS.

BOND.

Proof.

THE proof in an action on a bond depends entirely upon the issue taken upon the plea of *non est factum*, payment, performance of conditions, &c.

By the rules of Hil. Term, 4 Will. 4, in an action of debt on specialty, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Upon the plea of *non est factum* the plaintiff must prove the execution of the bond in the usual way (*d*).

Illegality or fraud cannot be proved under this plea (*e*).

Breaches.

Where the bond contains a condition for the performance of covenants and agreements, breaches must be assigned (*f*) under the stat. 8 & 9 Will. 3, c. 11, s. 8, in the declaration, or suggested on the roll, in all cases, except of money-bonds and bail-bonds (*g*), and, as it seems, bonds entered into by a

clear that it was not intended that the goods in question should be appropriated to the payment of the particular bills, and the goods not having reached the factor's hands, and no specific pledge having been made. *Patten* v. *Thompson*, 5 M. & S. 350. See *Kinloch* v. *Craig*, 3 T. R. 119. 783.

(*d*) *Infra*, tit. DEED. It is no defence on this plea that the defendant was misled as to the legal effect of the bond. *Edwards* v. *Brown*, 1 Cr. & J. 307. The obligatory part of a bond purported that the obligor was to become bound for ——, omitting to insert the word *pounds*, but from the recitals in the condition it appeared to be the intent that he should enter into a bond for securing various sums of money composed of pounds sterling; the court read the bond as if the word *pounds* were inserted in it. *Coles* v. *Hume*, 8 B. & C. 568. Debt on bond described in the declaration as conditioned for payment by three persons; the bond produced was a bond for payment by two of those named, and by a third person not named; held to be a fatal variance, although the bond was joint and several. *Adams* v. *Bateson*, 6 Bing. 110, and 3 M. & P. 339.

(*e*) A party cannot, even after notice, give in evidence that it had been executed in consideration of foregoing a prosecution against *R.* for embezzling monies of his employers which had been concealed from the defendant when he executed the bond; the fact must be pleaded specially. *Harmer* v. *Rowe*, 6 M. & S. 146. In debt on bond given by the defendant on his being appointed deputy to the plaintiff as a colonial secretary, the condition reciting an agreement to appoint him such deputy, to execute the office and receive the fees, and pay a yearly sum of —— *l.* to the plaintiff *thereout*, but the condition was for payment of that sum *absolutely*; held that it was competent to the defendant to plead, and the jury to find, the fact that the sum was to be paid out of the fees, and that they exceeded the amount, in order to show the illegality of the bond; the fact not being so inconsistent with the bond that it must be rejected. *Greville* v. *Athins*, 9 B. & C. 462. And see *Collins* v. *Blantern*, 2 Wils. 347, and *Paxton* v. *Popham*, 9 East, 408. The condition of a bond given by the collector of taxes contained also a distinct clause for accounting and paying over to the commissioners, which was not authorized by the 43 Geo. 3, c. 99; held, that it might be rejected as surplusage, and did not vitiate the bond, being neither contrary to the statute nor *malum in se*. *Collins* v. *Gwynne*, 7 Bing. 423. Fraud also must be pleaded. *Edwards* v. *Brown*, 1 Cr. & J. 307; 1 Tyrw. 182. *Turk* v. *Tooke*, 4 Mann. & Ry. 393; 12 Moore, 435. *Greville* v. *Athins*, 9 B. & C. 462.

(*f*) Where a party indemnified by bond is sued in respect of the matter of the indemnity, and damages recovered against him, the defendant in his suit on the bond is bound to assign not only the damages and costs so recovered against him, but also the costs incurred by him in consequence, although he may not have actually paid them; and he cannot upon a *scire facias* suggest them as a further breach, being precluded by 8 & 9 W. 3, c. 11. *Harrap* v. *Armitage*, 12 Prl. 441.

(*g*) 2 B. & P. 446. Tidd's Prac. 507, 4th edit. In debt on bond, where the breaches are assigned in the replication under the statute, the jury may assess the damages without any special *venire*. *Scott*

petitioning creditor to the Ld. Chancellor in case of bankruptcy (*h*); and in general where nothing but computation is necessary to ascertain the precise sum due (*i*). After proof of the bond the plaintiff proceeds to prove the breaches assigned, where, from the nature of the case, the burthen of proof is not thrown on the defendant to prove the affirmative; as, where the condition is to pay money by instalments, or the payment of rent (*j*). Breaches.

Where a sum by the condition is payable by instalments, with a stipulation that on default of payment of interest the whole shall become payable, on such default the whole may be recovered (*k*).

In an action on an annuity-bond, the plaintiff must prove that the party during whose life the annuity is granted is still living. If the bond be conditioned for the performance of covenants in some other deed, the plaintiff must prove the execution of the latter deed, as well as of the bond, and also that the covenant has been broken (*l*). Annuity-bond.

The plaintiff, in cases where breaches are assigned under the statute, must give evidence of the amount of his damages (*m*).

Upon an engagement to replace stock, the plaintiff may estimate his damages, either according to the price of stock at the day appointed for replacing it, or on the day of the trial (*n*).

A bond conditioned for the payment of a smaller sum bears interest from the day of payment, although it be given voluntarily (*o*); and where no day of payment is expressed, interest is payable from the time of execution.

Damages may, it seems, be recovered for more than the amount of the penalty (*p*); a jury, in assessing damages on a registration bond, are not confined to the diminution of the value of the advowson to the plaintiff by the defendant's life interest, nor in estimating the annual value are they bound to deduct the curate's stipend (*q*). Where in debt on a bond with a condition, the condition is not set out in the pleadings, the plaintiff must prove that the bond mentioned in the suggestion and produced to the jury is that on which the action is brought (*r*).

v. *Starey*, 4 Bing. N. C. 724; 6 Sc. 598; and 6 Dowl. (P. C.) 714. And see *Quin* v. *King*, 1 M. & W. 42.

(*h*) *Smithey* v. *Edmonson*, 3 East, 22.

(*i*) And therefore unnecessary in an action on a *post obit* bond for a precise sum. *Murray* v. *Earl of Stair*, 2 B. & C. 82.

(*j*) Debt on bond, the defendant pleaded, *inter alia*, by way of set-off, a bond given to him by the plaintiff, conditioned for payment of an annuity granted by the defendant to a third party, and for indemnifying the defendants therefrom; held that the onus of proving performance of that condition was on the plaintiff, and not on the defendant, to show the breach. *Penny* v. *Foy*, 8 B. & C. 11, and 2 Mann. & R. 181.

(*k*) *James* v. *Thomas*, 5 B. & Ad. 40.

(*l*) If the defendant let judgment go by default in an action on a bond, and the plaintiff makes a suggestion in which he sets out the condition of the bond, and that appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture or articles, as well as the breaches suggested. *Edwards* v. *Stone*, Cor. Lawrence, J. 1 Will. Saund. 58 *e*. (n.)

(*m*) See 2 Will. Saund. 187, a. 2 N. R. 362

(*n*) *Downes* v. *Back*, 1 Starkie's C. 318. *Macarthur* v. *Ld. Seaforth*, 2 Taunt. 257. In a late case it was held to be proper to take the price at the day of trial. *Harrison* v. *Harrison*, 1 C. & P. 413.

(*o*) *Hellier* v. *Franklin*, 1 Starkie's C. 291. *Farquhar* v. *Morris*, 7 T. R. 124. *Aliter*, in case of a single bond. *Hogan* v. *Page*, 1 B. & P. 337.

(*p*) *Lonsdale* v. *Church*, 2 T. R. 388. *M'Clure* v. *Dunkin*, 1 East, 436. *Francis* v. *Wilson*, 1 R. & M. 105.

(*q*) *Sondes* v. *Fletcher*, 5 B. & A. 835.

(*r*) *Hodgkinson* v. *Marsden*, 2 Camp. 121. It will be sufficient if the attorney for the plaintiff swear that the bond produced is the instrument delivered to him for the purpose of bringing the action, and that he knows no other of the same date, without calling the attesting witnesses. *Ib.* In an action on a bond for performance of covenants in a lease, the defendant's plea to the bond being overruled on demur-

Breaches.

Upon a plea of *non est factum* to a bond with conditions, breaches of which are assigned in the declaration, the jury who try the issue may also assess the damages under the common *venire* (*s*).

For the proofs by the defendant under the plea of *non est factum*, see tit. DEED.

Where the defence is that the consideration of the bond was illegal, and the illegality does not appear on the face of the bond, it should be shown by means of a special plea, and is not evidence under the plea of *non est factum*, whether the bond be avoided by the common or only by the statute law (*t*).

Plea of payment.

Proof of the payment of the principal only, will, it is said, support a plea of *solvit post diem* (*u*).

After a lapse of twenty years without demand of payment, or of acknowledgment by the obligor, a presumption arises that the bond has been satisfied (*x*); and such presumption is not rebutted by proof of the obligor's poverty (*y*). But it is otherwise where the obligor has resided abroad during the whole of the time (*z*). So, on the other hand, satisfaction may be presumed from the lapse of a space less than twenty years, if other circumstances render it probable that the bond has been satisfied; as, if there has in the meantime been a settlement of accounts between the parties (*a*).

Indorsements on the bond, although in the handwriting of the obligee, acknowledging the receipt of interest within the space of twenty years, have been admitted for the purpose of rebutting the presumption of satisfaction, arising from the lapse of twenty years, although no evidence was given to prove that the indorsements existed before the twenty years had elapsed (*b*); but the admissibility of such evidence appears to be very doubtful in principle, and the contrary has been ruled at Nisi Prius (*c*). Parishioners at a vestry agreed that the overseers should give their bond for a debt due from the parish, and by a minute resolved that they should be indemnified out of the rates; the obligee, a parishioner, signed the agreement and resolution of the vestry; he subsequently received for many years the interest out of the rates, without calling on the obligors for the principal; held, that the parishioners having no power to bind the parish, and the obligee having acceded to the resolutions only so far as they would bind the parish, the liability of the obligors, who undertook personally to pay, was not affected thereby (*d*).

rer, he is estopped from saying he did not execute the lease. *Collins* v. *Rybot*, 1 Esp. C. 157.

(*s*) *Parkins* v. *Hawkshaw*, 2 Starkie's C. 381. *Scott* v. *Starey*, 4 Bing. 724. *Quin* v. *King*, 1 M. & W. 42. 180. As to the plea of the Statute of Limitations, see tit. LIMITATIONS.

(*t*) *Harmer* v. *Wright*, 2 Starkie's C. 35,

(*u*) *Dixon* v. *Parkes*, 1 Esp. C. 110. *dub. Hellier* v *Franklin*, 1 Starkie's C. 291. See tit. PAYMENT.

(*x*) *Oswald* v. *Leigh*, 1 T. R. 270. *Colsell* v. *Budd*, 1 Camp. 27.

(*y*) *Willaume* v. *Gorges*, 1 Camp. 217.

(*z*) *Newman* v. *Newman*, 1 Starkie's C. 101.

(*a*) 1 T. R. 270. *Colsell* v. *Budd*, 1 Camp. 27.

(*b*) *Searle* v. *Ld. Barrington*, 2 Str. 826. *Glynn* v. *Bank of England*, 2 Ves. 42. *Saunders* v. *Meredith*, 3 M. & R. 120.

(*c*) *Rose* v. *Bryant*, 2 Camp. 321; see tit. LIMITATIONS, and Append. Vol. II. 270.

(*d*) *Jaquet* v. *Lewis*, 8 Sim. 480.

BOUNDARY ACT, 6 & 7 Will. 4, c. 103. *See* CORPORATION.

BREACH OF PROMISE OF MARRIAGE. *See* tit. MARRIAGE.

BRIBERY.

Proof in action for

UPON a trial for bribery under the stat. 2 Geo. 2, c. 24 (*e*), although the defendant took the note of the voter to whom the money was paid, and insists that it was a mere loan, it is a question for the jury whether it was not a gift (*f*).

To prove the allegation that *A. B.* was a candidate, where the bribery was previous to the election, it is sufficient to show that a poll was demanded for him, for till then every one is a candidate for whom a poll is asked; and that fact makes the person on whose behalf the bribe was given a candidate (*g*); but after the time of election the poll-books are the proper evidence to prove that a particular person was a candidate (*h*). The time of delivering the precept to the returning officer need not be proved (*i*).

Where the declaration alleged that the party was bribed to vote for *L.* and *E.*, and it was proved that he was bribed to vote for *L.* and *his friend*, it was held that the variance was not fatal, since the material fact is that the party was bribed to vote (*k*). The plaintiff must prove some bribe, or promise, or agreement, previous to the election (*l*).

On a declaration for corrupting one *Moor*, and bribing him to vote for the defendant, it is no defence to show that *Moor* did not vote for the defendant (*m*). The person who took the bribe is a competent witness (*n*).

If an offender who makes a discovery be sued, he may give his defence in

(*e*) This Act is to be construed prospectively, *Lord Huntingtower* v. *Ireland*, 1 B. & C. 297; 2 D. & R. 450. An offender discovering another, so that he be convicted, and not being himself convicted, is indemnified. See *Sutton* v. *Bishop*, 4 Burr. 2283. Making an affidavit is a sufficient discovery, *Sutton* v. *Bishop*, 1 Bl. 665, and a *verdict* without judgment a sufficient *conviction*; and it is sufficient though the witness be convicted *after* discovery, *Ib.* As to delay in going to trial, see *Talmuth* v. *Gardiner*, 1 D. & R. 512. *Petrie* v. *White*, 3 T. R. 5.

(*f*) 1 Bl. R. 317, 318. A wager with a voter that he does not vote for a particular candidate is within the statute. *Anon.* Lofft. 552.

(*g*) Ibid. 523.

(*h*) Ibid.

(*i*) *Grey* v. *Smithyes*, 4 Burr. 2273. Where the declaration set forth the precept from the sheriff to the portreeve of a borough, it was held that the improper insertion of the *if* in the declaration, which was not in the precept, was immaterial. *King* v. *Pippet*, 1 T. R. 235. See *Dickson* v *Fisher*, 4 Burr. 2267.

(*k*) *Coombe* v. *Pitt*, 3 Burr. 1586.

(*l*) *Lord Huntingtower* v. *Gardiner*, 1 B. & C. 297; 2 D. & R. 450. Note, that the declaration alleged that the defendant received a large sum *for* giving his vote for, &c., a second class of counts charged a previous agreement; it appeared that the defendant received money *after* the election for giving his vote for, &c. but no evidence was given of any pre-existing agreement. The learned judge reserved the point, and left the case to the jury, who found for the defendant on all the counts which charged a previous agreement. On motion for a nonsuit, this court held that the words of the statute were to be construed *prospectively*; that the terms of the first class of counts were ambiguous, and might after verdict be construed either prospectively or retrospectively, so as to support the verdict, and therefore that the question arose, not upon the record, but on the evidence, and a nonsuit was accordingly directed. See *Avery* v. *Hoole*, 2 Cowp. 825.

(*m*) *Sulston* v. *Norton*, 1 Bl. 317; 3 Burr. 1235. *Bush* v. *Rawlins*, Say. 289. *Phillips* v. *Fowler*, Pasch. 7 Geo. 2, C. B. It is immaterial whether he had in fact a right to vote if he claimed the right, and the defendant thought he had such right. *Lilley* v. *Corrie*, 1 Sel. N. P. 650, n. And such right of voting need not be proved. *Coombe*, q. t. v. *Pitt*, 1 Bl. 523; 3 Burr. 1586.

(*n*) 4 Burr. 2285. 2469. *Edwards* v. *Evans*, 3 East, 451. *Heward* v. *Shipley*, 4 East, 180.

evidence under the plea of *nil debet* (*o*). No damages are recoverable for the detention of the debt (*p*).

BRIDGE.

Indictment against a county.

On an indictment against a county (*q*) for not repairing a bridge, the prosecutor must prove, 1st, that it is a public bridge; 2dly, that it is situate within the county; 3dly, that it is out of repair.

That it is a public bridge.

1st. That it is a public bridge.—The principal evidence to prove this is that of the actual use of the bridge by the public, and that it is of *public convenience* and has been repaired at the public expense. It is not necessary to prove that it is an ancient bridge, or that it was originally built with the concurrence of the public. Where a bridge had been originally erected by a private person forty years ago, but had been since used by the public, it was held that it was a public bridge (*r*).

About forty-five years ago there was a ford through the river where the bridge was built, which was part of a highway from London to Maidstone. The river was deep; at flood-times up to the middle, at ordinary times up to the knee. A miller erected a dam across the river, which raised the water about three inches, and five years afterwards built the bridge in question. In this case much reliance was placed on the *dictum* in Rolle's Ab. 368; viz. "that if a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects used to go over this as a common bridge, the bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit," for which he cites 8 Edw. 2, the case of the Prior of Stratford. But on referring to that case, it appeared that the liability there was *ratione tenuræ* (*s*), and the court laid down the rule broadly, in conformity with all the authorities, except that in Rolle, that if a private person build a private bridge, which afterwards becomes of *public convenience*, the *county* is bound to repair it (*t*). The circumstance that the bridge is of private convenience and utility to the party who built it, makes no difference (*u*) The test is not, as it seems, any *adoption* of the bridge by the public, but its

(*o*) *Dary* v. *Baker*, 4 Burr. 2471. The court, after a verdict given against him, will not interpose on motion that judgment may be stayed for the discovery and conviction of another person. *Pugh* v. *Curgenvan*, 3 Will. 35.

(*p*) *Cuming* v. *Sibley*, 4 Burr. 2489.

(*q*) The county is liable for such bridges only as are over "water flowing in a channel between banks more or less defined;" they are not liable for the repair of arches forming a causeway and easier access to the main bridge and passage of flood water, the channel of which was occasionally dry. *R.* v. *Oxfordshire*, 1 B. & Ad. 289. And see S. P. ib. in notis, and *Bridges & Nichols' Case*, Godb. 346, pl. 441.

(*r*) *R.* v. *Inhab. of Kent*, 2 M. & S. 513; 1 Roll. Ab. 368. *R.* v. *Inhab. of Wilts*, 6 Mod. 307; 3 Salk. 359. *Case of Glusburne Bridge*, 5 Burr. 2594; 2 Bl. R. 386, n. 685. *R.* v. *Inhab. of the W. R. of York*, 2 East, 353. *R. Inhab. of Glamorgan*, 2 East, 356. *Lord Portman's Case*, 13 East, 225. *Case of the Medway Canal*, 13 East, 220. *A.* licenses *B.* to build a bridge on his land; *B.* covenants to repair; the property in the materials, subject to the public right of passage after dedication to the public, continues in *B.*, who may maintain trespass against a wrongdoer who severs them. *Harrison* v. *Parker*, 6 East, 154; and see *Spooner* v. *Brewster*, 3 Bing. 139.

(*s*) See a copy of the curious record in this case, 2 M. & S. 520.

(*t*) *R.* v. *Inhab. of Kent*, 2 M. & S. 513. And see *R.* v. *Inhab. of Wilts*, 1 Salk. 359. And see the rule laid down by Aston, J. in the *Glusburne Bridge Case*, Burr. 2594. *R.* v. *Inhab. of Lancashire*, cited by Lawrence, J., 2 East, 352.

(*u*) *R.* v. *Inhab. of Glamorganshire*, 2 East, 356, in note.

becoming *useful* to the county in general (*x*): if the bridge be of public utility, the county who derive advantage from it must support it.

A bridge may be a public carriage-bridge, although used but occasionally by carriages, except in times of flood and frosts, when it is dangerous to pass the river (*y*).

Public bridge.

Where the Medway Navigation Company, under an Act, which enabled them to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them, or others as convenient, in their room, forty years ago destroyed a ford across the river in a public highway, by deepening its bed, and built a bridge over the same place, it was held that they were bound to keep it in repair under the conditions of the Act (*z*). So, where a canal-company cut and deepened a ford across a highway, and thereby rendered a bridge necessary for the use of the public, which they built, it was held that they were bound to repair it; the bridge being necessary for the purposes of the company, and not for the purposes of the public (*a*).

Where a parish wooden bridge, used occasionally by light carriages, had been replaced by a spacious stone bridge, built by the trustees of a road, it was held that the county was bound to repair it, and that the inhabitants of the county could not plead that it had been repaired immemorially by the parish (*b*).

By the stat. 43 Geo. 3, c. 59, s. 5 (*c*), no bridge shall be deemed and taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected (*d*) in a substantial or commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their general annual sessions.

The inhabitants of a county are also bound to repair to the extent of 300 feet of the highway at each end of the bridge (*e*).

The inhabitants of a county are not bound to widen a public bridge, though it be too small for the measured breadth of modern carriages (*f*).

(*x*) Per Lord Ellenborough, *R.* v. *W. R. of Yorkshire*, 2 East, 349; and per Aston, J. in the *Glusburne Bridge Case*, Burr. 2594; and Lord Coke's Comment. on the Stat. of Bridges, 2 Inst. 700. Where a bridge is in a highway, the forbearing to prosecute it as a nuisance is evidence of acquiescence by the county. Per Bayley, J. *Rex* v. *Inhabitants of St. Benedict*, 4 B. & A. 450. *R.* v. *Devon*, 1 R. & M. 144.

(*y*) *R.* v. *Inhab. of Co. of Northampton*, 2 M. & S. 262.

(*z*) *R.* v. *Inhab. of the Co. of Kent*, 13 East, 219.

(*a*) *R.* v. *Inhab. of the parts of Lindsey, in the Co. of Lincoln*, 14 East, 317. See also *R.* v. *Inhab. of Somerset*, 16 East, 305.

(*b*) *R.* v. *Inhab. of Surrey*, 2 Camp. 455. *R.* v. *Inhab. of Cumberland*, 6 T. R. 194; S. C. in error, 3 B. & P. 354. Where townships have so enlarged a bridge which they were before liable to repair as a foot-bridge, they are still liable *pro ratâ*. *R.* v. *W. R. of Yorkshire*, 2 East, 353.

(*c*) By this stat. s. 4, the surveyor may sue or be sued.

(*d*) This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the statute. Trustees under a Turnpike Act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such a bridge on the ground that it was not absolutely necessary. *R.* v. *Inhab. of Lancashire*, 2 B. & Ad. 813.

(*e*) *R.* v. *Inhab. of W. R. of Yorkshire*, 7 East, 588; and in Dom. Proc. 5 Taunt. 284.

(*f*) *R.* v. *Inhab. of Devon*, 4 B. & C. 670; 7 D. & R. 147. *R.* v. *Inhab. of Cumberland*, 3 B. & P. 354.

But those who are bound to repair must make it of such height and strength as is answerable to the course of the water (*g*).

Proof in defence by a county.

The inhabitants (*h*) of a county, upon the plea not guilty, cannot throw the *onus* of repairing the bridge upon any other parties; to do this, a special plea is necessary, setting forth the obligation of such other parties specially (*i*). Under the general plea the defendants cannot adduce evidence, except in denial of one or more of the points which must be established on the part of the prosecution; viz. 1st. that the bridge is a public one; 2ndly, situate within the county; and 3dly, out of repair.

But a county on the plea of not guilty, may prove the repair of the bridge by individuals (*k*), as a medium of proof that the bridge is not a public bridge. As that the feoffees of certain estates had repaired it (*l*); for repairs done by an individual are *primâ facie* to be ascribed rather to motives of private interest in his own property, than presumed to have been done for the public benefit (*m*). But it seems that such evidence is of little weight (*n*) when placed in competition with evidence of *user* by the public. Evidence that a bar across a public bridge is kept locked except in times of flood, is conclusive to show that the public have no more than a limited right to use it on those occasions; and in such a case, if the indictment should aver that the bridge was a public bridge, used by the King's subjects at their free will and pleasure, the variance would be fatal (*o*).

Where an indictment alleged that a bridge was a public carriage-bridge, and also for the King's subjects passing and repassing on foot; and upon the evidence it appeared that it had been used by passengers on horseback and on foot, and not with carriages, it was held that the defendants could not be convicted of any part of the charge (*p*).

Special plea.

Upon a special plea by a county that some smaller district, or some individual, is liable to the repairs of the bridge, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual.

Against individuals, &c. Prescription.

Upon an indictment against a less district than a county, or against an individual, the prosecutor must also prove the liability of the defendants to repair, either from prescription (*q*) generally, or *ratione tenuræ* (*r*), as alleged in the indictment.

A plea by the inhabitants of a county, that certain townships had *immemorially* used to repair a bridge, is disproved by evidence that the townships had enlarged the bridge to a carriage-bridge which they had before been bound to repair as a foot-bridge (*s*). Where, upon a similar plea, it

(*g*) 1 Haw. C. 77, s. 1.

(*h*) A particular inhabitant or tenant of land charged to the repairs, may be made defendant to an indictment, and be liable to the whole fine, and must sue at law for contribution. 1 Haw. C. 77, s. 2. And now see the stat.

(*i*) See the stat. 22 Hen. 8, c. 5. *R.* v. *Inhab. of W. R. of Yorkshire*, 7 East's R. 558. 5 Taunt. 284. *R.* v. *Inhab. of Bucks*, 12 East, 192.

(*k*) 2 M. & S. 262. *R.* v. *Inhab. of Co. of Northampton.*

(*l*) Ibid.

(*m*) Per Ld. Ellenborough, 2 M. & S. 264.

(*n*) Ibid.

(*o*) *R.* v. *The Marquis of Buckingham*, 4 Camp. 189.

(*p*) Per Bayley, J., *R.* v. *Inhab. of Lancashire*, Lancaster Summer Assizes, 1820.

(*q*) See *R.* v. *Hendon*, 4 B. & Ad. 628.

(*r*) See tit. PRESCRIPTION & HIGHWAYS.

(*s*) *R.* v. *Inhab. of W. R. of Yorkshire*, 2 East, 353. See also *R.* v. *Inhab. of the County of Surrey*, 2 Camp. 455. Where an Act made a town part and parcel of a hundred, and directed that the inhabitants of the town should do every thing with the inhabitants of the hundred which the latter did or were bound to do, held that a presentment against the inhabitants of

appeared that a parish was bound by prescription to repair a wooden foot-bridge, used by carriages only in time of flood, and that forty years ago the trustees of a turnpike-road had built upon the same site a wider bridge of brick, which had since been constantly used by all carriages passing that way, it was held that the plea was not sustained by the evidence (*t*).

Ratione tenuræ.

Upon an indictment against a county, the defendants pleaded that *J. S.* was liable *ratione tenuræ*. It appeared that *J. S.* had purchased part of an estate, the owner of which, both before and after the purchase, had repaired the bridge, and it was held that this was not sufficient evidence to support the plea (*u*). But where an entire estate or manor is liable to the repair of a bridge, and the estate or manor is afterwards divided amongst several, they are each severally liable to the whole charge (*x*).

Corporation.

Where the indictment charged a corporation with a prescriptive obligation to repair a bridge, and a charter of incorporation granted by Edw. 6. was given in evidence, from the terms of which it appeared to be doubtful whether the corporation had before existed immemorially, and whether lands had not been given for the repair of the bridge (*y*), but parol evidence was given that the corporation had in fact repaired the bridge as far back as living memory could go, it was held that the parol evidence and the charter might be taken in aid of each other, and that the preponderance of evidence was, that this was a corporation by prescription, although words of incorporation were used in the incorporating part of the charter only; and that the corporation were still bound to repair by prescription, and not by tenure (*z*).

On an indictment for not repairing a bridge, *ratione tenuræ*, it was held, that in order to negative any such immemorial liability, a record of a presentment in the 18th of Edw. 3, by the men of *K.* against the bishop of *L.*, for the non-repairs of the bridge, on which the jury negatived the liability of the bishop, and went on to find that the bridge had been built about sixty years, and that they were wholly ignorant who of right was bound to repair it, the verdict being followed soon after by a grant of pontage to the men of *K.* for the same repairs, were admissible documents, as material to the issue (*a*).

Defence.

An individual, or the inhabitants of any district inferior to a county, may give any matter in evidence in their own discharge under the general issue (*b*).

Competency.

The stat. 1 Anne, c. 18, s. 13, reciting that many private persons, and

the hundred for the non-repair of a bridge within the town was good, although charging them as liable by prescription. *R.* v. *Oswestry*, 6 M. & S. 361.

(*t*) *R.* v. *Inhab. of the County of Surrey*, 2 Camp. 455.

(*u*) *R.* v. *Inhab. of Oxfordshire*, 16 East, 223. There was no evidence to show in respect of what lands the former owner of the whole (Ld. Cadogan) repaired the bridge; and as he still retained part of the estate, and continued to repair the bridge, there was no evidence to charge *J. S.*, except that Ld. Cadogan had sold him some lands, which the Court held to be insufficient to charge him with the obligation to repair. Where an individual *ratione tenuræ* is bound to repair a carriage bridge, he is not bound to repair a foot-bridge, though it be annexed to and connected with the carriage bridge. *R.* v. *Inhab. of Middlesex*, 3 B. & Ad. 201.

(*x*) *R.* v. *Duchess of Buccleugh*, 1 Salk. 357; 3 Salk. 77; 6 Mod. 150; Holt, 128.

(*y*) *R.* v. *The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348. The terms of the charter itself are too long to be introduced here, and the case is cited merely for the purpose of showing how far parol evidence of the cause may be given as explanatory of the doubtful terms of a charter.

(*z*) 14 East, 348.

(*a*) *R.* v. *Lady Sutton*, 3 Nev. & P. 569.

(*b*) See tit. HIGHWAY & PRESCRIPTION.

bodies politic or corporate, are of right liable to the repair of decayed bridges, and the highways thereto adjoining, but that because the inhabitants of the county, riding or division in which such decayed bridge or highways lie, have not been admitted as legal witnesses against such persons, enacts that the evidence of the inhabitants shall be taken and admitted in all such cases. Previous to this statute such witnesses were in some instances held to be competent on the ground of necessity (*c*).

BURGLARY (*d*).

Breaking.

On an indictment for burglary it is essential to prove, 1st, a felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night-time; 4thly, with intent to commit a felony.

In the first place, it is a question of fact for the jury, whether the prisoner has been guilty of any act of breaking; but whether that act amounts to a *burglarious* breaking, is a pure question of law. There must be evidence of an actual or constructive *breaking*, for if the entry was obtained through an open door or window, it is no burglary (*e*). But the lifting of a latch (*f*); taking out a pane of glass; lifting up of folding-doors (*g*); breaking of a wall or gates which protect the house (*h*); the descent down a chimney (*i*); the turning of a key where the door is locked on the inside (*k*), constitutes a sufficient breaking.

Proof of breaking.

Where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was sufficient, and no judgment was given (*l*).

Where an entry has been gained without any breaking, a subsequent breaking will constitute the offence; as, where the party lifts the latch of a chamber-door (*m*), or a servant raises the latch of his master's door with intent to murder or rob his master (*n*).

(*c*) See *R.* v. *Carpenter*, 2 Show. 47. It has been said that inhabitants are competent witnesses on indictments against the county, because they stand indifferent, every man being for his own convenience concerned to uphold the bridge, and, on the other hand, being interested not to subject himself to an useless charge. Gilb. L. E. 240, Lofft's ed. It is, however, obvious that this reason is applicable only in cases where the mere fact of repairs is disputed. Ibid.

(*d*) See the form of the indictment, and the necessary averments, CRIM. PLEADINGS.

(*e*) Fost. 107; 1 And. 114; Saville, 50; 1 Hale's P. C. 551. 553. 556; Summ. 81; 3 Ins. 64; 1 Haw. c. 38. The breaking, which is sufficient in an action of *clausum fregit*, will not always be sufficient to constitute a burglary. 1 Haw. c. 38; 1 Hale, 508. 527. 551.

(*f*) East's P. C. 487.

(*g*) *Brown's Case*, East's P. C. 487. In this case the doors, which were horizontal, were closed by their own natural weight, without any interior fastening; but in *Callam's Case*, (Russel, 903, *cor.* Ld. Ellenborough, O. B. 1809,) which was similar, except that the trap-door had an internal bolt, which was not in; it seems that the Judges were of opinion that the lifting up of the door was not a sufficient breaking. Lifting up the flap of a trap-door which had no fastening, but was kept in its place by its own weight merely, was held not to be a breaking; but the unlocking and opening a door, was held a sufficient breaking out. *R.* v. *Lawrence*, 4 C. & P. 231. Raising a sash partly before open, was held not to amount to a breaking, to sustain a conviction for house-breaking. *Smith's Case*, 1 Ry. & M. C. C. L. 178. Where the sash-window was closed down, not fastened, and was thrown up by the prisoner, and a crow-bar introduced to force the shutters, but there was no proof that any part of the hand was within the window; held not to amount to an entering sufficient to constitute burglary. *Rust's Case*, 1 Ry. & M. C. C. L. 183.

(*h*) 1 Hale's P. C. 559.

(*i*) East's P. C. 485; Cromp. 32; Dalt. 253.

(*k*) Ibid. 487; 1 Hale, 552.

(*l*) *Chambers's Case*, East's P. C. 487.

(*m*) *R.* v. *Johnson*, East's P. C. 484; 1 Hale's P. C. 553.

(*n*) Kel. 67; Pop. 14; Hutt. 20. *R.* v. *Binglose*, East's P. C. 488. *R.* v. *Gray*, Str. 481; Dy. 90.

It has been doubted, whether a guest at an inn can be guilty of burglary, in respect of breaking his own chamber-door, since he has a special property in the chamber (*o*). Most of these observations apply also to an indictment for *breaking out*, under the stat. 12 Ann. c. 7, s. 3, which was a declaratory Act, and for which the stat. 7 & 8 G. 4, c. 29, s. 13, is now substituted.

Some part of the *house* must be broken; it is not sufficient to show that a box was broken (*p*); and it seems, that in favour of life, cupboards, presses, lockers, and other fixtures, which merely supply the place of chests, and other ordinary utensils of household, are to be considered as mere moveables, although in questions between the heir or devisee and the executor, they may with propriety be considered as parts of the freehold (*q*).

Breaking, constructive.

A constructive *breaking* may be proved; as where entrance was gained by means of fraud, stratagem, or threats, with a felonious design, for the law regards such means in as heinous a point of view as actual violence (*r*). Hence, the gaining admission by raising a hue and cry, and bringing a constable, to whom the owner opens the door (*s*), under pretence of business (*t*); under pretence of taking lodgings (*u*); under a judgment against the casual ejector obtained by false affidavits and without any colour of title (*x*); by fraudulently persuading an inmate to give admission (*y*); by conspiracy with a servant (*z*); or, lastly, by threats of violence to the owner who opens the door of his house (*a*), is sufficient to constitute the offence.

Entry.

Some *entry* must be proved. If thieves by threats of violence induce the owner of a house to throw out his money to them in the night time, which they take up in the owner's presence, the offence would be a robbery, but not a burglary (*b*). But any the least entry is sufficient, by means of the hand (*c*) or foot, or even by an instrument, such as a pistol or hook (*d*). So, it seems, that the discharging a loaded gun through the window of a dwelling-house is a sufficient entry (*e*).

But the entry must appear to have been made with the immediate intent

(*o*) Haw. c. 38. But if the chamber of the guest be broken by another, the dwelling-house must be alleged to be the inn-keeper's, and a guest may be guilty of larceny in respect of goods entrusted to him as a guest.

(*p*) Foster, 108.

(*q*) Ibid. 109, in *Gibbon's Case.*

(*r*) 1 Haw. c. 38; 1 Hale's P. C. 508. 527. 551.

(*s*) East's P. C. 485; 1 Haw. c. 38, s. 5; 3 Inst. 64; Summ. 81.

(*t*) *Le Mott's Case*, Kel. 40; 1 Haw. c. 38, s. 8.

(*u*) *R.* v. *Cassey & Cotter*, Kel. 63. And see *Semple's Case*, 1 Leach, 484.

(*x*) *R.* v. *Farre*, Kel. 43.

(*y*) *R.* v. *Ann Hawkins*, East's P. C. 485, MS. Tracy, 80, & MS. Sum. The prisoner, in the absence of the family, persuaded the boy, who kept the key of the house, to let her in, by a promise of a pot of ale; and after admission, and whilst the boy was gone for the ale, she robbed the house. See *R.* v. *Le Mott*, Kel. 42; East's P. C. 486. 494.

(*z*) Where a servant lets another in to commit a burglary, it is burglary in both. *Cornwall's Case*, East's P. C. 486; 2 Str. 881; 4 Bl. Comm. 227; 10 Str. 433; 1 Hale, 553.

(*a*) East's P. C. 486; 2 MS. Sum. 298; 1 Hale, 553; 1 Haw. c. 38, s. 4; East's P. C. 491. Where, however, the servant, by the assent of the master, lets in robbers, under an agreement with them to rob the house, it seems to be doubtful whether the act be burglarious. See East's P. C. 486; and *Eggington's Case*, Ibid. 494.

(*b*) 1 Hale, 505. East's P. C. 486; 1 Haw. c. 38, s. 3; Sav. 50; Cromp. 31, *contra*. Dalt. c. 151, s. 3.

(*c*) *R.* v. *Gibbons*, Fost. 107. East's P. C. 490; where the prisoner cut a hole in the shutters of a dwelling-house, through which he put his hand and took out watches.

(*d*) 3 Inst. 64; East's P. C. 490.

(*e*) See East's P. C. 490; 1 Haw. c. 38, s. 7; 1 And. 115; Ld. Hale (1 P. C. 555,) says that it does not make a burglary; but adds a *quære.*

Entry.

to *commit a felony*, as distinguished from the previous intent to *procure admission* to the dwelling-house. Where it appeared that a centre-bit had penetrated through the door, chips being found in the inside of the house, yet, as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property, or committing any other felony, it was held that the entry was incomplete (*f*).

If *A.* send in a child of seven or eight years old at the window, who takes goods out and delivers them to *A.*, who carries them away, it is a burglary by *A.*, though the child, for want of discretion, be not guilty (*g*).

It is not essential to prove that the entry was on the same night with the breaking (*h*), provided both were in the night.

Dwelling-house, what is.

Secondly, of the *dwelling-house* of another (*i*). It is to be considered, 1st, what constitutes a dwelling-house; 2dly, its extent; 3dly, proof of ownership.

Inhabitancy.

1st. A dwelling-house is constituted by a *permanent inhabitancy* of the house. Mere inclosed ground, or a booth, or tent, is not a dwelling-house (*k*); but a hay-loft above a stable is, if inhabited, although it be rated as appurtenant to the stable (*l*). Chambers in the inns of court, and in colleges within the Universities, are dwelling-houses (*m*).

An actual inhabitancy previous to the offence is essential; and therefore, although goods have been brought into a house, and possession taken with a view to inhabitancy, yet no burglary can be committed by breaking into the house previous to actual residence by the owner or some of his family (*n*). Nor where the inhabitancy is casual, and for a particular purpose, as, where a workman sleeps in an unfinished house (*o*), or an agent is placed in the house to watch thieves or goods (*p*).

Animus revertendi.

But where there has been an actual inhabitancy, by the owner or his servants sleeping in the house, a burglary may be committed in the absence of the owner and all his family, provided the house has not been abandoned, and there be an *intention to return* to the house (*q*). But in all such cases

(*f*) *R.* v. *Hughes and others*, 1 Leach, 452; East's P. C. 491.

(*g*) 1 Hale, 565, 6.

(*h*) Ibid. 551, 557; East's P. C. 491. An entry sufficient to constitute a burglary is also sufficient under the statutes against housebreaking in the day-time, under the stat. 1 Edw. 6, c. 12, s. 6; 39 Eliz. c. 15; Post. 108. See the late stat. 7 & 8 G. 4, c. 29, s. 12 & 14.

(*i*) A mansion, the breaking which may constitute a burglary, includes the walls or gates of a town and churches.

(*k*) Haw. c. 39, s. 17.

(*l*) *Turner's Case*, East's P. C. 492.

(*m*) Hale, 556; Haw. c. 38, s. 1.

(*n*) *R.* v. *Lyon and Miller*, Leach, 221. East's P. C. 497; Haw c. 38, s. 11. *Hallard's Case*, East's P. C. 498; where the former tenant had quitted the house, and the in-coming tenant had put all his goods into the house, and had frequently been there in the day-time, but neither he nor any part of his family had ever slept there; it was held by Buller, J. that no burglary could be committed there. The same point was decided by Grose, J. in another case. See East's P. C. 498.

(*o*) Where an executor puts servants into the house which belonged to him as executor, it seems that burglary may be committed there. *R.* v. *Jones and Longman*, East's P. C 490. If a servant live in a house of the master at a yearly rent, it is the house of the servant, though he has it by reason of the service. *R.* v. *Jervis*, 1 R. & M. 7.

(*p*) *Brown's Case*, East's P. C. 501. *Smith's Case*, East's P. C. 497; 1 Hale, 557. *Harris's Case*, Leach, 808; East's P. C. 498. *R.* v. *Davis*, East's P. C. 499. Where a servant with his family inhabited part of the house of business of a company, the whole being open to him, and he and his family were the only persons dwelling there, held that it might properly be described as his dwelling-house; and *semble*, it might also have been laid as the house of the company. *Witt's Case*, 1 R. & M. C. C. L. 248.

(*q*) 1 Hale, 550; 1 Haw. c. 38; East's P. C. 496; Summ. 82. *R.* v. *Murry and Harris*, East's P. C. 496; Post. 77. J. Nicholls, the owner of the house at Westminster took a journey into Cornwall, with intent to return, and sent his wife and

the inquiry as to the intention to return is material, and should be distinctly proved.

Where the owner of the house, at the latter end of the summer quitted the house, which he had generally used for a summer residence, and took away great part of the furniture, and had not then come to any settled resolution whether he would return or not, but said that he was rather inclined totally to quit the house, and let it for the remainder of the term, and the house was broken and robbed in the January following, the Court held, that under the circumstances the house could not be considered as his dwelling-house (*r*).

2dly. *Extent of the dwelling-house.*—The term dwelling-house comprehends all buildings within the curtilage or inclosure (*s*), all under the same range of building and roof, such as the buttery of a college (*t*); and it was formerly sufficient if the building adjoined the dwelling-house, and it appeared to the jury that it was occupied as parcel of the dwelling-house, although there were no common curtilage and inclosure, or internal communication (*u*), such as a barn, stable, cow-house, dairy-house or the like, or a back-house eight or nine yards distant from the dwelling-house, and connected only by a pale extending between them (*x*). But now by the stat. 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. Extent.

In *Garland's Case* (*y*) the jury found specially that the prisoner in the night-time broke into an out-house in the possession of *G. S.*, and occupied by him with his dwelling-house, and separated therefrom by an open passage eight feet wide, and that the said out-house was not connected with the said dwelling-house by any fence inclosing both. And the Judges were of opinion that there should be judgment for the prisoner, for the jury should have found it parcel of the dwelling-house if it were so (*z*).

In *Eggington's Case* (*a*) it appeared that a manufactory was carried on in

family out of town, and left the key with a friend to look after the house; after he had been gone a month, the house was broken and robbed in the night-time; in a month afterwards he returned with his family and inhabited the house; and adjudged to be burglary, O. B. 10 Will. 3. In the case of *R.* v. *Kirkham and Ellison*, (Lanc. Sp. Ass. 1817), Wood B. held that the offence of stealing in a dwelling-house, under the stat. 12 Anne, had been committed, although the owner and his family had left the house six months before, having left the furniture, and intending to return.

(*r*) *Nutbrown's Cases*, Fost. 176; East's P. C. 496.

(*s*) 1 Hale, 558, 559; Haw. c. 38, s. 12; East's P. C. 492.

(*t*) *R.* v. *Maynard*, East's P. C. 501.

(*u*) *Brown's Case*, East's P. C. 493.

(*x*) So held by all the Judges in 1665. See 1 Hale, 558, 559; 1 Haw. c. 38, s. 12; 3 Inst. 64, 65; 4 Bl. Comm. 225; Dalt. c. 151, s. 4; East's P. C. 492.

(*y*) East's P. C. 493, Som. Lent Ass. 1776.

(*z*) Ld. Hale seems to intimate, that if the prosecutor were to hold the out-house as tenant to one, and the dwelling-house as tenant to another, burglary could not be committed in the out-house, however proximate to the dwelling-house its situation might be (1 Hale, 559); but this doctrine is justly questioned by Mr. East in his P. C. 493. It is difficult to conceive how the title under which the legal occupant of an out-house holds it can affect the question whether it be or be not a parcel of the dwelling-house. It is very possible that a man may hold different parts of the same entire dwelling-house under different owners; and the principle, if well founded, would equally apply to such a case.

(*a*) Staff. Spring Ass. 1801, East's P. C. 494.

Extent. the centre of a large pile of building, in the wings of which several persons lived, but they had no internal communication; that the roofs were connected, and the entrances to all were from the same common inclosure. And all the Judges held that the centre building could not be considered as parcel of any of the dwelling-houses, and could not be considered as under the same roof, although the roofs were connected.

Ownership. The *ownership* and situation of the dwelling-house must be proved as it is laid in the indictment, and in the proper county. Since the consideration of ownership is sometimes rendered complicated by the circumstances of the number of owners, and the nature of their interests, it will be desirable to class the cases as follow:

The first, including those cases where one person alone, by himself or his agents, occupies the whole dwelling-house or curtilage:

2dly. Where several persons severally occupy distinct parts of the same dwelling-house:—

3dly. Where several persons jointly occupy the same dwelling-house.

1st. Where a person in his own right, by himself or his agents, occupies the dwelling-house.—In such case, the ownership must be laid in the *suo jure* occupant, and the inhabitancy by his family, his servants, or even his guests in his own absence, will support the allegation that the dwelling-house is his (*b*). And even where a feme covert lives apart from her husband, the dwelling-house must be laid as his (*c*). And this rule holds in the case of all persons who occupy as mere agents or servants of another. Apartments in the King's palaces, or in the houses of noblemen for their stewards or chief servants, must be laid as the mansion-houses of the King or noblemen, as has been long ago adjudged in the instances of Somerset-house and Whitehall, and more recently in that of Chelsea Hospital; for in all such cases the occupation is in a representative capacity, and in point of law, is not the inhabitancy of the servant or agent, but of the lord or proprietor of the mansion (*d*).

2dly. Where several are severally possessed of distinct parts of the same dwelling-house:

Where a house once entire is actually converted into two by partitions, without internal communication, and the parts are inhabited by different persons, they are distinct dwelling-houses.

In *Jones's case*, a house was so divided for the purpose of accommodating two partners, each of whom paid his own separate household expenses, but the rent and taxes were paid jointly out of the partnership fund. A burglary having been committed in one part, it was laid in the indictment to be the dwelling-house of the partners jointly; and the Court held that it ought to have been laid in the separate occupant, and the jury were directed to acquit the prisoner of the capital part of the charge (*e*)

If the owner of an entire house inhabit part, and let part to a lodger, and there be a common entrance for both, the whole remains the dwelling-house of the owner, and must be so laid, although the part occupied by the lodger or lessee be broken (*f*) But if the owner inhabit part, and let another part

(*b*) East's P. C. 500; Haw. c. 38, s. 13, 14; 1 Hale, 522. 557; Kel. 27.

(*c*) *Farr's Case*, Kel. 43.

(*d*) East's P. C. 500. *Ann Hawkins's Case*, Fost. 38. *Picket's Case*, East's P. C. 501.

(*e*) *R.* v. *Jones*, Leach, 607; East's P. C. 504. As to the rating houses separated or united as distinct houses, see *Tracy* v. *Talbot*, Salk. 592.

(*f*) Kel. 84; 4 Bl. Comm. 225. *Lee* v. *Gansel*, Cowp. 1; East's P. C. 505, 6.

to a tenant, and the part so let be entirely separated from the rest of the dwelling-house, then if the tenant inhabit the part so separated, and it be broken into, it must be laid to be his dwelling-house (*g*). And if in such case the tenant did not inhabit his part so separated, either by himself or by his servant or family, the breaking that part would not amount to a burglary (*h*). Ownership.

Where *A.* let off a cellar from the house, to which there was no entrance but from the street, to *B.*, and also let a chamber to *B.*, which was part of the remainder of the house inhabited by *A.*, and the cellar was broken into in the night-time, it was held that the ownership was to be laid in *A.* (*i*). And this seems to be the necessary consequence of two former rules considered in connection; for, in the first place, *B.*'s occupation of the cellar, together with the chamber which he inhabited, rendered the breaking burglarious as far as regarded the inhabitancy, or, in other words, it was parcel of a dwelling-house; and according to another rule, the ownership of that dwelling-house was not in *B.* but in *A.*, who continued to occupy part.

A guest at an inn has no possession as distinct from that of the landlord, and therefore if his chamber be broken into it must be laid to be the dwelling-house of the landlord (*k*).

If a lodger at an inn open the latch of his own chamber-door with a felonious intent in the night-time, it is said that he does not commit a burglary (*l*); but that if he break the chamber-door of another lodger or guest, he is guilty of burglary (*m*).

Where a house is let to several lodgers or inmates, and the owner inhabits elsewhere, each separate apartment is the dwelling-house of the lodger, by reason of his separate inhabitancy. So burglary may be committed by breaking into chambers in the inns of court, or in colleges, and each must be laid to be the dwelling-house of him who inhabits it *suo jure* (*n*).

3dly. Where several are in joint occupation of the dwelling-house *suo jure*, the dwelling-house is that of all, and must be so laid.

Where the buttery of a college is burglariously broken, it must be laid to be the dwelling-house of the master, fellows and scholars (*o*).

Thirdly, in the night-time.—By the stat. 7 W. 4, and 1 Vict. c. 86, s. 4, night (in the case of burglary) is considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day. Both the breaking and entry must, it is said, be in the night (*r*), but it is not essential that both should be done on the same night. In the night-time.

Fourthly, with a felonious intent.—This may be to commit a felony at common law, as a murder, larciny or rape (*s*), or a felony by statute; for such a felony possesses all the incidents of a felony at common law (*t*). Intent.

Evidence that larciny was committed is *primâ facie* evidence of an entry

Dictum of Holt, C. J. *R.* v. *Carroll*, East's P. C. 506; Leach, 273.

(*g*) East's P. C. 507.

(*h*) Ibid.

(*i*) *Gibson's Case*, East's P. C. 508.

(*k*) 1 Hale, 554. 557. *R.* v. *Prosser*, East's P. C. 502; where it seems that a landlord cannot be guilty of burglary in breaking open the chamber of his guest. East's P. C. 502; Kel. 84. But see Dalton.

(*l*) 1 Hale, 554. *Qu.* Kel. 69.

(*m*) Ibid.

(*n*) *Trapshaw's Case*, Leach, 478; East's P. C. 506.

(*o*) *R.* v. *Maynard*, East's P. C. 501.

(*r*) Cromp. 33; 8 Edw. 2. East's P. C. 509.

(*s*) East's P. C. 509; 1 Hale, 559. 561; Kel. 67; 1 Show. 53. As to a rape, see *R.* v. *Locost and Villers*, Kel. 30; 1 Hale, 560. 562. *Gray's Case*, Str 481.

(*t*) *R.* v. *Dobbs*, East's P. C. 513; 1 Hale, 561.

Intent. with a felonious intent (*u*). The felony, or the intent, must be proved as laid.

If an intent to steal be alleged, it is not sufficient to prove an intent to rescue goods seized by an excise officer (*x*). If the intent be alleged to kill, it is insufficient to prove an intent to maim (*y*). If an intent be laid to steal the goods of *A.* it is not sufficient to prove an intention to steal the goods of *B.* (*z*). If an actual larceny be alleged, it is not sufficient to prove a mere intention to steal (*a*).

Principal and accessory. If a servant in conspiracy with another let him into the house, it is burglary in both (*b*). Where several are concerned, the entry of one is the entry of all; and although some stand on the outside to keep watch, all are equally guilty of burglary (*c*).

Evidence in case of larceny. If a burglar in one county convey the goods into another county, where he is convicted of larceny, he may be ousted of his clergy by proof of the burglary in the former county (*d*).

BYE-LAW.

Debt for penalty on. See *Butchers' Company* v. *Money*, 1 H. B. 370. Willes, 381. Wentw. Ind., 501. Com. Dig. tit. Bye Law.

The words in a bye-law, "it shall be lawful," are optional. *R.* v. *Bailiffs of Eye*, 2 D. & R. 172; *R.* v. *Mayor of Fowey*, 2 B. & C. 584; 4 D. & R. 132.

CANCELLATION. *See* DEED.

CAPTION. *See* REPLEVIN.

CARRIERS.

Proof in action against. In an action against carriers for negligence or other improper conduct, in respect of the carriage of goods or persons, whether the declaration be founded in *assumpsit* for breach of the defendant's undertaking, or in *tort* for breach of duty, it is necessary to prove, 1st, a *contract* express or implied; 2dly, the *delivery* of the goods; and 3dly, the defendant's *breach* of promise or duty.

Proof of contract. 1st. The action is founded either upon an express and special contract, or an implied one. When an express contract exists, it must be relied upon and proved; for where there is an express contract, none can be implied (*e*).

(*u*) Kel. 30; 1 Hale, 560.

(*x*) *R.* v. *Knight and Roffey*, East's P. C. 510.

(*y*) East's P. C. 513.

(*z*) *R.* v. *Jenks*, Leach, 896; East's P. C. 514.

(*a*) *R.* v. *Vandercombe and Abbott*, East's P. C. 514.

(*b*) *Cornwall's Case*, East's P. C. 486; 1 Str. 881; 1 Hale, 555; 1 Haw. c. 38; 10 St. Tr. 433. It has been said that the servant in such case is guilty of larceny only (Dalt. c. 151); but since they both act in the commission of the same crime, it seems that it must be burglary in both or neither, and the breaking and entry by one is the act of both.

(*c*) 1 Hale, 439. 555; 1 Haw. c. 38; Kel. 111. 161; Foster, 350. 353.

(*d*) See tit. Certificate.

(*e*) See tit. Assumpsit. Where the plaintiffs declared in the general form, and it appeared that the course of dealing was, that the plaintiffs paid an annual sum for the carriage of parcels between London and Dover, and that on the delivery of each parcel the defendants gave a written acknowledgment, stating their undertaking to carry and deliver the same safely, fire and robbery excepted, it was held to be a fatal variance. *Latham* v. *Rutley*, 2 B. & C. 20; 3 D. & R. 211; 3 Starkie's C. 143. As to the right of a vendor or vendee to maintain the action, see tit Vendor. In the case of *Swain* v. *Shepherd*, cor. Parke, J., York Summ. Assizes, 1832, there was an order in writing for goods to be sent by a particular carrier; the goods being lost, the vendor brought the action, and his agent swore that the course of

Implied contract.

The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier, as alleged in the declaration, and that the goods in question were delivered to one acting as his agent at the office, warehouse, or other place of business, or to an agent conducting his coach or waggon in its usual course (*f*).

Where there is but one contract for the carriage, and the carrier receives the whole consideration, he is liable for the loss of goods arising before the delivery, although it takes place whilst the goods are in the possession of another for the purpose of custody or of cartage, although the profits in respect of such custody or cartage are allowed to the latter by the carrier, and although that fact be known to the owner; for as between the owner and the carrier, such third person is merely the agent of the carrier (*g*).

Where *A.*, a part-owner in several coaches, made a contract with *B.* for the carriage of parcels which he was in the habit of sending to various places, it was held that this was binding on all the co-part-owners, as well those who became partners after the contract, as those who were partners before (*h*).

Express contract.

Where the defendant is not a common carrier, it is necessary to prove what the terms of the defendant's undertaking were. If, although he was not a carrier, he expressly undertook to carry the goods safely and securely, he will be liable for any damage which they sustain (*i*).

If any receipt was given on the delivery of the goods, it should be produced (*k*); and if an entry was made in the defendant's book, notice should

dealing was that the vendee had a right to return all goods which did not suit him, and that the vendor paid for the carriage; Parke, J., held that it was a question for the jury whether the property passed by delivery to the carrier.

(*f*) Where the only proof of the defendant's being a carrier from London was that he kept a booking-office, and that on a board at the door were painted the words "conveyances to all parts of the world," Lord Tenterden was of opinion that this was not sufficient, there being in London booking-offices not belonging to carriers. *Upstone* v. *Stack*, 2 C. & P. 598. *Qu.* whether this was not sufficient evidence to go to a jury. See further, *Gilbert* v. *Dale*, 5 Ad. & Ell. 543. Where a railroad Act enabled the company to carry passengers and goods, and contained also a clause requiring notice of action to be given in respect of anything done in pursuance of such Act, a loss having arisen by the carriages getting off the railroad, in consequence of cattle having strayed thereon, through the insufficiency of the fences made by the company, it was held, that having availed themselves of the permission given by the Act to carry goods, they thereby became common carriers, and liable as such, and that the action being brought against them as such, no notice of action was necessary. *Palmer* v. *Grand Junction Railway Company*, 4 Mee. & W. 747; 7 Dowl. 232.

(*g*) *Hyde & another* v. *The Mersey and Trent Navigation Company*, 5 T. R. 389. The defendants, carriers from *A.* to *B.*, charged and received for the amount of cartage from a warehouse at *B.*, where they usually unloaded, but which did not belong to them, to the consignee's house; and it was held, that they were responsible for the loss of the goods destroyed in that warehouse by an accidental fire, although they allowed (with the knowledge of the consignee) all the profits of the cartage to another person. But where the contract was to carry goods from *S.* to *M.*, to be forwarded from *M.* to *N.*; and according to the course of business such goods were, on their arrival at *M.*, immediately delivered to a carrier to be carried to *N.* on payment of the carriage to *M.*, and if no carrier were ready, were deposited in the carrier's warehouse at *M.*, for which no charge was made, till they could be delivered to a carrier to *N.*; and no carrier to *N.* being ready on the particular occasion, the goods were deposited in the warehouse, and destroyed by an accidental fire; it was held, that the defendants were not liable. *Garside* v. *Proprietors of Trent and Mersey Navigation*, 4 T. R. 582. So where *A. B. C.* & *D.* agreed to carry goods from London to France, and there to deposit them in the warehouse of *A.*; held that their liability as carriers ceased on the arrival of the goods in France, and that *A.* having paid the amount of a loss of the goods, after they had been deposited in the warehouse, could not recover contribution from *B. C.* & *D.* *In re Webb*, 8 Taunt. 443.

(*h*) *Helsby* v. *Mears*, 5 B. & C. 504.

(*i*) *Robinson* v. *Dunmore*, 2 B. & P. 416.

(*k*) *Latham* v. *Rutley*, R. & M. 13. It

be given to produce it, and also the way-bill, if the goods were sent by a coach. It should also be proved what orders were given at the time, as to the carriage of the goods, and place of destination, and what was the written direction upon them.

Where there is no privity of contract other than arises from ownership, it should appear from the evidence that the plaintiff was the owner of the goods, for if the vendor of goods deliver them to the carrier by order of the vendee, at whose risk they are sent, the vendor is the mere agent of the vendee, and the action should be brought by the latter (*l*); and if the action were brought by the vendor, he would be nonsuited. Where goods were shipped and described in the bill of lading to have been shipped by order and on account of the consignee, it was held that no property could be recognized but that specified in the bill of lading, and as that showed the property to be in the consignee, the consignor, who brought the action, was nonsuited (*m*). Where, on the other hand, the bill of lading stated that the goods were shipped by the plaintiffs (in England), to be delivered to *L. D.* in Surinam, and freight was to be paid in London, and the plaintiffs were in fact the agents of *L. D.*, who resided abroad, it was held that a sufficient privity of contract had been established (*n*).

An action for negligence of this nature must be brought against the principal, and not against an agent employed in the conduct of the master's business, although the loss has resulted from the negligence of the latter.

Where it appeared, in an action against the defendant as a common carrier, that he was the mere driver of the coach, and not the owner, and that he had before carried parcels for the plaintiff, and it did not appear that in this or any other instance any contract had been made for any reward to be paid for conveyance, it was held that the action should have been brought against the principal. The loss in this case resulted from the negligence of the master through the medium of the servant (*o*). It would have been otherwise if the servant had undertaken to carry for hire on his own account, although in fraud of his master (*p*). So where a parcel carried from Bristol to Bath was delivered by the mail-guard to a porter, who received a proportion of the porterage, the rest being paid to the proprietors

does not require a stamp if the carriage does not exceed 20 *l.*, although the goods be of greater value.

(*l*) *Dawes* v. *Peck*, 8 T. R. 330. *Dutton* v. *Solomonson*, 3 B. & P. 582. *Jacobs* v. *Nelson*, 3 Taunt. 423. *Davis* v. *James*, 5 Burr. 2680. *Moore* v. *Wilson*, 1 T. R. 659. Although the carrier is to be paid by the vendor. *King* v. *Meredith*, 2 Camp. 639. And see tit. GOODS SOLD AND DELIVERED. But where the consignor makes the contract with the carrier, and is to pay him, he ought to bring the action. *Davis* v. *James*, 5 Burr. 2680. Where the plaintiffs consigned goods according to an order received, and the party who ordered them turned out to be a swindler, who got possession of them by the carrier's negligence; it was held that they might maintain the action, as no property had passed to the consignee. *Duff* v. *Budd*, 3 B. & B. 177. And see *Brooke* v. *Pickman*, 4 Bing. 218. *Middleton* v. *Fowler*, 1 Salk, 282. It is otherwise where the owner has undertaken to watch his property. *Brind* v. *Dale*, 2 M. & W. 775. Or where it appears that a consignor does not intend to trust a shipowner with the custody, as where he is in the habit of sending his own servant in charge of the goods, who has the exclusive management of them. *East India Company* v. *Pullen*, 2 Str. 690. Where goods are forwarded on approval, the consignor should sue. *Swain* v. *Shephard*, 1 Mo. & R. 223.

(*m*) *Brown* v. *Hodgson*, 2 Camp. 36. A special property is sufficient, as in the case of a laundress returning clothes. *Freeman* v. *Birch*, 1 N. & M. 420.

(*n*) *Joseph* v. *Knox*, 3 Camp. 320.

(*o*) Per Ld. Ellenborough, *Williams* v. *Cranston*, 2 Starkie's C. 82. But a stage-coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part. *Beauchamp* v. *Powley*, 1 Mo. & R. 38.

(*p*) *Beauchamp* v. *Powley*, 1 Mo. & R. 38.

of the inn where the coach stopped, for booking, it was held that the porter being a mere servant was not liable for the loss (*q*).

Where two are jointly interested in a waggon, each is liable for the negligence of an agent in conducting it, although by a subordinate arrangement between themselves, each undertakes the conduct and management of the waggon by his own driver and his own horses, for specified distances (*r*). Parties.

Where the declaration is in *assumpsit*, the plaintiff must, as in other cases, prove a joint promise, as by proof that *all* the defendants were proprietors, or otherwise; and it is no ground of nonsuit that there are other partners or proprietors who have not been made defendants.

Where the action is laid in *tort*, there has been some difference of opinion whether, inasmuch as the action is virtually founded upon a contract either express or implied, a verdict may be given against one defendant, and in favour of another (*s*). But it is now settled, that where the action is founded on a misfeasance, a breach of common law duty, it is several in its nature, and maintainable against some only of those against whom the action is brought (*t*).

In a late case where the action was against eleven, as coach-owners, for negligence, in consequence of which the coach was overturned and the plaintiff injured, and there were two counts, both of which specified a contract to carry the plaintiff; and upon the trial the plaintiff proved the partnership of all but two, and had a verdict against them, the Court of King's Bench afterwards refused a motion for a new trial, or a nonsuit, observing, that the application was contrary to the justice of the case, and that as the objection was on the record, the defendants might take it by means of a writ of error (*u*). The judgment was afterwards affirmed.

Where the declaration (in *assumpsit*) alleged that the defendant undertook to carry goods in consideration of certain hire and reward to be paid by the plaintiff, the consignor, and it appeared in evidence that the consignee of the goods had agreed with the plaintiffs to pay for the carriage, it was held to be no variance; for as between the carrier and the plaintiff the latter was liable (*x*). Variance.

Where the plaintiff declares in *assumpsit* in the common form, proof of notice to him of special terms of contract contained in a notice by the defendant, by which he has limited his responsibility, does not occasion a variance (*y*).

A mis-description of the *termini* in the contract of carriage is fatal (*z*).

(*q*) *Cavenagh* v. *Such*, 1 Price, 328. The coach proprietors in this case had proteeted themselves by a notice.

(*r*) *Waland* v. *Elkins*, 1 Starkie's C. 272. As to their liability for goods supplied in such a case, see *Barton* v. *Hanson*, 2 Taunt. 49.

(*s*) On the one hand, see *Boson* v. *Sandford*, Salk. 440; 3 Lev. 258; Carth. 58; 3 Mod. 321. *Powell* v. *Layton*, 2 N. R. 365. *Max* v. *Roberts*, 2 N. R. 454. *Buddle* v. *Wilson*, 6 T. R. 369. On the other, *Govett* v. *Radnidge*, 3 East, 62. *Dickon* v. *Clifton*, 2 Wils. 319. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. *Weall* v. *King*, 12 East, 452. See tit. VARIANCE.

(*t*) *Bretherton* v. *Wood*, 3 B. & B. 54; 9 Price, 408; see *Ansell* v. *Waterhouse*, 2 Ch. 1.

(*u*) *Wood* v. *Bretherton*, *cor.* Park, J., Lancaster Sum. Ass. 1820, 3 B. & B. 54.

(*x*) *Moore* v. *Wilson*, 1 T. R. 659.

(*y*) *Clarke* v. *Gray*, 6 East, 564.

(*z*) *Tucker* v. *Cracklin*, 2 Starkie's C. 385, *cor.* Abbott, J. But in *Woodward* v. *Booth*, 7 B. & C. 301, where it was averred that the plaintiff delivered to the defendant a trunk to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and the proof was, that the trunk was delivered to the defendant at the *city* of Chester (being a county of itself, but within the ambit of the county of Chester), it was held that the variance was not material. And see *Beckford* v. *Crutwell*, 1 Mo. & R. 187, where the *terminus a quo* being stated to be London,

Proof of delivery.

2dly. Delivery.—It is sufficient to prove a delivery either to an agent of the defendant's at the usual place of receipt or to an agent who has authority to receive them, driving the coach or waggon on the course of conveyance (*a*).

If the master of a vessel receive goods at the quay or beach, or send his boat for them, the owners' liability commences with such receipt (*b*).

Of loss.

3dly. Proof of loss.—The plaintiff having proved the defendant's receipt of goods on a contract to deliver them safely at some other place, it seems to be incumbent on the defendant to prove the performance of his promise. To support an averment of loss, it is enough for the plaintiff to show that the goods in fact have not arrived (*c*).

A promise by a book-keeper to make compensation for the loss of a parcel is not binding upon the master, unless he be proved to be a general agent of the master for such purposes (*d*).

Where the plaintiff's shopman stated that he did not know of the delivery of the goods, and that they could not have been delivered without his knowledge, it was held to be sufficient (*e*).

The declarations of a coachman relating to the loss have been held to be admissible against the carrier (*f*).

Proof of the loss of goods by a carrier will not be sufficient to maintain a count in trover (*g*); but trover lies against a carrier who delivers the goods to a wrong person, although by mistake (*h*). And if a carrier refuse to deliver goods in his possession to the owner after demand, it will be evidence of a conversion (*i*).

If the plaintiff declare on a loss in negligently carrying, &c., he cannot insist on a loss of the goods in the defendant's warehouse previous to the commencement of the carriage (*k*).

Ld. Tenterden held, that it was sufficient to prove that the coach went from a part of the town usually called London, as Piccadilly.

(*a*) *Gouger* v. *Jolly*, Holt's C. 317; *Williams* v. *Cranston*, 2 Starkie's C. 82. *Secus*, if such delivery were not in the ordinary course of business, but for the driver's own gain. *Butler* v. *Baring*, 2 C. & P. 613. The merely leaving goods in the yard of an inn where the defendant and other carriers put up, is insufficient. *Selway* v. *Holloway*, 1 Ld. Ray. 46. So, if goods be left at a wharf piled up among other goods without communication to any one there. *Buckmore* v. *Levi*, 3 Camp. 414. The delivery on board ship should be to the mate, or other accredited officer. *Cobham* v. *Downe*, 5 Esp. C. 43.

(*b*) *Fragans* v. *Long*, 4 B. & C. 219; *Boys* v. *Pink*, 8 C. & P. 361.

(*c*) *Tucker* v. *Cracklin*, 2 Starkie's C. 385. The delivery must be according to the contract, if there be a special contract, or according to the course of trade, where such a known course exists; see *Golden* v. *Manning*, 2 Bl. 916; 3 Wils. 429; *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129. He is bound to deliver a parcel at the place to which it is directed. *Bodenham* v. *Bennett*, 4 Price 31. Where a parcel was directed to '*J. Worthy, Exeter*,' and the carrier delivered it to one who told him he had been sent for it by a person whom he did not know, but who was in the street, it was held that he was guilty of gross negligence, and liable, notwithstanding the notice of non-liability which had been given. *Birkett* v. *Willan*, 2 B. & A. 356. So where a parcel was delivered to the carrier, directed '*Mr. Parker, High-street, Oxford*,' and after the parcel had been refused by Mr. Parker, was delivered to a stranger calling himself Parker, whose residence was unknown to the carrier. *Duff* v. *Budd*, 3 B. & B. 177. In general, carriers are bound to carry the goods to the residence of the consignee, wherever they are directed. *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129, *infra* note (*l*).

(*d*) *Olive* v. *Eames*, 2 Starkie's C. 281.

(*e*) *Griffiths* v. *Lee*, 1 C. & P. 110.

(*f*) *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*g*) *Ross* v. *Johnson*, 5 Burr. 2825. *Kirkman* v. *Hargreaves*, Lanc. Sum. Ass. 1800, *cor.* Graham, B. cited in Selwyn's Ni. Pri. tit. CARRIERS.

(*h*) *Youle* v. *Harbottle*, Peake's C. 49. *Syeds* v. *Hay*, 4 T. R. 260. *Ross* v. *Johnson*, 5 Burr. 2825; *Stephenson* v. *Hart*, 4 Bing. 583.

(*i*) Salk. 655.

(*k*) *Roskell* v. *Waterhouse*, 2 Starkie's

Proof in defence.

By the rules of Hilary Term, 4 Will. 4, the plea of not guilty operates as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

The delivery must be according to the contract, if there be a special contract, or according to the course of trade where a known course exists (*l*).

According to the well known rule of law, a carrier is liable for all losses and injuries to the goods, except such as arise from the act of God, or the King's enemies (*m*); as by lightning, or by a hostile invading force. He is liable, therefore, although it appear that the goods were destroyed in consequence of a casual fire which broke out in a booth at the distance of a hundred yards from the place where the defendant had deposited the goods to be ready for carriage, although the jury negative any negligence on the part of the defendant (*n*); so where the goods had been carried from *A.* to *B.*, where the plaintiff lived, and were accidentally burnt in a warehouse there before they had been carted to the plaintiff's house, the carriers were held to be liable, although the warehouse did not belong to them, and although they allowed the profits of cartage which they received to another person (*o*).

A carrier is liable, although the plaintiff sends a servant of his own with the defendant's cart to guard the goods, and although he is not a common carrier, if he undertakes for the safety of the goods (*p*). So it is no defence that the damage was occasioned by the wrongful act or negligence of a third person (*q*). This is a rule of policy and convenience in order to make carriers more careful; for if a carrier were to be excused where the damage was occasioned by the misconduct or negligence of strangers, when he found that to be the case he would give himself no more trouble about the goods. He is liable, although the goods were taken by robbers, using force which he could not resist (*r*).

C. 461. See also *In re Webb*, 2 Moore, 500; 8 Taunt. 443.

(*l*) *Golden* v. *Manning*, 2 Bl. 916. 3 Wils. 429; *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129. In the absence of any express contract or usage, a carrier is bound to deliver the goods at the house of the consignee. *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 389; *Duff* v. *Budd*, 3 B. & B. 182. If it be according to the carrier's course of trade that he should deliver the goods at the consignee's residence, he is bound to do so. *Golden* v. *Manning*, 2 W. B. 916. Where goods are carried by sea, it seems to be sufficient that the captain should deposit them in a place of safety, and give notice to the consignee. *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 398. And see *Gotliffe* v. *Bourne*, 4 Bing. N. C. 314.

(*m*) 1 T. R. 27; 5 T. R. 389; 2 B. & P. 416; 1 East, 604; 3 Esp. C. 127.

(*n*) *Forward* v. *Pittard*, 1 T. R. 27. See also *Hyde* v. *The Trent Navigation Company*, 5 T. R. 389. So of a hoyman. *Dale* v. *Hall*, 1 Wils. 281. He continues liable until delivery to the party, and is not discharged by delivery at a wharf which he uses. *Wardell* v. *Mourillyan*, 2 Esp. C. 693. An exception of losses by the perils of the sea, includes a loss from the vessels running foul of another. *Bullen* v. *Fisher*, 3 Esp. C. 67.

(*o*) *Hyde* v. *The Trent Navigation Company*, 5 T. R. 389. Declaration on a contract by the owners of a steam-vessel to carry goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns. A plea, that after the arrival of the vessel at London the defendant caused the goods to be deposited on a wharf, to remain there until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery had elapsed they were destroyed there by fire, was held to be bad. *Gotliffe* v. *Bourne*, 4 Bing. N. C. 314.

(*p*) *Robinson* v. *Dunmore*, 2 B. & P. 416. So, though a man travel in a stage-coach, and take his portmanteau with him, although he has his eye upon the portmanteau, the carrier will be responsible if the portmanteau be lost. Per Chambre, J. 2 B. & P. 419.

(*q*) Per Ashurst, J. 3 Esp. C. 131.

(*r*) Per Ld. Mansfield, C. J., and Buller, J. 3 Esp. C. 131.

Loss by the act of God.

But it is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel, in order to save the passengers in a storm (*s*).

In order to prove a destruction or loss by the king's enemies, the goods having been taken by an armed force, it must be proved that they were taken by robbers or pirates (*t*).

There is no distinction between a land and water carrier (*u*); and the rule extends to a wharfinger who conveys goods from a wharf to vessels in his own lighters (*x*).

Proof of notice.

The most common defence in actions of this nature is by proof that the defendant has limited his common-law responsibility, by notice to that effect to the plaintiff; for since, in point of law, it is competent to a carrier so to limit his liability, if he can show that the plaintiff had previous notice of the terms on which the defendant undertook to deal, there is an end of his common-law liability, and the notice of those terms constitutes a special and particular contract between the parties (*y*).

To establish a defence of this nature, the defendant must prove, in the first place, that the plaintiff had notice of the defendant's terms. The burthen of proof lies upon the defendant: it is not sufficient to show that he has used means to give notice, he must prove that such means have been effectual. The most usual evidence to show this is by proof that a notice was put up in the office, where goods are received and entered for the purpose of carriage, in so conspicuous a situation that it must (unless he were guilty of *wilful negligence*) have attracted the attention of the plaintiff or his agent, for a notice to the agent under such circumstances is notice to the plaintiff himself (*z*). This proof fails where the party who delivers the goods at the office cannot read (*a*); and where the goods were delivered by a porter who admitted that he had frequently been at the defendant's office, and that he had seen a painted board, but did not suppose that it contained anything material, and in fact had never read it, it was held, that although the board in fact contained a notice of limitation, the evidence of notice was insufficient, and that it was incumbent on a party who wished to rid himself of his common-law responsibility, to give effectual

(*s*) 1 Roll. Abr. 79.

(*t*) 1 T. R. 33. 2 Vent. 100.

(*u*) 3 Esp. C. 127. A water-carrier impliedly undertakes that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage, *Lyon* v. *Mills*, 5 East, 428. Even although notice be given that he will not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel. For a loss by the *personal* default of the carrier is not within the scope of such a notice. *Ib.*

(*x*) *Maving* v. *Todd*, 1 Starkie's C. 72. *Rich* v. *Howland*, Cor. J. 330. So also are the proprietors of stage-coaches carrying goods, and owners and masters of vessels and hoymen. *Wordell* v. *Mourillyan*, 2 Esp. C. 693. *Morse* v. *Slue*, 2 Lev. 69. Goods made to order are delivered by the tradesman at a *booking-office* to be forwarded to the customer, without specifying any particular conveyance; *qu.* whether the consignor can maintain an action against the *office-keeper* for the loss of the goods whilst under his charge. *Gilbert* v. *Dale*, 5 Ad. & Ell. 543.

(*y*) Where one of several partners in a stage had agreed to carry the parcels of the plaintiff gratis, but the co-partners had no knowledge of the agreement, and the ordinary notice of non-responsibility was given, it was held that the defendants were not liable for the loss of a parcel, where the value exceeded 5 *l.*, no notice of value having been given. *Bignold* v. *Waterhouse*, 1 M. & S. 255.

(*z*) Notice to the principal in London is sufficient, though the goods were delivered by his agent to the carrier in the country. *Mayhew* v. *Eames*, 3 B. & C. 601.

(*a*) *Davis* v. *Willan*, 2 Starkie's C. 279.

notice (*b*). So, the proof failed where the notice at the office at Cheltenham stated the advantages of carriage by the particular waggon in large letters, and the notice of non-responsibility in small characters (*c*), although at the *termini* of the carrier's route, notice was given at the offices by means of a board inscribed with large letters. So also where the goods are not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods (*d*), or at an intermediate stage between the two places, from each of which the carrier conveys goods to the other, if there be no notice at the place of delivery, although notices are suspended at the two *termini* (*e*).

By advertisement.

Another usual mode of proof is by evidence that notice was given by means of printed cards, or by advertisements in the public newspapers; but this is insufficient, unless it be proved that the plaintiff has seen such cards, or read the newspapers (*f*). And even then it is a question of fact for the jury (*g*).

Where it appeared on cross-examination of one of the plaintiff's witnesses, that the plaintiff had been in the habit of sending parcels by that conveyance, and that two parcels had at different times been lost, and that the plaintiff had acquiesced in those losses, desiring the witness for the future to insure the parcels sent, it was held to be evidence of the plaintiff's knowledge that the defendants limited their responsibility (*h*).

In the next place, if the notice be brought home to the plaintiff, it must appear, that in point of law it is sufficient to protect the defendant in the particular instance, either *in toto*, or *pro tanto*. This of course is a matter of pure legal consideration for the decision of the Court (*i*).

(*b*) *Kerr* v. *Willan*, 2 Starkie's C. 53, *cor.* Ld. Ellenborough, C. J., and afterwards by the Court of K. B.

(*c*) *Butler* v. *Heane*, 2 Camp. 415.

(*d*) *Clayton* v. *Hunt*, 3 Camp. 27.

(*e*) *Gouger* v. *Jolly*, 1 Holt's C. 317.

(*f*) *Clayton* v. *Hunt*, 3 Camp. 27. As to proof of notice in an advertisement, see *Jenkins* v. *Blizard*, 1 Starkie's C. 418. *Leeson* v. *Holt*, 1 Starkie's C. 186. Evidence is requisite to identify *E. F.*, who gives the notice, with the defendant, and in the absence of such evidence, the allegation of negligence need not be proved. *Macklin* v. *Waterhouse*, 5 Bing. 212 & 224, and 2 M. & P. 319. It is not sufficient to show that the notice was inserted in a paper which circulates in the place in which a party lives, without some proof that he took in the newspaper. *Proprietors of the Norwich Navigation* v. *Theobald*, M. & M. 153. See *Boydell* v. *Drummond*, 11 East, 144, n. An advertisement in the *Gazette* is not *per se* receivable for this purpose, for although a party might be expected to look into the *Gazette* for notices of dissolution of partnership, he could not be expected to do so for notice by carriers. *Munn* v. *Baker*, 2 Starkie's C. 255.

(*g*) *Rowley* v. *Horne*, 3 Bingh. 2. It was proved that the plaintiff had taken in, for three years, a weekly newspaper, in which the defendant's restrictive notice had been always advertised, and the jury, notwithstanding, found a verdict for the plaintiff, the Court of Common Pleas thought the verdict perfectly right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished, by means of notice, to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person, who brought a parcel for conveyance, a printed paper containing the notice; and a new trial was refused.

(*h*) *Roskell* v. *Waterhouse*, *cor.* Abbott, L. C. J. 2 Starkie's C. 461. The defendant may show that when other parcels were delivered to him by the plaintiff, a ticket was delivered containing the notice. *Mahew* v. *Eames*, 3 B. & C. 603.

(*i*) Where the notice was, "that cash, plate, jewels, &c. will not be accounted for, if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value:" the Court held that the defendants were not liable to any extent, the parcel (containing light guineas) not having been entered and paid for as valuable (*Clay* v. *Willan*, 1 H. B. 298). Where the notice was, "that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, &c. or any package whatsoever, if lost or damaged, above the value of 5*l.*, unless insured and paid for at the time of delivery;" it was

Where a carrier affixes one notice to his counting-house, and delivers another to the party, he is bound by that which is the least beneficial to himself (*k*). So if he circulate hand-bills, limiting his liability, he cannot further restrain it by evidence of a notice upon a board in his office (*l*).

Where the plaintiff declared in *assumpsit* for not safely carrying, and the defendant proved a notice to the plaintiff, couched in the usual form, it was held that the plaintiff could not (as the declaration was framed, at all events), insist that the loss was not protected by the notice; the goods having been stolen from the defendant's warehouse before the carriage of the goods commenced, the plaintiff ought for that purpose to have charged the defendants as warehousemen, and not as carriers (*m*).

Proof in reply to notice.

A party, after notice that the carrier will not be responsible for goods of above a specified value, unless they be entered and paid for according to their value, cannot recover in respect of goods of greater value which have not been so entered and paid for; for the notice throws upon him the duty of communicating the value, and the concealment is a fraud on the carrier, both because it deprives him of the compensation for which he has a right to stipulate, and also because it precludes him from exercising a degree of vigilance and caution proportioned to the increased risk (*n*). The proof of

held that the plaintiff having delivered goods of a greater value than 5*l.* without insuring or paying for them when delivered, could not recover even to the amount of 5*l.* *Nicholson* v. *Willan*, 5 East, 507. See also *Izett* v. *Mountain*, 4 East, 371; where the notice was nearly in the same terms.

In *Beck* v. *Evans*, 16 East, 244, where the proprietors of a public waggon gave notice that they would not be answerable for cash, bank-notes, writings, jewels, plate, watches, lace, silk hose, wool, muslins, china, glass, paintings, or any other goods of what nature or kind soever, above the value of 5*l.*, if lost, stolen, or damaged; it was held that the notice did not extend to goods of large bulk and known quality, where the value must be obvious, such as a large cask of brandy. There was, however, in the above case, proof of gross negligence. Bayley, J. doubted whether the words of the contract extended to a case of gross negligence.

Where a carrier by water had given notice that he would not be answerable for *any damage*, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. on the damage, so as the whole did not exceed the value of the vessel and freight, it was held that he was answerable for a damage arising from a leakage, on the ground that it was a personal default in the carrier himself in not providing a sufficient vessel, and that the loss was not within the scope of the notice. *Lyon* v. *Mells*, 5 East, 428.

C., one of several coach-proprietors, in consideration of a favour conferred upon himself, undertook that he and his partners would carry the plaintiff's own family and private parcels free of expense, and they were so carried for two years, and the word "banking," which was usually written upon the parcels, was omitted on the suggestion of *C.*, and the word "carrier" written in its place, to which *C.* or his son usually added the word "*free*;" there was no evidence that the other proprietors (partners with *C.*) had notice of this agreement. The defendants had given notice that they would not be liable for any parcels of above the value of 5*l.*, unless entered and paid for, &c. A parcel of the plaintiff's, delivered under these circumstances, of considerable value, having been lost, it was held that the plaintiff was not entitled to recover against the partners. For even where the carrier under such circumstances undertakes to carry without reward, notice of value ought to be given, in order to point his attention to the particular goods; he does not dispense with notice in *toto*, but only with payment; also, because there was no notice to the other partners; and notice to one partner is not notice to all, unless the transaction be *bonâ fide*. There was no consideration between the plaintiff and the other partners, and therefore no contract. *Bignold* v. *Waterhouse*, 1 M. & S. 255. A notice from the proprietors of a coach going from *A.* to *B.* extends to the return-journey; but it must be proved that the party sending on the return-journey knew that the coach was one that started from it. *Riley* v. *Horne*, 5 Bing. 227, and 2 M. & P. 333.

(*k*) *Munn* v. *Baker*, 2 Starkie's C. 255.

(*l*) *Cobden* v. Bolton, 2 Camp. 108.

(*m*) *Roskell* v. *Waterhouse*, 2 Starkie's C. 461.

(*n*) And in such a case the owner can-

misfeasance in such case would of course be incumbent on the plaintiff (*o*). Notwithstanding this the carrier will still be liable for any actual misfeasance, or even for gross negligence, through which the goods are destroyed or lost (*p*); for this is a substantive wrong, independently of the contract, in respect of which the plaintiff would be entitled to recover on a declaration stating, that having delivered the goods to the plaintiff for one purpose he had converted them to another. And where the concealment is not the cause of non-performance, the contract is not so wholly avoided but that the plaintiff in such a case may still sue on the contract, notwithstanding the fraud; and thus, proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice. The question of gross negligence is usually a question for the jury (*q*). The defendant was held to be liable, notwithstanding such notice, where his agent knew that a cask of brandy was leaking fast in the course of the carriage, and yet took no pains to stop it (*r*).

Proof in reply to notice.

not recover even to the amount of the value specified, as the minimum for which no extra price is payable. *Harris* v. *Packwood*, 3 Taunt. 264.

(*o*) *Marsh* v. *Horne*, 5 B. & C. 327.

(*p*) Conditions of this nature were introduced for the purpose of protecting carriers against extraordinary events, and not to exempt them from due and ordinary care. Per Wood, B., 4 Price, 34; and see the cases cited, note (*r*).

(*q*) *Beck* v. *Evans*, 16 East. 244. *Duff* v. *Budd*, 3 B. &. B. 177; 6 Moore, 469. *Batson* v *Donovan*, 4 B. & A. 21.

(*r*) *Beck* v. *Evans*, 16 East, 244; *supra*, 290. In the case of *Batson* v. *Donovan*, 4 B. & A. 21, the plaintiffs, after notice by the carrier, delivered a parcel of bank notes to a large amount to the carrier, without informing him of its contents; the coach in which the parcel was conveyed was left at midnight in the middle of a very large street with a porter, who was ordered to watch it; during this time the parcel was stolen. The Court held that it had been properly left to the jury to say, first, whether the plaintiffs had been guilty of any unfair concealment of the value of the property; secondly, whether the carrier had been guilty of gross negligence. The jury found for the defendants, and the Court of King's Bench on a special case refused a new trial. Best, J. dissentient. So in *Duff* v. *Budd*, 3 B. & B. 177, where a parcel directed to a particular place had been mis-delivered, it was left to the jury to say, whether the defendants had been guilty of gross negligence; and it was held, that the usual carrier's notice, and a subsequent correspondence with the carrier, with a view to detect and punish the fraud by which he had been misled, did no amount to a bar or waver of the action. S also, where goods sent to *A.* and *B.* to be carried by a mail-coach, were taken out and left to be forwarded by a coach, of which *B.* alone was the proprietor, and were lost; *Garnett* v. *Willan*, 5 B. &. A. 53; for this was not a loss within the terms of the notice, but a consequence of a wrongful act, by which the defendants devested themselves of the charge which they had undertaken. So in *Sleat* v. *Fagg*, 5 B. & A. 342, where a parcel of notes packed in brown paper was sent without any communication as to value, to be conveyed by the mail, but was forwarded by a light coach, from which it was stolen; where the jury found that the risk had been increased by altering the mode of conveyance contracted for. Note, that this case was distinguished from that of *Batson* v. *Donovan*, 4 B. & A. 21; for it was not merely the case of a negligent performance of a contract, but a refusal to perform it altogether. It is to be observed, that the effect of giving notice to throw the obligation of giving information as to the value of the subject-matter upon the owner, whereas where no notice is given, the duty of making inquiry with a view to claim a remuneration adequate to the risk is incumbent on the carrier; and where the owner having such notice, conceals the value, he is not, in the absence of misfeasance or of gross negligence, entitled to recover. See the observations of the Court in *Batson* v. *Donovan*, 4 B. & A. 21. For the concealment of the real value in such a case is as much a fraud on the carrier, as if the owner had used an active artifice for the purpose of deceit, as in *Gibbon* v. *Paynton*, 4 Burr. 2298; where a person knowing that the carrier had given notice that he would not be responsible for money, sent money hid in hay, in an old nail bag, without disclosing the contents. The general principle applies "*ex dolo malo non oritur actio.*" A carrier is in the situation of an insurer, and concealment of that which will enhance the risk discharges the insurer. See also *Harris* v. *Packwood*, 3 Taunt. 266. Where, Lawrence, J., observed, "that there was nothing unreasonable in a carrier requiring a greater sum when he carried goods of greater value, for

Proof in reply to notice, &c.

A parcel of bank-notes had been sent by a coach from Hereford to Brecon, and their value was known to the agent of the defendants; on the arrival of the coach at Brecon, the book-keeper, who usually unloaded the coach, received the way-bill in which the parcel was entered, but supposing that the coachman had the parcel about his person, did not ask him about it, or look for it in the coach, in the back seat of which the parcel had been deposited; it was left to the jury to say whether the defendants had not been guilty of gross negligence, the jury found for the plaintiffs, and the Court of Exchequer afterwards held, that in such a case a notice of non-liability, which the defendants had given, did not protect them (*s*).

Where the defendant's agent, in the course of delivering out parcels in London, carried in a cart, left the cart in the street, and the plaintiff's parcel was stolen out in his absence, the jury found it to be gross negligence in the defendant (*t*).

Where the owner of vessels navigating from *A.* to *C.*, gave notice that he would not be answerable for losses, received goods at *A.* to be carried to *B.*, an intermediate place, and instead of delivering them at *B.*, took them on towards *C.*, and before their arrival at *C.* the goods were sunk, without any want of care in the master, it was held that the defendant, who ought to have delivered the goods at *B.*, was liable to the full amount (*u*).

Where a box was sent from London directed to '*J. W.*,' Exeter, and was delivered at the coach-office in Exeter on a Sunday evening, to a stranger, who said that he had been employed by a man in the street to call for *W.*'s box, it was held that there was sufficient evidence of gross negligence to go to a jury (*x*).

Evidence may also be given, in answer to proof of notice, to show that in the particular case the defendant waived or dispensed with the entry or payment according to value.

Where the defendant's agent was informed of the nature and value of the article, and told to charge what he pleased for it, it was held that the defendant was answerable for the loss, notwithstanding the notice in the usual form, on the ground that the payment on delivery had been dispensed with (*y*). But the usual notice will exempt the carrier from liability, notwithstanding the bulk of the package, unless the nature of the goods be *known* to the carrier, and is such that the value of the goods must necessarily exceed the value specified in the notice (*z*). And even where it was proved that the defendant's book-keeper knew the value of the parcel (con-

he was to be paid not only for his labour in carrying, but for the risk he runs." See also *Clark* v. *Gray*, 6 East, 564; *Izett* v. *Mountain*, 4 East, 371. As the owners in such cases, by their misconduct, deprive the carriers of the compensation which they ought to receive, and withhold that information which would reasonably render a greater degree of caution necessary, they are not entitled to recover. But though in such cases a plaintiff is not entitled to recover for a mere breach of contract, still the defendant is liable for a misfeasance, where he acts in direct contravention of the contract; as in *Ellis* v. *Turner*, 8 T. R. 531; *Beck* v. *Evans*, 16 East, 244; *Birkett* v. *Willan*, 2 B. & A. 356; *Bodenham* v. *Bennett*, 4 Price, 31. It seems that in some cases the plaintiff may still declare in *assumpsit*, although he may declare on the misfeasance. See the observations of Holroyd, J. in *Sleat* v. *Fagg*, 5 B. & A. 349.

(*s*) *Bodenham* v. *Bennett*, 4 Price, 31. See also *Tyly* v. *Morris*, Carth. 485. *Gibbon* v. *Paynton*, 4 Burr. 2298; 3 Taunt. 264.

(*t*) *Smith* v. *Horne*, Holt's C. 643; 2 Moore, 18; 8 Taunt. 144.

(*u*) *Ellis* v. *Turner*, 8 T. R. 531.

(*x*) *Birkett* v. *Willan* 2 B. & A. 356. The defendants had proved the usual notice.

(*y*) *Wilson* v. *Freeman*, 3 Camp. 527; and see Vent. 238.

(*z*) *Down* v. *Fromont*, 4 Camp. 40; and see *Thorogood* v. *Marsh*, 1 Gow. 105.

taining 200 guineas), but nothing was said to him as to the contents or value, and the parcel was lost, it was held that *mere knowledge* of the value did not defeat the notice of non-liability (*a*).

Proof of fraud.

The defendant may also in this, as in other cases, set up fraud on the part of the plaintiff, as an answer to the action. Thus, where the plaintiff at *W.* apprehending, from the disturbed state of the country, that his corn was in danger of being seized by a mob, after having written to the defendant, a carrier by water, to send a private boat, stopped a boat of the defendant, passing from *R.* to *B.*, which was not one of the boats employed in carrying goods from *W.* to *B.*, and, without communicating the circumstances to the boatmen, prevailed upon them to take the goods on board, and the corn was seized by the rioters, and lost; it was held, principally on the ground of fraud apparent in the transaction, the circumstances and urgency of the case not having been communicated to the boatmen, that the plaintiff was not entitled to recover (*b*).

Where the plaintiff, a passenger by the defendants' coach, having received a parcel of value from a friend, to be booked and conveyed by the same coach, and instead of doing so, places it in his own bag, which is subsequently lost; being a wrong doer towards the defendants, the loss is imputable to his own misfeasance, and he cannot sue them for the value (*c*).

Where, on the delivery of a box to the carrier, he asked what was in it, and the owner answered "a book and tobacco," as in fact so there was, but there was also 100 *l.* besides, and the carrier was robbed, Rolle, C. J., is reported to have held at *Nisi Prius*, that the defendant was answerable, for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance (*d*). But where a carrier received two bags of money sealed up, and was told that they contained 200 *l.*, and a receipt was given, charging 10 *s.* per cent. for carriage and risk, and the bags, of which the carrier was robbed, contained 400 *l.*, it was held that the plaintiff could not recover more than 200 *l.* (*e*); and it may be doubted whether the defendant would now be considered as liable even to that extent, and whether the whole contract would not be considered as avoided by the fraud (*f*).

Negligence.

The defendant may also show in defence that the loss has resulted from the improper and negligent manner in which the goods have been packed or delivered by the plaintiff. Where a carrier gave a receipt for a dog, which was afterwards lost, it was held to be no defence that the dog had not been delivered in a state of security, there being no collar about his neck, but only a cord. Lord Ellenborough ruled, that after a complete delivery to the defendant, the property remained at his risk, and he was bound to use

(*a*) *Levi* v. *Waterhouse*, 1 Price 280. *Marsh* v. *Horne*, 5 B. & C. 322. Neither will the fact, that the defendants have made allowance for damage on former occasions, without inquiring into the cause of such damage. *Evans* v. *Soule*, 2 M. & S. 1.

(*b*) *Edwards* v. *Sherratt*, 1 East, 604. It was left by Rooke, J. to the jury to say whether the goods were put on board according to the usual course of dealing with a common carrier; the Court held that the direction was proper, and that it was in effect a question whether the boatman acted under the proper authority of his employer when he took the corn on board.

(*c*) *Miles* v. *Astle*, 6 Bing. 743.

(*d*) 1 Bac. Ab. 556; and see *Mayhew* v. *Eames*, 1 C. & P. 550.

(*e*) B. N. P. 71; 1 Bac. Ab. 346.

(*f*) Where the plaintiff adopts a disguise for his parcel, calculated to prevent the carrier from taking any particular care of it, and so as not to give due information or protection to him, he cannot recover. *Bradley* v. *Waterhouse*, 1 M. & M. 154.

Negligence.

proper means for securing it (*g*) If the defendant insist that the contract was void for illegality, it lies on him to prove it; for illegality will not be presumed (*h*).

The responsibility of carriers of goods is further limited by the provisions of the statute 11 G. 4, and 1 W. 4, c. 68, s. 1 (*i*).

(*g*) *Stuart* v. *Crawley*, 2 Starkie's C. 323.

(*h*) *Sissons* v. *Dixon*, 5 B. & C. 758; where the illegality insisted on was, that the goods had not been entered at the custom-house. But a carrier may show, in defence to an action of trover, that he delivered the goods to one who had a legal right to the custody of them; as that he delivered the clothes of a female minor, who had eloped, to her guardian. *Barker* v. *Taylor*, 1 C. & P 101. Where the parcel contained bank-notes, stamps, and a *letter*, it was held that the fact that the letter accompanied the stamps was *primâ facie* evidence that it related to them, so as to bring the case within the stat. 42 G. 3, c. 81, s. 6. *Bennett* v. *Clough*, 1 B. & A. 461.

(*i*) By that stat. no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of, or injury to, any article or articles, or property, of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description; trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, or Ireland respectively, or of any other bank in Great Britain or Ireland; orders, notes, or securities for payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles; glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials; furs or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at the office, warehouse, or *receiving-house* of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Section 2. When any parcel or package, containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such common carrier, &c. to demand an increased rate of charge, to be notified by some notice affixed in legible characters in some public part of the office, &c. stating the increased rates of charges required to be paid as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons shall be bound by such notice, without further proof of knowledge.

Section 3. When the value shall have been so declared, and the increased rate of charge paid, or an engagement accepted for the same, the person receiving such increased rate of charge or accepting such agreement shall, if required, sign a receipt for such package or parcel, acknowledging the same to have been insured, such receipt not to be liable to any stamp-duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, such common carrier, &c. shall not be entitled to any benefit under this Act, but shall be liable as at common law, and to refund the increased rate of charge.

Section 4. From and after the 1st day of September then next, no public notice heretofore or hereafter made shall be deemed to limit or affect the liability at common law of any such common carriers as aforesaid, in respect of any goods to be carried by them, but that all such common carriers shall, after the said 1st day of September, be liable, as at common law, to answer for the loss of, or any injury to, any goods in respect whereof they may not be entitled to the benefit of this Act, any notice by them made contrary thereto or limiting such liability notwithstanding.

Section 5. For the purposes of this Act, every office, warehouse, or receiving-house appointed by such common carrier as aforesaid for receiving parcels shall be deemed the receiving-house, &c. of such common carrier; any one of such common carriers may be sued, and no action shall abate for want of joining any co-partner.

Section 6. No special contract between any such common carriers and other parties shall be affected by this Act.

Section 7. Where any parcel shall be

Carriers of persons.

In an action against a coach-owner for an injury sustained by a passenger, the plaintiff must prove, not only the usual engagement to carry him, by proof that he has taken his place, &c. (*k*), but must prove *negligence*; for coach-owners do not insure the persons of passengers against accidental injuries (*l*). But upon general principles, the owners of mail and other coaches are liable for injuries occasioned by the negligence of their agents (*m*). The liability continues till the passengers are safely set down, though beyond the place of destination (*n*). The breaking down or overturning of a stage-coach is *primâ facie* evidence of negligence (*o*). Where the road was such as to require an extraordinary degree of caution on the

delivered at any such office, and the value and contents declared as aforesaid, and increased rate of charges paid, and such parcel shall have been lost, the party entitled to recover damages in respect of such loss shall also be entitled to recover back such increased charges so paid as aforesaid.

Section 8. That nothing in this Act shall be deemed to protect such common carriers from liability for loss arising from the felonious acts of any servant, nor to protect any such servant from liability for loss occasioned by their own neglect.

Section 9. Such common carriers shall not be concluded as to the value of any such parcel by the value so declared as aforesaid, but shall be entitled to require from the party suing proof of the value, by ordinary legal evidence, and shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges.

Section 10. That in all actions brought against such common carriers for loss, &c., whether the value of such goods shall have been declared or not, the defendants may pay money into court, as in any other action.

The Act extends to all articles comprised within Section 1, although not within the terms of the preamble, viz. an article of great value in small compass. A looking-glass of above 10*l.* value was packed up and sent to be carried from the carrier's office in London to the house of S. near Lymington. A notice pursuant to the statute was fixed up in the office. The words, "plate-glass," "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from Lymington to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken. It was held that the carrier was not liable for the damage occasioned by the breaking of the glass. *Owen* v. *Burnett*, 2 C. & M. 353; 4 Tyr. 139, S. C. The plaintiff sent a parcel, directed to one in London, to the postmaster of Bradford, to be forwarded to M. The postmaster received 2*d.* to book the parcel, and sent it by a mail-cart to the King's Arms inn at M. He was accustomed so to take in parcels for the mail-cart. The innkeeper at M. booked the parcel for London, charging 2*d.* as "booking" for his trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail-coach, of which the defendants were proprietors, to London. Several coaches used to stop at the King's Arms; the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the King's Arms. The parcel was lost, and it was held, first, that for the purpose of taking in the above parcel, the King's Arms was a receiving-house of the defendants, within the stat. 11 G. 4 & 1 W. 4, c. 68; secondly, that the plaintiff might properly sue the defendants on a contract to carry from M. to London. *Syms* v. *Chaplin*, 5 Ad. & Ell. 634,

Value.—The notification as to the value must be express. *Boys* v. *Pinks*, 8 C. & P. 361.

Shall have been declared.—A defence that no notice was affixed at the receiving-house pursuant to the statute, must be specially pleaded. *Syms* v. *Chaplin*, 5 Ad. & Ell. 634.

On a plea that the property was not delivered at a receiving-house, but to the defendant's servant, and that the plaintiff did not at the time of delivery declare the value, &c., replication *de injuria*, and verdict for the plaintiff, it is no ground for a new trial that no notice was affixed. *Ibid.*

(*k*) See the observations, *supra*, as to the *contract*.

(*l*) *Aston* v. *Heaven*, 2 Esp. C. 533. *Christie* v. *Griggs*, 2 Camp. 79.

(*m*) *White* v. *Boulton and others*, Peake's C. 81. *Brucker* v. *Fromont*, 6 T. R. 659; 2 Salk. 441. *Michael* v. *Allestree*, 2 Lev. 172.

(*n*) *Dudley* v. *Smith*, 1 Camp. 167.

(*o*) *Christie* v. *Griggs*, 2 Camp. 79. 345, note (*m*); see also *Dudley* v. *Smith*, 1 Camp. 167.

Carriers of persons.

part of the passengers, a driver was held to have been guilty of negligence in not warning them of the full extent of the danger (*p*). Evidence that the coach at the time of the overturning was carrying a greater number of passengers than are allowed by the Act of Parliament (*q*), has been held to be conclusive to show that the accident arose from the overloading of the coach (*r*); on the other hand, if it appear that a coach is loaded with more passengers than its construction will bear, it is no excuse that the number did not exceed the statutory allowance (*s*). If the driver of a coach may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues (*t*).

If through the default of a coach-proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, and in consequence his leg be broken, the proprietor will be responsible in damages, although the coach was not actually overturned (*u*). It is no defence that the contract was for travelling on a Sunday (*x*). A party who pays his whole fare is entitled to take his seat at any stage of the journey (*y*); *secus*, if he pay a deposit only (*z*). A postmaster is not compellable to let a chaise, but if he do so, and the passenger take his seat, the postmaster is bound to proceed if the fare be tendered (*a*).

CASE, ACTION ON.

Effect of the new rules.

PREVIOUSLY to the new rules of pleading, the whole of the material allegations on the record were put in issue by the plea of not guilty. The new rules of H. T. 4 Will. 4, have, in ordinary cases, made great alteration in this respect, and the proofs now requisite on the part, as well of the plaintiff as the defendant, are regulated by the form of pleading and the

(*p*) *Christie* v. *Griggs*, 2 Camp. 79. As where the coach, before it reached its usual destination, had to pass under a low gateway, and it was scarcely practicable for a passenger on the roof of the coach to pass without injury, and the coachman merely informed the passenger that the passage was very *awkward*. See also *Dudley* v. *Smith*, 1 Camp. 167.

(*q*) 50 G. 3, c. 48, s. 2.

(*r*) *Israel* v. *Clarke*, 4 Esp. C. 259.

(*s*) *Ibid.*

(*t*) *Mayhew* v. *Boyce*, 1 Starkie's C. 423.

(*u*) *Jones* v. *Boyce*, Ibid. 493. In an action against a coach proprietor for negligence, it appeared that the coach travelled from the county of O. to the county of W., that the plaintiff became an outside passenger for hire, that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers, and that the plaintiff being seated with her back to the luggage, was by a sudden jolt thrown from the coach, and her leg was thereby broken in the county of O., where she remained some time to be cured, but before she was fully recovered she removed to the county of W., where further medical attendance become necessary, and expense was consequently incurred. The learned Judge directed the jury to find for the plaintiffs, if they were of opinion that the injury was occasioned by the negligence of the defendant. The jury found for the plaintiff, and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat. It was held that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant; also, that the inconvenience suffered and expense incurred by the plaintiff in the county of W. *was material evidence of a matter in issue* arising there, within the meaning of the undertaking given by the plaintiff, in answer to motion to change the venue. *Curtis and Wife* v. *Drinkwater*, 2 B. & Ad. 169.

(*x*) *Sandiman* v. *Breach*, 7 B. & C. 96. Under the stat. 3 Car. 1, c. 1, and 29 Car. 2, c. 7. But the driver of a stage van is a common carrier, and subject to penalties for travelling on a Sunday. *R.* v. *Middleton*, 3 B. & C. 164; 4 D. & R. 824.

(*y*) *Ker* v. *Mountain*, 1 Esp. C. 27.

(*z*) *Ibid.*

(*a*) *Massiter* v. *Cooper*, 4 Esp. C. 260.

issues taken. As the new rules affect only the mode of making the defence, leaving the proof of material facts put in issue as before, and, indeed, still allow the plea of the general issue as before, where it is given by a particular statute (*b*), the proofs will be stated as before, subject to the observation, that their materiality must depend on the issue taken. New rules.

For the proofs in particular actions of this class, see the different heads CARRIERS.—CRIMINAL CONVERSATION.—FALSE REPRESENTATION.—DISTURBANCE.—LIBEL AND SLANDER.—LIGHTS.—MALICIOUS ARRESTS AND PROSECUTIONS.—NEGLIGENCE.—NUISANCE.—REVERSION.—SEDUCTION.—SHERIFF.—TROVER.—WATERCOURSE.—WAY.

The proof of the different averments essential to support an action on the case in *tort*, and the necessity of the correspondence of such proofs with the allegations upon the record, are severally considered under the respective appropriate titles, and under the general head of VARIANCE.

Some points will now be considered which are particularly applicable to the present form of action. Parties.

The action must in general be brought by the party whose person or property has sustained the injury complained of. Thus the vendor of goods cannot maintain an action for their loss against the carrier, where the property has vested in the vendee by the delivery to the carrier on his behalf (*c*). So where *A.* chartered the whole of the defendant's ship, the defendant agreeing to receive a full cargo, and to deliver the same to *A.* or his assigns, and the plaintiff, to whose order the goods were consigned, brought an action against the defendant for negligence in stowing the goods, and it appeared that the plaintiff was the mere agent of *A.*, he was nonsuited (*d*). Plaintiffs.

If it appear that some of the plaintiffs are not entitled to support the action, it will be a ground of nonsuit; they must recover, if at all, in respect of a general joint damage, for the Courts will not take cognizance of separate and distinct injuries in one and the same action (*e*). The plaintiffs must therefore prove a joint cause of action, such as damage done to joint property (*f*); joint slander of the plaintiffs in their trade or business (*g*); and two persons may join, although their interests be several, if the injury complained of were a joint damage to both (*h*). Where the damage is laid as a joint damage to several plaintiffs, and appear in evidence to be a separate damage to some of them only, they must be nonsuited; as, where the declaration alleged a slander of the plaintiffs in their joint trade, and it appeared in evidence that the words were addressed personally to one only (*i*).

It is a general rule, that in actions of *tort* one defendant may be acquitted and another found guilty, *torts* being several in their nature (*k*); where, however, the action is virtually founded upon a breach of contract, doubts Defendants.

(*b*) The intention to rely on the statute, under the general issue, must be notified by inserting the words "By statute" in the margin of the plea.

(*c*) *Supra*, tit. CARRIER.

(*d*) *Moores* v. *Hopper*, 2 N. R. 411.

(*e*) 1 Saund. 291, *g.*; Bac. Ab. Action, [C.]; 2 Saund. 116, n. 2; 2 Wils. 423; 3 Lev. 362.

(*f*) If one tenant in common only be sued in trespass, trover or case, for anything concerning the land held in common, the defendant may plead the tenancy in common in abatement. 2 Saund. 291, *d.*

(*g*) 3 B. & P. 150; 2 East, 426.

(*h*) 2 Saund. 116, *a*; 3 Lev. 362.

(*i*) *Solomons and others* v. *Medex*, 1 Starkie's C. 101. And see *Barnes* v. *Holloway*, 8 T. R. 150. *Hawkes* v. *Hawkey*, 8 East, 427. *Helly* v. *Hender*, 3 Bulst. 83.

(*k*) 1 Will. Saund. 291, *d.*, where the cases on the subject are collected.

have been entertained upon this point. In a late case in an action against carriers, the Court of King's Bench refused a new trial, leaving the defendant to take his objection, which was upon the record, by writ of error (*l*), and the judgment was afterwards affirmed.

Time. The allegation of the particular day on which an injury was committed is not material, and the plaintiff may prove it to have been committed on any day before or after the day laid in the declaration, provided it be before the commencement of the action (*m*), whether the form of action be trespass or case. But if the injury be continuous in its nature, or has been repeated, it seems that the plaintiff, if there be but one count alleging a continuance or repeated acts within a time specified, may either give in evidence upon that count one act anterior to the first day specified in the declaration, or any number within the limits assigned (*n*). But if the declaration contain several counts, he may give in evidence so many acts, each anterior to the first day specified in each respective count (*o*).

Where in an action on a policy of insurance, the declaration alleged, that after the making the policy the ship sailed, and it appeared in evidence that she sailed before, the variance was held to be immaterial (*p*).

Place. Where the injury is of a transitory nature, and the place is merely alleged by way of *venue*, a variance is immaterial; and, as will be seen in actions for nuisances to real property, where there is a doubt whether the place was introduced by way of *venue*, or of local description, it will be ascribed to *venue* (*q*). Where however a precise local description is given of such an injury, it must be proved as laid (*r*).

Means and manner. If the injury be the immediate result of force used by the plaintiff and not the mere remote consequence of his wrongful act, trespass is the proper form of action. The distinction between such injuries as are to be laid in trespass, and consequential injuries, for which an action on the case is the proper remedy, is frequently very nice. The general rule is, that if the injury result immediately from force applied by the defendant, trespass is the proper form of action (*s*), and it is immaterial whether the trespass be wilful or not (*t*).

Negligence of agent. In actions for the negligence of an agent, it is a general rule that an allegation of negligence by the defendant is supported by proof of negligence in his agent, for the negligence of the latter is the negligence of the principal who employed him (*u*). A declaration alleging that the defendant so negligently drove his cart that the plaintiff's horse was killed, is supported by proof that the defendant's servant drove the cart and occasioned the injury (*x*). And it is a general rule in civil actions, and also in cases of indictments for treason and misdemeanors, and in some instances for felony,

(*l*) *Wood* v. *Bretherton*, K. B. Mich. 1820; vide tit. CARRIERS. And see 1 Will. Saund. 291, *d.*; and *supra*, 201, and the cases there referred to.

(*m*) 1 Will. Saund. 24, n. *Brook* v. *Bishop*, 7 Mod. 152; Ld. Raym. 823. 974. 976; 2 Salk. 639. *Hume* v. *Oldacre*, 1 Starkie's C. 351.

(*n*) Ibid.

(*o*) Ibid.

(*p*) *Peppin* v. *Solomons*, 5 T. R. 496. *Matthie* v. *Potts*, 1 B. & P. 23.

(*q*) *Supra*, 201.

(*r*) See tit. VARIANCE.—VENUE.

(*s*) Per De Grey, C. J. in *Scott* v. *Shepherd*, 3 Wils. 403; 2 Bl. R. 892.

(*t*) Per Ld. Ellenborough, *Leame* v. *Bray*, 3 East, 599. For the decisions on this head, see TRESPASS.

(*u*) *Supra*, tit. AGENT, 31. *Michael* v. *Allestree*, 2 Lev. 172; *supra*, 55. But the plaintiff may usually waive a trespass and bring case, *infra*, 212, note (*x*).

(*x*) *Brucker* v. *Fromont*, 6 T. R. 659. And see *Turbervile* v. *Stamp*, 1 Ld. Raym. 264; Skinn. 681; Carth. 425; Salk. 13.

that the act of the agent may be alleged to be the act of the principal who gave him directions (*y*).

Proof of agency.

Where in an action against *A.* for damage to the plaintiff's window, occasioned by the negligence of the defendant's servant in driving his waggon, it appeared that *A.* and *B.* were in partnership as carriers, and that by a private agreement *inter se* each undertook the conveyance of goods by his own waggons, horses, and drivers, for specified distances, and that the damage in question had been effected within *B.*'s division, and by his waggon and driver, it was held that *A.* was liable, for since the waggon was to be drawn for his benefit, for all legal purposes the servant was his, although for inferior purposes, and, as between *A.* and *B.*, he was considered as the servant of *B.* (*z*).

Sums, &c.

A variance from sums and quantities will not be material, unless they constitute part of a contract, or other entire subject-matter. It is unnecessary to prove the precise sum as laid in support of an averment that so much was *due* for rent in an action to recover double the value of goods removed to prevent a distress (*a*).

In an action on the Post-horse Act, for letting and not accounting for divers, to wit, eight post-horses, proof of letting and not accounting for five, was held to support the declaration (*b*).

Under a count for a total loss it is sufficient to prove an average loss (*c*).

Damages.

In covenant, evidence of part of the breach will enable the plaintiff to recover *pro tanto*. Where the plaintiff alleged, by way of breach, that the defendant had pulled down the whole house, it was held that he was entitled to recover damages for pulling down half the house (*d*).

It is always essential to prove the allegation that the particular damage alleged was the immediate and natural result of the wrongful act of the defendant stated in the declaration. Thus in an action for slander, by means of which the plaintiff lost his situation as a journeyman to a third person, it is not sufficient to prove, that in consequence of the wrongful act of the defendant, the master dismissed the plaintiff from his employment before the end of the term for which he had contracted with him, for the dismissal was not the legal and natural consequence of the words, but the mere wrongful act of the master (*e*).

No evidence can in general be given of damage which is not specially alleged in the declaration. But where special damage is laid, the plaintiff may frequently recover in respect of that damage in this form of action, where he could not have recovered for it in trover. As, where the plaintiff alleged that the defendant wrongfully had detained the tools used by him in his trade, for the space of two months, whereby he had lost the benefit of his trade, it was held that a special action on the case was the proper form of action, for the damages being special, the action ought to be special (*f*).

It is sufficient, in many instances, to give presumptive evidence of the loss sustained; as, in an action for firing guns so near the plaintiff's decoy-

(*y*) *Supra*, tit. ACCESSORY—AGENT.
(*z*) *Waland* v. *Elkins*, 1 Starkie's C. 272.
(*a*) *Gwynnet* v. *Phillips*, 3 T. R. 646.
(*b*) *Radford* v. *M'Intosh*, 3 T. R. 632.
(*c*) *Nicholson* v. *Croft*, Burr. 1188.
(*d*) Burr. 1907. Bl. 200.
(*e*) *Vicars* v. *Wilcocks*, 8 East, 1. See also *Ashley* v. *Harrison*, Peake's C. 194; 1 Esp. C. 48; *Taylor* v. *Neri*, 1 Esp. C. 386; where it was held that a manager of a theatre could not sustain an action for beating a performer, *per quod* he was prevented from performing.
(*f*) *Kettle* v. *Hunt*, B. N. P. 78.

pond, that it causes the birds to take flight (*g*); or prevents the wild ducks from coming there (*h*); or for hindering horses from being brought to the plaintiff's market, in consequence of which he lost the toll payable upon the sale (*i*). So the law will presume some damage where the defendant has been guilty of a breach of legal duty to the plaintiff (*k*). As where the sheriff has not a prisoner in custody on the return of the writ, although the plaintiff can prove no damage (*l*). The variance from the amount of the damages laid in the declaration is immaterial.

Proof in Bar.

As this action is founded on the plaintiff's title in justice and equity to receive a compensation in damages, the defendant might before the new rules, except in some instances depending on peculiar circumstances, have given in evidence under the general issue any facts or circumstances which in equity and conscience were sufficient to bar the plaintiff's claim (*m*). The excepted defences were, that of a justification, in an action for slander or libel, of the truth of the words; this rested on peculiar grounds; a special plea was necessary in order to apprize the plaintiff that evidence would be adduced to prove the truth of the charge of which he complained. So, perhaps, where the defendant had published a true account of a judicial proceeding. So again where the defence was founded upon the Statute of Limitations. The stat. 8 & 9 Will. 3, c. 27, s. 6, enacts, that in an action of escape against the keeper of any prison, no retaking on fresh pursuit shall be admitted in evidence under the general issue, or without a special plea verified by affidavit.

Evidence in defence.

In an action for beating the plaintiff's horse, *per quod* he was deprived of the use of it, the defendant was admitted to prove that the horse and cart of the plaintiff were before the defendant's door, and hindered him from coming to load, wherefore he whipped the horse in order to remove it (*n*). So in an action for obstructing the plaintiff's light, it was held that the defendant might, under the general issue, prove that he had built upon an ancient foundation according to the custom of the city of London (*o*). So a release is evidence (*p*). So in an action for the seduction of a servant, evidence that the plaintiff had recovered a penalty against the servant, was evidence in bar of the action under the same plea (*q*). The defendant might, under the general issue, give in evidence a verdict and judgment in a former action as to the same subject-matter between the same parties; but if he meant to rely upon it as an *estoppel*, he was bound to plead it; if he merely gave it in evidence, it was not conclusive (*r*).

It is an answer to the action to show that the profits, of which the plaintiff complains he has been deprived, were to be derived through the medium of

(*g*) *Carrington* v. *Taylor*, 11 East, 571. The defendant had before fired at a greater distance, and brought out some of the birds, and though he did not fire into the decoy-pond, it was held to be evidence of a wilful disturbance of, and damage to the decoy. Ibid.

(*h*) *Keble* v. *Hickringill*, 11 Mod. 73. 130. So an action lies for firing a cannon at negroes, and thereby preventing them from trading with the plaintiff; *Tarleton* v. *M'Gawley*, Peake's C. 205; and it is no defence that the plaintiff had not paid duty to the king of the country for a license to trade. Ibid.

(*i*) Per Holt, C. J. Ibid.

(*k*) *Barker* v. *Green*, 2 Bingh. 317.

(*l*) It may, perhaps, be more properly stated, that the breach of legal duty is in itself a damage in law sufficient to support the action. See *Pindar* v. *Wadsworth*, 2 East, 154; and *infra*, tit. DISTURBANCE. —DAMAGE.

(*m*) Per Ld. Mansfield, Burr. 1353.

(*n*) *Slater* v *Swann*, Str. 872.

(*o*) *Anon.* Com. 273.

(*p*) Burr. 1353.

(*q*) *Bird* v. *Randall*, Burr. 1345. P. C. Bl. 373. 387. But *qu.* whether this ought not to have been pleaded, *vide supra*, Vol. I. Ind. tit. JUDGMENT, and Stra. 701.

(*r*) *Vooght* v. *Winch*, 2 B. & A. 662. Ind. tit. JUDGMENT.

an illegal transaction (*s*), or that the thing destroyed was a nuisance (*t*). It seems to be no objection that trespass might have been sustained, for the plaintiff may waive the trespass, and rely on the consequential injury (*u*).

By the new rules of Hil. T. 4 W. 4:—1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.:* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received. Rules H. T. 4 W. 4.

2. All matters in confession or avoidance shall be pleaded specially, as in actions of assumpsit.

CERTIFICATE.

For PARISH CERTIFICATE, *vide* INDEX.

OF a *Conviction of Felony.* By the stat. 3 & 4 W. & M. c. 9, s. 7, a transcript certified by the clerk of the crown, peace, or assizes, of the conviction of a man who has the benefit of clergy, or of a woman who has the benefit of the statute, containing the effect and tenor of the indictment and conviction, to the Judges and justices in any other county where such man or woman shall be indicted, on being produced in court, shall be evidence of the fact of admission to the benefit of clergy or of the statute. Provisions nearly similar are made by the stat. 15 G. 2, c. 28, s. 9, in case of a conviction for uttering counterfeit coin (*x*). Conviction of felony.

(*s*) But Ld. Kenyon held that the plaintiff might recover against the defendant for preventing him from carrying on a foreign trade, although he had not conformed to the law of the country. *Tarleton* v. *M'Gawley*, Peake's C. 205.

(*t*) *Hannam* v. *Mockett*, 2 B. & C. 934; where the action was brought for disturbing plaintiff's rookery. See *Du Bost* v. *Beresford*, 2 Camp. 511. *Keeble* v. *Hickeringill*, 11 East, 574.

(*u*) Thus where a distress is made after tender of the rent, the plaintiff may waive the trespass and bring case. *Branscomb* v. *Bridges*, 1 B. & C. 145; 3 Starkie's C. 171; and in general the plaintiff it seems may waive a trespass committed in taking goods, and bring trover. See *Moreton* v. *Harden*, 4 B. & C. 223.

(*x*) See tit. COIN.

Certificate of conviction in case of felony.

By the stat. 6 G. 1, c. 23, s. 6, a transcript of the indictment, conviction, and order for transportation of a felon, certified by a clerk of assize or of the peace, is evidence, under an indictment against a felon ordered to be transported, for being at large before the expiration of his term.

By the stat. 7 & 8 G. 4, c. 28, s. 11, in an indictment for any felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of 6*s.* 8*d.*, and no more, shall be demanded or taken), shall, upon proof of the identity (*y*) of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.

So in some other cases, which will be noticed in their proper places, certificates by authorized officers are admissible in evidence; so also are certificates, in some instances, by public notaries (*z*). In other instances, where the certificate is not made by an accredited agent of the law, to whom authority is delegated for the purpose, such as a chirographer (*a*), the general rule is, that his statement or certificate of a fact is inadmissible (*b*). The certificate of a British vice-consul abroad is not evidence to prove any fact, even such as the amount of a sale, although he is by the law of the country where he resides, constituted the general agent for absent owners of goods, and was obliged to make the sale in question (*c*). The certificate of the Secretary at War, relating to the office of a sergeant in the army, has, it seems, been admitted in evidence (*d*); but this decision does not appear to be founded in principle.

Certificate in the nature of an adjudication.

In general, where the certificate is in the nature of an adjudication by a Court of competent jurisdiction, it is receivable in evidence, when properly authenticated, of the fact itself. As for instance, a certificate by commissioners appointed by a statute to inquire into and state the debts of the army (*e*); or a record by a magistrate of a forcible entry, and detainer (*f*).

The certificate of a Bishop in a case of bastardy or marriage, when entered of record, is in general conclusive upon the fact (*g*); but this is a regular legal adjudication upon the fact by a competent tribunal. It has in one instance, it seems, been held, that a certificate under the seal of a minister resident abroad, that a particular marriage was solemnized by him (*h*), was admissible; but this was when the rules of evidence were in a

(*y*) In order to prove a former conviction it is sufficient to prove that the prisoner was the party who underwent the sentence, in the certificate of the clerk of the peace; it is not necessary to call a witness who was present at the trial. *R.* v. *Crofts*, 9 C. & P. 220.

(*z*) See Vol. I. Index, tit. CERTIFICATE.

(*a*) See BILLS OF EXCHANGE.

(*b*) Vide Index, tit. CERTIFICATE.

(*c*) *Waldron* v. *Coombe*, 3 Taunt. 162. *Roberts* v. *Eddington*, 4 Esp. C. 88. *R.* v. *Vyse*, Forrest, 35. See further on the subject of certificates, *Omichund* v. *Barker*, Willes, 550; 1 Blacks. 29.

(*d*) *Lloyd* v. *Woodall*, 1 Bl. R. 29.

(*e*) Str. 481; *supra*, Vol. I. Index, tit. JUDGMENT.

(*f*) See the stat. 15 Rich. 2, c. 2; 8 Hen. 6, c. 9, s. 2; Burn's J. tit. *Forcible Entry and Detainer*. 2 Rol. R. 39. Dalt. c. 44.

(*g*) See tit. BASTARDY, *supra*; and tit. MARRIAGE, *infra*.

(*h*) *Alsop* v. *Bowtrell*, Cro. J. 541.

crude and unsettled state (*i*). Even the King himself, it has been held, cannot give evidence in a cause by letters under his sign manual (*k*).

Where a parish has pleaded guilty to an indictment for not repairing a highway, a certificate, signed by two magistrates, is received as evidence by the Court, to advise them to discharge the defendants; and the practice is of ancient date (*l*). It does not however appear, that such certificates have been used as evidence before a jury. So the Courts, in some instances, receive certificates from other Courts as to particular laws and customs. The customs of the City of London are ascertained by the Courts at Westminster by means of a certificate by the recorder of London (*m*). So, certificates are received from the Courts in Wales as to their practice (*n*).

It has been held that a certificate of the discharge of an insolvent debtor under the stat. 2 G. 2, c. 20, is admissible to prove the discharge (*o*).

CHARACTER.

HERE may be considered the proof,—

I. Of the moral character and conduct of a person in society:

II. Of an allegation that a party holds an office, or fills a particular situation.

Moral character in society.

There are three classes of cases in which the moral character and conduct of a person in society may be used in proof before a jury, each resting upon peculiar and distinct grounds.

Such evidence is admissible,—1st. To afford a *presumption* that a particular party has or has not been guilty of a criminal act. 2dly. To affect the *damages* in particular cases, where their amount depends upon the character and conduct of any individual; and, 3dly. To impeach or confirm the *veracity* of a witness.

Evidence of the character which a person bears in society is in many instances admissible, as affording a presumption that he did or did not commit a particular act.

Presumptive evidence of innocence.

Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character, since it is not probable that a person of known probity or humanity would commit a dishonest or cruel act in the particular instance. Such presumptions are, however, so remote from the fact, and it is frequently so difficult to estimate a person's real character, that they are entitled to little weight, except in doubtful cases. Since the law considers a presumption of this nature to be admissible, such evidence is in principle admissible wherever a reasonable presumption arises from it, as to the facts in question; in practice it is admitted whenever, technically speaking, the character of the party is involved in the issue.

(*i*) See Willes's R. 549, where the decision is questioned.

(*k*) 2 Roll. Ab. 686; and per Willes, C. J. in *Omichund* v. *Barker*, Willes's R. 550; notwithstanding the case of *Aubigny* v. *Clifton*, Hob. 213, *contra*; *vide* Vol. I. 3 Wooddeson, 376. Com. Dig. Testmoigne, [A.] 1; 1 Parl. Hist. 43.

(*l*) Per Ashurst, J. in *R.* v. *Mawbey*, 6 T. R. 619; 2 Roll. R. 412. *Leyton's Case*, Cro. Car. 584. *Randall's Case*, 1 Keb. 256; 2 Keb. 221; T. Raym. 215; Salk. 358; 1 Str. 688.

(*m*) 1 Burr. 251.

(*n*) Cro. Eliz. 503.

(*o*) *Gillum* v. *Stirrup*, C. T. Hardw. 144. This statute has expired. *Qu.* as to the provisions of the statute. It seems

When evidence in criminal cases.

Formerly, evidence of the defendant's good character, in criminal proceedings, was admitted in capital cases only (*p*), and that in *favorem vitæ*; but such evidence is now admissible in all cases of misdemeanors, where the character of the defendant is in jeopardy (*q*).

Upon indictments for larciny, or fraud of any description, the general character of the defendant for honesty is admissible; and where the indictment charges upon the defendant any violence committed against the person of an individual, or against the public peace, evidence may be adduced by him of his general character for humanity and peaceable conduct. Such evidence is also admissible upon an indictment for a libel (*r*).

Usual questions.

It is a general rule, that evidence must be given of the general character of the party, and not of particular acts (*s*), for the presumption in favour of the prisoner arises from the general uniform tenor of his conduct, and not from particular isolated facts. The questions usually put for this purpose are, how long the witness has known the prisoner, and what his general character has been for honesty, humanity, or loyalty (according to the nature of the charge), during that period.

A prosecutor cannot impeach the character of a defendant until the latter has adduced evidence to support it (*t*); and although such evidence is warranted in principle, it is not resorted to in practice; he may cross-examine the witnesses as to the grounds of their belief, and as to particular facts, and may bring evidence in contradiction to impeach the general character of the defendant (*u*).

Civil proceedings.

In civil proceedings, unless the character of a party be put directly in issue by the nature of the proceeding, evidence of his character is not in general admissible.

Upon an ejectment brought by an heir-at-law to set aside the will, for fraud committed by the defendant, evidence of the defendant's good character was rejected as inadmissible (*x*). And even upon an information to recover a penalty from the defendant for keeping false weights, such evidence was rejected, because the prosecution was not directly for the crime, but to recover a penalty (*y*). The principle of this distinction is not very intelligible; the good character of the defendant in a prosecution for keeping false weights can be admitted upon no ground, except that it affords a presumption that the fact imputed has not been committed, and this is the very fact which is in issue in the former case. The effect of the distinction is, to make the admissibility of evidence to prove a fact to depend, not upon its tendency to prove it, but upon the consequences which result from the fact when proved.

In an action of slander, imputing dishonesty to the plaintiff, who was the defendant's servant, the plaintiff may, it has been held, adduce evidence of

that such a certificate would not be evidence, unless it was the original entry of the adjudication, or an examined copy of it; or unless it was made evidence by the express provisions of the statute.

(*p*) *R.* v. *Harris*, 2 St. Tn. 1038. *R.* v. *Carr*, 32 G. 2; 3 St. Tr. 57.

(*q*) *R.* v. *Harris*, 2 St. Tr. 1038. *Attorney-General* v. *Bowman*, 2 B. & P. 532, *a.*

(*r*) *R.* v. *Harris*, 2 St. Tr. 1038.

(*s*) 1 T. R. 754. See Vin. Ab. Evidence, M. a. 1. 6.

(*t*) B. N. P. 296. In the case of barratry, the prosecutor may examine as to particular facts, for otherwise the case cannot be proved; but then particular notice is requisite as to the facts to be proved.

(*u*) 2 Atk. 339. *Clarke* v. *Periam.*

(*x*) *Goodright* v. *Hicks*, 1 Phill. L. Ev. 174, 5th edit.

(*y*) On an information in the Exchequer by the Attorney-general, to recover a penalty. *Attorney-General* v. *Bowman*, *cor.* Eyre, C. B., 2 B. & P. 532.

general good character, even before any evidence to the contrary has been given on the other side (*z*). The words, it is observable in that case, were published in giving a character of the servant upon the application of one who required the character, and consequently where, according to the ordinary rule by which such actions are governed, the plaintiff would be bound to prove the falsity of the words, and malice of the defendant. In other cases, and where no justification is pleaded, it seems that such evidence would not be admissible, for the truth of the charge imputed by the slander could not come in issue. Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit of a very different consideration, for there the party is charged with a crime, and in such a case, character affords just the same presumption of innocence as if the party had been tried for the offence (*a*). And next, although, as will be seen, a defendant may in some instances impeach the plaintiff's character, or even that of a third person, in order to mitigate the damages, and where he does so, it is clear that the plaintiff may, on the other hand prove the goodness of his character, yet, in general, a plaintiff is not allowed to adduce such evidence in the first instance (*b*); such evidence is unnecessary till the character has been impeached; for the law presumes a person's character to be good till the contrary be proved. Civil proceedings.

The character of *third persons* is also in some instances admissible, as affording a presumption with respect to the disputed fact.

Upon the question of illegitimacy, it has been held, that after probable evidence of non-access has been adduced, evidence may be given that the mother was a woman of bad character (*c*). So upon an indictment for a rape, or for an attempt to commit a rape, general evidence is admissible to impeach the character of the woman for chastity and decency (*d*). And in such a case evidence is admissible that the woman has formerly been connected with the prisoner, although it cannot be shown that she has been criminally connected with other persons (*e*).

General evidence to impeach the character of a prosecutrix for chastity, is admissible upon an indictment for a rape, or for an assault to commit a rape, although she has been examined as a witness, and has not been asked questions on cross-examination tending to impeach her character for chastity (*f*).

2dly. In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant (*g*). So in actions for Damages.

(*z*) *King* v. *Waring*, 5 Esp. C. 13.

(*a*) In *Cornwall* v. *Richardson*, 1 Ry. & M. 305, it is said to have been held that though the plea justified a charge of felony, the plaintiff could not give evidence of good character; yet, *qu.* might he not go into any evidence to rebut the justification?

(*b*) *Dodd* v. *Norris*, 3 Camp. 510. *Bamfield* v. *Massey*, 1 Camp. 460.

(*c*) *Pendrell* v. *Pendrell*, Str. 925.

(*d*) *Hodgson's Case*; by a majority of the Judges, on a case reserved, 1812; and *cor.* Wood, B. York summer Assizes, 1812. And see 2 Starkie's C. 241.

(*e*) Ibid.

(*f*) *R.* v. *Clarke*, 2 Starkie's C. 241. The prosecutrix is not bound to answer the question whether she has had connection with other men. 3 Camp. 515.

(*g*) B. N. P. 27. 296. *Coote* v. *Berty*, 12 Mod. 232. See *Foulkes* v. *Selway*, 3 Esp. 236; *Roberts* v. *Mulston*, Sel. N. P. 25.

Damages.

slander and libel, where the defendant has not justified, evidence of the plaintiff's bad character has also been admitted (*h*).

The grounds of admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished (*i*). Where, however, the defendant justifies the slander, it seems to be doubtful whether evidence of reports as to the conduct and character of the plaintiff can be received (*k*).

And in an action for a malicious prosecution on a charge of felony, it was held, that a witness could not be asked on cross-examination whether the plaintiff's house had not been searched on a former occasion, and whether he was not a person of suspicious character, in order to prove that there was probable cause for the charge; for in an action of slander, such proof is given to mitigate the damages, and not to bar the action; and such evidence affords no proof of probable cause (*l*).

But it seems, that in general a *plaintiff* cannot go into evidence of good character to increase the damages, until evidence has been given to impeach it. The plaintiff in an action for adultery with his wife, or for the seduction of his daughter, cannot give evidence of the good character of the one or the other, until the defendant has given evidence to impeach it (*m*); for till the contrary appear, their previous characters are presumed to be good, and that presumption is very forcibly confirmed by the consideration that the defendant is at liberty, if there be ground for it, to impeach the character by evidence.

It has even been held, that where the defendant has attempted to impeach the plaintiff's character on cross-examination of his witnesses, and has palpably failed, the plaintiff cannot call witnesses to his own good character (*n*). It may be doubted whether this is not carrying the general rule too far; such evidence is in general inadmissible, because the law presumes that the party's conduct has been correct and proper, a presumption which is strongly confirmed by the silence of the adversary upon the subject; but where he attempts to impeach the character of the party by evidence, the presumption from acquiescence ceases. Besides, although the witnesses deny the facts, it is very possible that the insinuation conveyed

(*h*) *Ld. Leicester* v. *Walter*, 2 Camp. 251; 1 M. & S. 284. *Rodriguez* v. *Tadmire*, 2 Esp. C. 720.

(*i*) —— v. *Moor*, 1 M. & S. 284. See *Snowdon* v. *Davis*, 1 M. & S. 286; and tit. LIBEL & SLANDER. *King* v. *Francis*, 3 Esp. C. 116. And see tit. DAMAGES.—TRESPASS.; and *Watson* v. *Christie*, 2 B. & P. 224.

(*k*) In the case of *Snowden* v. *Smith*, (Devon Lent Ass. 1811), Chambre, J. rejected such evidence; and the case of the *Earl of Leicester* v. *Walter* being cited, said that it did not govern a case like the present, where the defendant justified. See 1 M. & S. 286, *a*. But in the subsequent case of *Kirkman* v. *Oxley*, (cited Phillips on Evidence, 189,) Heath, J., in an action for slander imputing larciny, allowed the defendant, who had justified, to go into evidence of the plaintiff's bad character in mitigation of damages. The latter decision appears to be better founded in principle, from this consideration: if the issue on the justification, and the question as to the quantum of damages, were to be tried separately, such evidence would clearly be admissible on behalf of the defendant after the issue on the plea of justification had been decided against him; and if so, it is difficult to say that such evidence can be rejected, although both questions are tried together; for although the defendant gives evidence tending to prove his justification, he is still entitled to give evidence in reduction of damages, in case the jury decide against him on the justification. It would be for the Court, in such a case, to advise the jury to apply such evidence to the reduction of damages only, and not to consider it as subsidiary to the proof of the justification.

(*l*) *Newsam* v. *Carr*, *cor.* Wood, B. 2 Starkie's C. 69.

(*m*) *Bamfield* v. *Massey*, 1 Camp. 460; 3 Camp. 519.

(*n*) *King* v. *Francis*, 3 Esp. C. 116, *cor.* Ld. Kenyon.

by the questions, and the mode of answering them, may have produced an effect upon the jury which ought to be removed.

It has been held in one instance, that in an action for the seduction of a daughter, evidence on the part of the defendant, in mitigation of damages, that the daughter had previously had a child by another man, did not warrant the admission of general evidence of good conduct (*o*), but that the plaintiff was confined to evidence to disprove the specific breach of chastity. And yet it should seem, upon principle, that as the fact was offered in evidence by the defendant, in order to diminish the value of that which the plaintiff had lost, and to show that the injury to his feelings and his comforts was less than might otherwise have been presumed, evidence was admissible on the other hand to show that the subsequent conduct of the daughter had been correct, and to prove in fact what degree of injury had been sustained.

In the subsequent case of *Dodd* v. *Norris* (*p*), where the daughter was cross-examined in order to show that in her intercourse with the defendant she had been guilty of great indelicacy and levity, evidence of good character was held to be inadmissible, no evidence of bad character having been given by the defendant. This case, it is to be remarked, differs essentially from the former, inasmuch as no evidence was given to impeach the daughter's character, and consequently to diminish the damages, except so far as it arose out of the very transaction itself; and if that were to be a sufficient ground for the admission of such evidence, it would be admissible in every such action, since the very nature of the action involves improper conduct on the part of the wife or daughter.

3dly. Evidence offered to impeach the character of a witness has already been considered (*q*).

II. In order to prove a *general* allegation that a party holds a particular office or situation, it is usually sufficient to prove his acting in that capacity. Special character or office.

In the case of all peace officers, justices of the peace, and constables, it is sufficient to prove that they acted in those capacities, even upon an indictment for murder (*r*). And prior to the statute 11 G. 2, c. 30, s. 32, which directs, that excise and custom-house officers acting in the execution of their duty, shall be taken to be such till the contrary appears, evidence was admitted, both in criminal and civil proceedings, to show that they were reputed officers (*s*). So upon an indictment for perjury, in taking an oath before a surrogate in the Ecclesiastical Court, evidence that he has acted as a surrogate is *primâ facie* evidence of his authority (*t*). But where a plaintiff, in an action for slander, avers that he is a physician, and has regularly taken his degree as a doctor of physic, he must prove that he is such, by producing the books of the University containing the act which conferred

(*o*) *Bamfield* v. *Massey*, 1 Camp. 460. See *Dodd* v. *Norris*, 3 Camp. 519. Vide *infra*, tit. SEDUCTION. In an action on the case for the seduction of the plaintiff's sister, the sister was cross-examined by the defendant's counsel as to her having had criminal intercourse with other men; Bayley, J. held that general evidence of good character was admissible. *Murgatroyd* v. *Murgatroyd*, York Sum. Ass. 1828.

(*p*) 3 Camp. 519.

(*q*) See Vol. I. 211, and tit. WITNESS.

(*r*) Per Buller, J., *Berryman* v. *Wise*, 4 T. R. 366. *Gordon's Case*, Leach, 581. *R.* v. *Shelley*, Leach, 381, (*a*). Upon an indictment for sacrilege, alleging the property in the custody of *A.* and *B.* churchwardens, it is sufficient to show that *A.* and *B.* have acted in that capacity. *R.* v. *Mitchell, cor.* Abbott, J., Salisbury Spring Assizes, 1818.

(*s*) Per Buller, J., 4 T. R. 366. See also *R.* v. *Bigg*, *supra*, tit. AGENT.

(*t*) *R.* v. *Verelst*, 3 Camp. 432.

the degree, or by proof of an examined copy of such act, or by the production of a diploma, with proof of the seal of the court (*u*). But in such case, to prove a *general* averment that the party is a physician, it seems to be sufficient to show that he has acted as such (*x*).

In an action by an attorney for fees, an allegation that he is an attorney of the Court of King's Bench, is evidenced by proof that he has acted as such (*y*). So it has been seen, that on an indictment for forgery, where it was necessary to prove that *Adams* was the agent of the Governor and Company of the Bank of England, it was held that this was sufficiently proved by evidence that *Adams* had been used to sign bills and notes as such agent, which from time to time had been duly paid and answered by the Bank (*z*).

Appointment, proof of.

In cases where, from the precise and special nature of the allegation, the due *appointment* of the party to an office or situation must be proved, then, according to the general rule, it must be proved by the best evidence which the case admits of; that is, by the production and due proof of the original appointment, where it is in writing.

Upon an indictment against overseers, alleging that they were duly appointed, their appointment must be proved by the production of that appointment under the hands and seals of two justices, as the statute requires (*a*).

On an indictment against an apprentice for a fraudulent enlistment, the indentures must be produced and proved by the attesting witness in the usual way (*b*).

Where an indictment for stealing a letter alleged that the prisoner was a sorter and charger, proof that he was a sorter only was held to be insufficient (*c*).

Proof by admission.

It is a general rule, that where a party has assumed to act in a particular character or situation, or has represented himself as such, the assumption or representation is evidence of the fact against himself, since it operates by way of admission.

In an action against an incumbent for non-residence, it is sufficient to

(*u*) *Moises* v. *Thornton*, 8 T. R. 303. So a barrister is proved to be such by the order-book of the society to which he belongs. *Savage's Case*, Doug. 342.

(*x*) *Moises* v. *Thornton*, 8 T. R. 307. *Berryman* v. *Wise*, 4 T. R. 366. But see *Pickford* v. *Gutch*, *cor.* Buller, J., Dorchester Summer Ass. 1787; which was an action for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, &c. of a physician; and Buller, J., held that proof of the plaintiff's acting as a physician was insufficient, and that it was necessary to produce a diploma; on which the diploma was produced in court, and the plaintiff recovered. In *Smith* v. *Taylor*, (1 N. R. 196,) in a similar action, the allegation was, that the plaintiff at the time of speaking the words was a physician; and the plaintiff having obtained a verdict without any documentary proof of his degree, the Judges of the Common Pleas were, upon a motion to set aside the verdict, equally divided in opinion upon the question whether regular proof of the degree was necessary.

(*y*) *Berryman* v. *Wise*, 4 T. R. 366.

(*z*) *R.* v. *Bigg*, 3 P. Wms. 427; *supra*, 41. But where a declaration for slander alleged that the plaintiff was a physician, and exercised that profession in England, it was held that proof of a diploma from St. Andrew's, and of having acted as a physician in England, was not sufficient; for such a person cannot legally exercise his profession in England. *Collins* v. *Carnegie*, 1 Ad. & Ell. 695.

(*a*) *R.* v. *Arnold*, Str. 101. In this case parol evidence of the appointment was offered.

(*b*) *R.* v. *Jones*, 1 Leach, 208. The indictment alleged that the defendant was an apprentice bound by indenture to *L. W.*

(*c*) *R.* v. *Shaw*, 1 Leach, 79; 2 Bl. 789; 2 East's P. C. 580. See *R.* v. *Ellins*, Russ. & R. 188; *Sellers* v. *Till*, 4 B. & C. 655; and *infra*, tit. VARIANCE.

prove that he is in possession, without proving his presentation, institution and induction (*d*).

Proof that a man had acted in this country as a priest of the see of Rome, was held to be evidence against himself, upon the trial of an indictment, that he had been ordained by the see of Rome (*e*).

In an action for penalties under the Post-horse Act, proof that the defendant had previously accounted with the plaintiff as farmer-general, was held to be *primâ facie* evidence of the appointment of the latter to that situation (*f*). Special character.

Upon an indictment for bigamy, actual proof of the marriage is requisite, although the prisoner has by cohabitation, and otherwise, acknowledged the first marriage, and although such proof would be sufficient for the purposes of a civil action (*g*), except for adultery.

CHURCHES.

Act for building, 1 & 2 W. 4, c. 38.

CHURCHWARDENS (*h*).

Two churchwardens elected for the township, *B.* may maintain an action against the late churchwardens of that township for money remaining in their hands, without joining the other late or present churchwardens for the rest of the parish, separate rates being made for the several townships (*i*).

COIN.

To prove the allegation that the coin specified was of the *current* coin of the realm, it is not in general necessary to prove, either the indenture be- Proof of currency.

(*d*) *Bevan* v. *Williams*, 3 T. R. 635, (*n*).

(*e*) *R.* v. *Lewis*, 2 St. Tr. 801.

(*f*) *Radford*, qui tam. v. *Macintosh*, *qu.* 3 T. R. 632, against the opinion of Chambre, J., 1 N. R. 211. See other instances, tit. Admission; and see Phill. 181.

(*g*) Vid. *infra*, tit. Polygamy.—Criminal Conversation.

(*h*) Churchwardens are a *quasi corporatum* to take goods for the use of the poor, Vin. Ab. tit. Churchwardens; or of the parish, 12 H. 7, 29. a. But they are incapable of purchasing lands, except by particular statutes, or by special custom, Co. Litt. 3, a; as by 9 G. 1, c. 7, for workhouses; by 59 G. 3, c. 12, s. 12, the churchwardens and overseers may provide land for the employment of the poor. By the statute 55 G. 3, c. 137, property in goods provided for the use of the poor is vested in the overseers. As to the actions which they may maintain, see Com. Dig. Eglise, [F.] 3. By the statute 54 G. 3, c. 170, s. 8, overseers may sue on securities to indemnify against bastards. Where land belonging to a parish was occupied by *A.*, who paid rent to the churchwardens, and they executed a lease of the same land to *B.*, and gave notice of the lease to *A.*, it was held that *B.* could not recover against *A.* for use and occupation. For they are not by law a corporation to hold lands, and the stat. 59 G. 3, c. 12, s. 17, which enacts, that the churchwardens *and* overseers shall accept, take, and hold in the nature of a body corporate, for and on the behalf of the parish, all buildings, lands, and hereditaments belonging to such parish, does not extend to such a case. *Phillips* v. *Pearce*, 5 B. & C. 433; and held that *A.* was not estopped from denying *B.*'s title. Ibid. It is contrary to the duty of an overseer to borrow money for parochial purposes. *Massey* v. *Knowles and others*, 3 Starkie's C. 65. They are a corporation at common law, Str. 52. The canons say, they shall be chosen by the parson and the parishioners; and if they disagree, then one by the parson and one by the parishioners, Ib. Burn's Eccl. Law, tit. Churchwardens. One alone cannot release, nor give away the goods of the church. Cro. J. 234; Burn's Eccl. Law, tit. Churchwardens. Both together cannot dispose of goods, or do any other act to the disadvantage of the church. Com. Dig. Eglise, [F.] 3; 1 Rol. 893, l. 20; Ib. 426.

(*i*) *Astle* v. *Thomas*, 2 B. & C. 271; and see 4 Sid. 281-2; Com. Dig. tit. Eglise, [F.] 2; *Turner* v. *Bayness*, 3 H. B. 559.

Proof of currency.

tween the king and the master of the mint (*k*), or the king's proclamation (*l*), to give it currency. For the fact, that the money is the king's money, and current within the realm, is one of general notoriety, and may be found, it seems, on evidence of common usage (*m*). Where, however, a new species of coin has lately been issued with a new impression, which is not familiar to the people, it may be desirable to give more precise evidence of the fact, by means of the indentures, or by the testimony of an officer of the mint cognizant of the new coin, and of the stamps used, or by similar evidence (*n*). And where by any statute, such as the stat. 37 Geo. 3, c. 126, s. 1, relative to a new coinage, the king's proclamation is essential, it ought to be proved (*o*).

Any coin once legally made and issued by the king's authority, continues to be the current coin of the country until it be recalled, notwithstanding any change in the authority by which it was so constituted (*p*).

A recall is proved by proclamation, or by an act of parliament enacting it; and it seems that long disuse is presumptive evidence of a recall (*q*). And on the other hand, where a proclamation is essential, long-continued and approved usage of the coin would be evidence of a legal commencement by proclamation (*r*).

Proof of the counterfeiring.

Whether there has been a counterfeiting of real coin is a matter of fact for the consideration of the jury; in consideration of law there should be such a resemblance as may in the ordinary course of circulation impose upon the king's subjects: a variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it, and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin (*s*). It is even unnecessary that there should be *any impression* upon the counterfeit coin, if there be evidence to the jury in fact that the counterfeit is of the likeness and similitude of the lawful current coin (*t*). It must, however, appear that the coin was perfected sufficiently for circulation; and therefore, where a stamp had been impressed on an irregular piece of metal not rounded, and in an unfinished and incomplete state for currency, it was held that the offence had not been consummated (*u*).

Under the stat. 8 & 9 Will. 3, c. 26, it was held, that the colouring blanks with such materials that when rubbed they resembled coin, was a colouring within the statute, before the resemblance had been actually produced by so rubbing the coin (*x*).

In the case of treasons relating to the coin, one witness was sufficient (*y*).

(*k*) The weight, alloy, impression, and denomination of money are regularly settled by indenture between the king and the master of the mint, which has been sometimes followed by a proclamation, as a more solemn mode of giving it currency. East's P. C. 149; 1 Hale, 101, *et seq.*; MS. 46.

(*l*) East's P. C. 149; 1 Hale, 101. 6, 7, 8. 204.

(*m*) Ibid. 1 Hale, 192. 197. 213.

(*n*) East's P. C. 149.

(*o*) Ibid.

(*p*) 1 Hale, 122; East's P. C. 148.

(*q*) East's P. C. 149.

(*r*) East's P. C. 150. For the various instances in which a proclamation is necessary, see East's P. C. 149. It is unnecessary to mention any of them here, except the stat. 37 Geo. 3, c. 126, s. 1, relative to new copper coinage, which renders a proclamation essential.

(*s*) East's P. C. 164. See *Ridgeley's Case*, East's P. C. 171; *Lennard's Case*, Leach, 85; East's P. C. 170.

(*t*) *R.* v. *Welsh*, Leach, 293; East's P. C. 164.

(*u*) *Varley's Case*, Leach, 71; 2 Bl. 632; East's P. C. 164. See *R.* v. *Harris*, Leach, 126.

(*x*) *R.* v. *Case*, East's P. C. 165.

(*y*) 1 Hale, 221; Fost. 239; East's P. C. 187. Such offences are no longer treasons. See st. 2 W. 4, c. 34, and 7 W. 4, and 1 Vict. c. 90; and see the Appendix, tit. COIN.

Upon an indictment for having in possession implements for coining (*a*), it is not necessary to prove that they have been actually used for making money (*b*).

Where it appeared that the object of the prisoner was to coin foreign money, and not the current coin of the realm, a majority of the Judges held that the fact amounted to a sufficient excuse, but Mr. J. Foster and Lord Hardwicke were of a different opinion (*c*).

Proof of putting off, &c.

Upon an indictment for knowingly uttering counterfeit coin (*d*), it was not sufficient, upon an indictment under the stat. 8 & 9 Will. 3, c. 26, to prove a mere tender or attempt to get rid of money, which had not been accomplished, for the words of the statute, *pay* or *put off*, denote an actual passing of the money (*e*). Where the indictment charged the putting off various counterfeit money "for the sum of 5*s.*;" it was held to be well supported by proof that it was paid for by two half-crowns, although the agreement was for a sovereign for 4*s.*, and 3*s.* for 1*s.*; it being all one contract and one transaction (*f*). Under the same statute it was unnecessary, in order to satisfy the allegation that the money was milled money, to show that the money was actually milled, that is, that it was passed through a mill or press to be formed into a plate of proper thickness, to be cut into pieces for stamping; it is sufficient if the money resemble genuine milled money, all money being now milled and not hammered (*g*).

Scienter.

In order to show the guilty knowledge of the defendant, evidence is admissible that the defendant uttered other base coin (*h*) to other persons on the same day, or perhaps on other days near the time of committing the offence. And this, upon the general principle, that the conduct of a prisoner is admissible in evidence to prove a guilty knowledge or intention (*i*). In such cases, indeed, where the intention does not appear from the transaction itself, it must be inferred from other facts and circumstances. Such other utterings are therefore evidence, although they may be in themselves substantive offences. The whole demeanor of the prisoner may afford pregnant evidence of his mind and intention; for it is a general rule, that where crimes intermix, and one is evidence to prove another, the Court must go through the whole detail.

In one instance, where a man committed three burglaries on the same night, which were all connected, the prisoner having left at one place property which he stole at another, evidence was given as to all three (*j*)

(*a*) See the stat. 8 & 9 Will. 3, c. 26, s. 1. 5. 7; and now the stat. 2 W. 4, c. 34.

(*b*) By all the Judges, *Ridyeley's Case*, Leach, 172; East's P. C. 171. An instrument for marking the edges, although of modern invention, but producing the same result, is an instrument within the meaning of the 8 & 9 W. 3, c. 26. *Moore's Case*, 1 Ry. & M. C. C. L. 122.

(*c*) *R.* v. *Bell*, Fost. 430; East's P. C. 169.

(*d*) See the form of the indictment, CRIM. PLEAD. 531, &c.

(*e*) *Woolridge's Case*, East's P. C. 179; Leach, 251. The prisoner there had brought the coin to the house of the intended buyer, to be sold at a certain rate, and had laid them down upon the table for the buyer to count them out, and she had counted part, when the officers entered and apprehended them, before the buyer could pay for those selected; and it was held that the offence had not been completed.

(*f*) *R.* v. *Hedges*, 3 C. & P. 411.

(*g*) *R.* v. *Bunning*, Leach, 708; East's P. C. 183. *R.* v. *Dorrington*, and *R.* v. *Lazarus*, Ibid.

(*h*) See *R.* v. *Wylie*, 1 N. R. 92. *R.* v. *Tattersall*, 1 N. R. 93, *u.* See tit. KNOWLEDGE.

(*i*) Upon an indictment for robbery in extorting money by threats, subsequent attempts are evidence to prove the *quo animo*. *Donally's Case.*

(*j*) Cited by Ld. Ellenborough, *R.* v. *Wylie*, 1 N. R. 94.

Scienter. There must, however, in such cases, be such a connection as to warrant the inference of knowledge in the principal case. This may arise, in the case of uttering, from proximity of time, but the more detached in point of time the previous utterings are, the less relation will they bear to that stated in the indictment. The fact that all the money uttered is from the same die, or, in the case of uttering forged notes, that they are all impressions from the same plate, is important to connect the utterings, and to indicate a guilty knowledge. The circumstance that the prisoner at the time of uttering had other counterfeit coin, (especially if it be of the same description with that uttered,) is also evidence for the same purpose (*k*), although not alleged in the indictment. It is, however, to be observed, that to make such circumstances evidence, there must be a strong connection in the subject-matter.

Upon an indictment for forging and uttering a bill of exchange, it was held that the prosecutor was not at liberty to prove that a bank-note which was found in the pocket of the prisoner was forged (*l*).

Other indications of guilty knowledge and intention, such as the taking precautions to prevent a quantity of base coin from being injured by rubbing, and the possession of powder or pith used to give to the base coin the usual appearance of coin which has been in circulation, are too obvious to require remark.

The information and proceedings before the magistrates were deemed the commencement of the suit under the 9th sect. of the stat. 8 & 9 Will. 3, c. 26, s. 6, and should be produced (*m*), although the indictment were for colouring, and the commitment were for counterfeiting, when the time was material.

In order to oust the prisoner of his clergy under the stat. 15 Geo. 2, c. 28, s. 23, the record of the former conviction must be proved (*n*). And where the second conviction is in a different county or city, it is sufficient under the 9th section of that statute to produce a transcript containing the effect and tenor of the former conviction made by the clerk of the assize, or clerk of the peace of the county or city where the first conviction was had.

And by the stat. 37 Geo. 3, c. 126, s. 5, such a transcript of conviction so certified (in case of uttering coin not current here), shall be evidence of such conviction in any other county, city or place.

The having counterfeit coin in possession, is evidence of procuring it with intent to circulate it, which is a misdemeanor (*o*).

COLLATERAL FACTS.

Collateral facts. It has been seen that all facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference as to the disputed fact (*p*); and that, on the other hand, remote and collateral facts, from which no fair and reasonable inference can be drawn, are inadmissible, for they are at best useless, and may be mischievous, because they tend to abstract the attention of the jury, and frequently to prejudice and mislead them (*q*). It seems to be the province of the Judge,

(*k*) Per Thompson, B., 1 N. R. 95.

(*l*) By Bayley, J., Lancaster Summ. Ass. 1820.

(*m*) East's P. C. 168. *R.* v. *Willace.* Ib.

(*n*) *R.* v. *Rothwell*, Add. Pen. St. 122.

(*o*) *R.* v. *Fuller*, Russ. & Ry. 308.

(*p*) *Supra*, Vol. I.

(*q*) Nothing is inadmissible which is material to the issue joined, to prove or disprove it (per Blackstone, J., Bl. 1169). No new matter foreign to the issue joined is admissible in evidence. Per De Grey, J., Bl. 1165. And *vide* Vol. I.

in the exercise of a sound discretion, to discrimate between such facts as are connected with the issue, and such as are merely collateral. Collateral facts.

It is, however, frequently difficult to ascertain *à priori*, whether proof of a particular fact offered in evidence will or will not become material, and in such cases it is usual in practice for the Court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material.

The following are instances where the facts have been held to be insufficient to afford any inference as to the fact in dispute.

The time at which one tenant pays his rent is not evidence to show at what time another tenant pays his rent (*r*).

A custom in one parish, archdeaconry, or manor, is no evidence of the same custom in another (*s*). For in these and other such cases there is no such connection between the fact and the issue as to afford a reasonable inference from the one to the other. Where, on the other hand, such facts are by any general link connected with the issue, they become evidence. Thus, where all the manors within a particular district are held under the same tenure, and the issue is upon some incident to that tenure, the custom of one manor is evidence to prove that the same custom exists in another (*t*).

Where the issue is as to a particular right upon a common, evidence is inadmissible of the existence of such right on an adjoining piece of common, unless a connection between them be proved, and the right be claimed on both (*u*).

Where the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with and tend to elucidate the issue (*x*).

A collateral fact is not in general evidence to discredit a witness (*y*). But where a witness swore that a party had acknowledged two instruments to have been made by him, evidence was admitted that one of them was forged (*z*). So evidence of character is in many instances admissible (*a*). So collateral facts are admissible to prove intention, malice, or guilty knowledge (*b*).

In an action for a malicious prosecution, a publication by the defendant, on the subject of the prosecution, is evidence to prove the malice. So, although acts done subsequent to a contract cannot alter the nature of the contract, they may be adduced to show what the contract was, if it be doubtful (*c*); therefore, an admission of a debt by the acceptance of bills of exchange by partners, in payment of goods sold, is evidence to show the fact of a sale to the partners (*d*). So, where the meaning of the terms of an agreement is doubtful, and depends on custom or usage, collateral evidence is admissible to explain them (*e*). So, collateral evidence is admissible to show the probability of a surrender by a tenant for life, where the possession has long accompanied the recovery (*f*).

(*r*) *Carter* v. *Pryke*, Peake's C. 95.
(*s*) Cowp. 808. *Ruding* v. *Newell*, Str. 957, 601. 662; Fort. 41; Doug. 425. Unless the custom be general.
(*t*) Str. 652. *Duke of Somerset* v. *France*, 3 Keb. 90; Fost. 41. 44; Doug. 495; Cowp. 808.
(*u*) 4 T. R. 157. *Morewood* v. *Wood*.
(*x*) *The Wells Harbour Case*, M. 23 G. 3.
(*y*) See Vol. I.; and *R.* v. *Watson*, 2 Starkie's C. 116.
(*z*) Ann. 311.
(*a*) See tit. CHARACTER.
(*b*) See tit. COIN.
(*c*) *Saville* v. *Robertson*, 4 T. R. 720.
(*d*) 1 T. R. 720.
(*e*) See tit. CUSTOM.
(*f*) See 2 Saund. 42. 7.

In order to prove that the acceptor of a bill of exchange knew the payee to be a fictitious person, evidence is admissible to show that the acceptor had accepted similar bills before they could, according to their date, have arrived from the place of date (*g*). And similar evidence is admissible to prove that the indorsee had a general authority from the acceptor to fill up bills with the name of a fictitious payee (*h*).

COMMENCEMENT OF ACTION. *See* TIME.

COMMON.

COMMON, or right of common, is an incorporeal hereditament, which consists in a profit which a man has in the lands of another.

Common is chiefly of four sorts: of pasture, piscary, turbary, and estovers (*i*).

Common of pasture, is a right of feeding one's beasts in another's land; and it is either appendant, appurtenant, or in gross (*j*).

Appendant. Common appendant is of common right (*k*), and it may be claimed in pleading as *appendant*, without laying a prescription. But appendancy *implies* a prescription (*l*). It cannot be claimed, except in the lord's wastes (*m*), for the claimant's *own* commonable cattle, *levant* and *couchant*, upon the land (*n*).

Appurtenant. Rights of common *appurtenant* to the claimant's land are altogether independent of tenure; they may be claimed in *other lordships*; and for cattle not commonable; may be claimed by *grant* as well as by *prescription*, and either for cattle *levant* and *couchant*, or for a stinted number not *levant* and *couchant* (*o*). And may be claimed as well by *grant* within legal memory as by *prescription* (*p*).

In gross. Common *in gross* may also be claimed by either grant or prescription.

As all these rights depend either upon a *prescription* or a *grant* (*q*) actually proved or presumed, much of the evidence on this subject is referable to the more general heads of evidence of *grants* and *prescriptions*. It is obvious, that unless a grant can be expressly proved, such rights must in general be

(*g*) 2 H. B. 288.

(*h*) Ibid.

(*i*) Finch's L. 157; Co. Litt. 122; 2 Inst. 86; 2 Com. 32.

(*j*) Co. Litt. 122; 2 Com. 33. Common *pur cause* of vicinage is not strictly a right of common. It happens where the inhabitants of contiguous townships have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields, without any molestation from either. It is a permissive right, intended to excuse what is, in strictness, a trespass in both, and to prevent a multiplicity of suits. 2 Com. 33. *Musgrave* v. *Cave*, Willes, 322.

(*k*) See 2 Inst. 86; 2 Com. 33. When the lords of manors originally granted out parcels of lands to tenants, the latter could not plough or manure the land without beasts; the beasts could not be sustained without pasture; and pasture could not be had but in the lands, wastes, and in the fallow lands of other tenants; and therefore the law annexed the right of common as inseparably incident to a grant of the lands for commonable cattle, *i. e.* beasts of the plough, or such as manure the ground. 2 Com. 33.

(*l*) Hargrave's note, 2 Inst. 122, *a*, n. A copyholder who has common in a waste without the manor, has it annexed to the land, and not to his customary estate, and must prescribe in a *que* estate through his lord. *Barwick* v. *Matthews*, 5 Taunt. 365.

(*m*) 2 Inst. 85; 1 Roll. 396; 4 Co. 37.

(*n*) Ibid. and Burr. 320. *Benson* v. *Chester*, 8 T. R. 396.

(*o*) 4 Burr. 2431; 1 Rol. 401, l. 15; 2 Cro. 27; 2 Mod. 185.

(*p*) *Cowlam* v. *Slack*, 15 East, 108.

(*q*) Cro. Car. 482; F. N. B. 180; Bac. Ab. Common, [A.] 2.

supported by evidence of usage (*r*) No such right of common appendant exists but for such cattle as are *levant* and *couchant* (*s*). So many are *levant* and *couchant* as the *land*, to which the common is appurtenant, will maintain in winter (*t*); and common cannot be claimed as appendant to a house without any curtilage or land (*u*).' And therefore, where a plaintiff in an action for the disturbance of his right of common, claimed the right for all commonable cattle *levant* and *couchant*, and it appeared that the house of which he was the owner had neither land, curtilage, nor stable, belonging to it, the plaintiff was nonsuited (*x*). And so, although the declaration, or plea of justification, allege the right of common to be appendant to a *messuage*, it must be proved that there is at least a curtilage belonging to it, on which the cattle may be *levant* and *couchant* (*y*). Levancy & couchancy.

But an allegation of right of common for all the plaintiff's cattle *levant* and *couchant* is supported, although the common be not sufficient to feed all the cattle for a length of time (*z*).

Where the declaration in an action for disturbance of the plaintiff's right of common alleged that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, it was held that he was entitled to recover *pro tanto*, although it appeared that he was possessed of land only (*a*).

But in order to prove that the cattle in question are *levant* and *couchant*, it must be proved on an issue taken on the fact that they are connected with the land on which they are so alleged to be *levant* and *couchant* (*b*). In the case of a distress, those cattle only are said to be *levant* and *couchant* which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of right of commmon appendant, *levancy* and *couchancy* is merely a mode of ascertaining the number of cattle which are entitled to the right of common (*c*), and actual *levancy* and *couchancy* need not be proved in an action for disturbance.

The plaintiff alleged a right of common of pasture for all commonable cattle *levant* and *couchant* on 100 acres of land in the plaintiff's possession, part of a certain common field over the said common field, every year when the same was sown with corn, after the corn was reaped, gathered, and carried away, until the said field, or some part thereof, was again sown with corn. This was held to be supported by proof that the plaintiff was a part-owner with the defendant and others, of a common field upon which, as stated in the declaration, the occupiers turned their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon the land during

(*r*) See 12 Vin. Ab. [T.] b. 18, pl. 3. Litt. R. 295.

(*s*) Bac. Ab. Common, [A.] 2.

(*t*) Per Coke, J., Noy, 30. Vent. 54. 5 T. R. 46. *Shakespear* v. *Peppin*, 6 T. R. 741.

(*u*) *Scholes* v. *Hargrave*, 5 T. R. 46; and per Buller, J. *Ibid.* The cases, Salk. 169, 2 Brownl. 101, *Emerton* v. *Selby*, 2 Ld. Raym. 1015, Noy, 30, are consistent with this doctrine, for in all of them the Courts say that they will intend that messuage or cottage includes land.

(*x*) *Scholes* v. *Hargreaves*, 5 T. R. 46, by Ld. Kenyon, C. J.; and the Court of K. B. afterwards approved of the nonsuit.

(*y*) Sir W. Jones, 227.

(*z*) *Willis* v. *Ward*, 2 Chitty, 297.

(*a*) *Ricketts* v. *Salwey*, 2 B. & A. 360. And see *Bower* v. *Hill*, 2 Scott, 535.

(*b*) 1 Will. Saund. 346, *c.*, in note.

(*c*) See the judgment of Bayley, J., *Cheesman* v. *Hardham*, 1 B. & A. 706. It need not be proved that the land was actually used for supporting the cattle. *Bolam* v. *Atkinson*, *cor.* Bayley, J., Northd. Summ. Ass. 1827, *i. e.* in an action for *disturbance*. An allegation of a right of common for all commonable cattle "*levant* and *couchant*," is proved by a grant of reasonable common of pasture.

winter, and although the number was in proportion to the extent, and not the produce, of the land in respect of which the right was claimed (*d*). A right for all commonable cattle is proved by evidence of use by all the cattle which the party had, although he never had any sheep (*e*). It must also be proved that the cattle are the party's own cattle, or at least that he has a special property in them (*f*); and, in the case of common appendant, that they are commonable cattle.

Where the right of common is claimed by an inhabitant of a particular place in right of inhabitancy, he can claim for such only as are *levant* and *couchant* (*g*).

Disturbance—Title.

Although a plaintiff in an action for disturbance of his right of common, whether against a commoner or stranger, may declare upon his possession only (*h*), (for possession is sufficient against a wrong-doer,) he must on the trial prove his right of common (*i*), such as he has alleged it to be in the declaration (*j*). And if the right to use the common for commonable cattle be subject to a condition precedent of making a money payment to the lord of the manor, it must be so alleged; for although the title need not be shown, the right must be stated (*k*).

Proof of the uninterrupted enjoyment of a common for twenty years will in general, as in the case of other easements, be evidence to raise a legal presumption of a right by prescription, or at least by grant (*l*). An enjoyment for a shorter period may or may not afford such a presumption, according to the circumstances which support or rebut the right (*m*).

If the plaintiff should unnecessarily state his title to the right in the declaration, it seems that, provided he prove a title to the particular right claimed, the variance will not be fatal; for the disturbance is the gist of the action, and the title is mere inducement, and not traversable (*n*).

(*d*) *Cheesman* v. *Hardham*, 1 B. & A. 706.

(*e*) *Manifold* v. *Pennington*, 4 B. & C. 161.

(*f*) Bro. Common, 47; 2 Show. 328; 1 Will. Saund. 346, *c*.

(*g*) 1 Roll. Ab. 398; 1 Will. Saund. 346, *c*. (3).

(*h*) *Saunders* v. *Williams*, 1 Vent. 319. *Strode* v. *Byrt*, 4 Mod. 418. *Atkinson* v. *Teasdale*, 2 Bl. R. 817; 3 Wils. 278.

(*i*) B. N. P. 76; 1 Will. Saund. 346, (*z*).

(*j*) Ibid.

(*k*) *Bolam* v. *Athinson*, *cor.* Bayley, J., Northd. Summ. Ass. 1827.

(*l*) See tit. DISTURBANCE—GRANT—PRESCRIPTION. Also 2 Will. Saund. 175, *d*. *Lewis* v. *Price*, *cor.* Wilmot, J., Worcester Spring Ass. 1761; 2 Will Saund. 175, *a*. *Darwin* v. *Upton*, Ibid. *Bealy* v. *Shaw*, 6 East, 214. *Martin* v. *Goble*, 1 Camp. 323. The plaintiff being possessed of a house and land in *E.*, uses right of common in the manor of *W.* for sixty years, the common in *W.* being adjacent to the common in *E.*, it is a question of fact for the jury to determine, whether the user be referable to a mistake of the boundary, or to a legal right of common in *W.*; *Hetherington* v. *Vane*, 4 B. & B. 428. An inclosure made from a common twelve or thirteen years ago, with the knowledge of the steward and without objection, is evidence by the lord, and ejectment cannot be brought against the tenant without previous notice to give up the land. *Doe* d. *Foley* v. *Wilson*, 11 East, 56. Common appurtenant may be claimed as well by grant within the time of legal memory, as by prescription, and after an unity of possession in the lord of the land in respect of which the right of common was claimed with the soil and freehold of the waste. Evidence that the lord's tenant had for fifty years past enjoyed the waste, was held to be evidence sufficient to warrant the jury in presuming a new grant of common as appurtenant, so as to support an action by the tenant for surcharging the common, and declaring on his possession of the messuage and land with the appurtenances, and that, by reason thereof, he was entitled of right to the common of pasture, as belonging and appertaining to his messuage and land: and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture. *Cowlam* v. *Slack*, 15 East, 108. See also *Clements* v. *Lambert*, 1 Taunt. 205.

(*m*) Per Ld. Ellenborough, *Bealy* v. *Shaw*, 6 East, 214.

(*n*) B. N. P. 76; 4 Mod. 424; 1 Saund.

In such an action against a stranger, or against a commoner for depasturing supernumerary cattle (*o*), it does not appear to be necessary for the plaintiff to prove that he has sustained any *specific injury*; for the consumption of the grass by the other cattle is in itself a diminution of the right and profit of the commoner, and considered to be sufficient proof of the damage alleged in the declaration; for if the other cattle had not been there, the plaintiff's cattle might have eaten every blade of grass which was consumed by the other; besides, the law considers that the right of the commoner is injured by the act, and therefore allows him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of encroachment (*p*). Proof of damage.

It is said to be a *general rule*, that wherever an act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for the invasion of the right, without proof of any specific damage (*q*); and this has been laid down by a writer of authority (*r*) to be a governing principle in these cases. As for instance, an action may be maintained for fishing in the plaintiff's several fishery, although it be neither alleged nor proved that the defendant caught any fish (*s*).

But if the defendant be the lord of the manor (*t*), or put his cattle upon the common with the lord's license, the plaintiff must prove a specific injury; and it would be insufficient to show that the cattle consumed the grass, as in an action against a stranger, without also proving that there was not a sufficiency of common left in order to support the action (*u*), for the lord is entitled to what remains of the gross, and may either consume it by his own cattle, or license another to depasture it; although in the case of a stranger it seems to lie on the defendant to show that a sufficiency of common is left for the plaintiff (*x*).

It is no defence to an action for surcharging the common that the plaintiff has also been guilty of a surcharge (*y*). A right of common is extin- Defence.

346, *a.* (*n*); *Ricketts* v. *Salwey*, 2 B. & A. 360. Yet if the plaintiff should set out an insufficient title, the declaration, it is said, would be bad. 1 Salk. 363; 2 Ld. Raym. 1230.

(*o*) See *Atkinson* v. *Teasdale*, 2 W. Bl. 817. Such action is maintainable although the plaintiff himself has been guilty of a surcharge. *Hobson* v. *Todd*, 4 T. R. 71.

(*p*) *Wells* v. *Watling*, 2 Bl. Rep. 1233. *Hobson* v. *Todd*, 4 T. R. 71. Taking away the manure dropped by the cattle is a sufficient damage. *Pindar* v. *Wadsworth*, 2 East, 254.

(*q*) 1 Will. Saund. 346, *a.* in note.

(*r*) Mr. Serj. Williams, 1 Will. Saund. 346, *a.*

(*s*) *Patrick* v. *Greenway*, *cor.* Lawrence, J., Oxford Spring Ass. 1796; cited 1 Will. Saund. 346, *b.*

(*t*) See the observations of Buller, J., in *Hobson* v. *Todd*, 4 T. R. 73; *Smith* v. *Feverell*, 2 Mod. 6; and 1 Will. Saund. 346, *b*, in note.

(*u*) *Smith* v. *Peverell*, 2 Mod. 6; 1 Saund. 346, b. (n). The plaintiff may declare against a licensee of the lord, as a stranger. *Hobson* v. *Todd*, 4 T. R. 71. And it lies on the defendant to prove the license, and sufficiency of common left. 1 Saund. 346. b. The lord may, by special custom, dig clay-pits, or do other acts in diminution of the right of common, or empower others to do so, without showing a sufficiency of common left. *Bateson* v. *Green*, 5 T. R. 411. *Clarkson* v. *Woodhouse*, 5 T. R. 412. *Place* v. *Jackson*, 4 D. & R. 418. So by special custom he may, by consent of the homage, let parts for building. *Folkard* v. *Hemmett*, 5 T. R. 417. A commoner cannot justify cutting trees planted by the lord on the waste; he must bring case or an assize. *Kirby* v. *Sadgrove*, 1 B. & P. 13; 3 Anstr. 892; 6 T. R. 483. As to the right of the lord of a manor to approve wastes under the Statute of Merton, see *Duberly* v. *Page*, 2 T. R. 391; *Glover* v. *Lane*, 3 T. R. 445; *Shakespear* v. *Peppin*, 6 T. R. 741. There can be no approvement in derogation of a right of common of fishery; *Grant* v. *Gunner*, 1 Taunt. 435; nor where the tenants have a right to dig for gravel, or take estovers. *Duberly* v. *Page*, 2 T. R. 391.

(*x*) See the form of declaration, Herne, 125; 2 Mod. 6; 1 Lutw. 107; 3 Wils. 290; 1 Will. Saund. 146, *a.*; 9 Rep. 113, *a.*

(*y*) *Hobson* v. *Todd*, 4 T. R. 71.

guished by unity of possession. A grant of land, &c. with common appurtenant, does not pass a right of common after the extinction by unity of possession, although those who have occupied the tenement since the extinction have used the common. *Secus*, if there had been a grant of all commons *used* therewith (*z*).

Proof under plea of justification.

A plea of justication, claiming a right of common appendant for the defendant's commonable cattle *levant* and *couchant*, may be put in issue by a general replication, for it is but one entire title (*a*); or the plaintiff may specially traverse that they were the cattle of the defendant *levant* and *couchant* (*b*); and in either case the defendant must prove that the cattle are his own, or that he has a special property in them (*c*), for a man has no right to use the common with the cattle of a stranger, or with his own cattle *levant* and *couchant*, upon some other land, and not upon the land to which the right is appendant or appurtenant; but if he borrow cattle to compester his land, they may be put upon the common, for he has a special property in them (*d*). And where a man has common appurtenant for a specific number of cattle as appurtenant, it may be severed by grant and converted into a right of common in gross.

If the defendant justify under an alleged right of common, and it appear that the common has been inclosed for twenty years, the justification cannot be supported (*e*).

Variance.

A plea claiming a prescriptive right of common for a certain number of beasts, generally, is not supported by evidence of a right of common of vicinage (*f*).

Proof of a prescription limited by an exception will not support a general prescription. Thus, proof of a prescription for all cattle, at all times of the year, (sheep only excepted for a certain time), will not support a prescription claimed for all cattle, &c. at all times of the year (*g*).

Proof on issue joined on the right.

On issue joined, as to a right of common, the defendant may give in evidence a release of the right of common, although he might have pleaded it (*h*). Such a release however will not avail where the common belongs to land which is entailed, and which cannot pass by release any more than the land itself (*i*).

Levant and Couchant.

Upon issue taken in replevin on a replication by the plaintiff, alleging a prescription for commonable cattle *levant* and *couchant*, and averring that the cattle in question were *levant* and *couchant*, the burthen of proof lies on the plaintiff. If in such case the cattle have been distrained by the lord (*k*), and on the trial it appeared that some of the cattle were *levant* and *couchant*,

(*z*) *Clements* v. *Lambert*, 1 Taunt. 205. See also *Morris* v. *Edgington*, 3 Taunt. 24.

(*a*) Skinn. 137; 2 Show. 328; *Robinson* v. *Raley*, 1 Burr. 316.

(*b*) Ibid. and *Bennett* v. *Reeves*, Willes, 227

(*c*) Bro. Common, 47; 2 Show. 328.

(*d*) *Mollitor* v. *Trevilian*, Skinn. 137; F. N. B. 180; Roll. Common, 402.

(*e*) *Creach* v. *Wilmot*, 2 Taunt. 160, cited by Lawrence, J. *Hawke* v. *Baron*, 2 Taunt. 156. And see tit. TRESPASS.

(*f*) 12 Vin. Ab. Common, T. b. 18. L. E. 235, pl. 37; 13 Hen. 7, 13; *supra*, and tit. VARIANCE.—PRESCRIPTION.

(*g*) Carth. 241.

(*h*) Clayton, 9—8, C. 1, *Atkinson's Case.*

(*i*) Clayton, 9—8, C. 1, *Atkinson's Case.*

(*k*) A commoner cannot distrain the surplusage where another commoner puts more cattle on the common than are *levant* and *couchant*; 1 Roll. Ab. 320. 405, pl. 5; Yelv. 104; 2 Bulst. 117; and *semble*, he cannot, although *none* of the cattle have been *levant* and *couchant*. 1 Will. Saund. 346, *d*. Yet *qu.* where the right is limited to a certain number. *Hall* v. *Harding*, 4 Burr. 2431. *Levancy* and *couchancy* are incident to common appendant as well as appurtenant, and can be claimed only in respect of cattle sufficient to plough and manure the tenant's arable land. *Bennett* v. *Reeve*, Willes, 227; Co. Litt. 122, *a*.

and that others were not, the issue would be found for the lord (*l*); and so it would be in trespass (*m*) for taking the cattle. But if in such a case the lord brought an action of trespass *quare clausum fregit*, and the defendant prescribed for his commonable cattle *levant* and *couchant*, and averred that he put such his commonable cattle *levant* and *couchant* upon the common, and upon issue taken, it appeared that some were, and some were not *levant* and *couchant*, the defendant would be entitled to a verdict, the plaintiff having traversed the *levancy* and *couchancy*, instead of new assigning the trespass, by stating that he brought his action for depasturing the common with *other* cattle; and this upon the general principle, that in trespass it is sufficient for the defendant to prove that which excuses the trespass, although not to the extent of the number or amount specified in the declaration (*n*). Levant and Couchant.

The defendant cannot give his right of common in evidence under the general issue in trespass (*o*).

It has already been seen, that evidence of reputation is admissible to prove customary rights where many are interested (*p*), although such evidence be not admissible to prove a private prescriptive right. Reputation.

On issue joined on a custom pleaded that a customary tenant shall have common of pasture on the plaintiff's land, evidence is admissible of a custom for the lord to inclose parcels, and of a grant to the plaintiff under such circumstances (*q*).

The general rule is, that if the issue be on a customary right of common, by the establishment of which the witness would be benefited, he is incompetent; but that where he gives evidence to establish the private prescriptive right of another, he is competent (*r*). Thus, if the issue be on a right of common which depends upon a custom pervading the whole manor, the evidence of the commoner is inadmissible, because, as the right depends upon the custom, the record in that action would be evidence in another action brought by that very witness to try the same right (*s*). In such a case, although the witness be not a party to the action, yet he claims under the same title with the party whose witness he is, and thereby immediately establishes his own title (*t*). So where the issue was upon the question whether the defendant was bound *ratione tenuræ* to repair a fence contiguous to a common on which the plaintiff prescribed for common appurtenant, it was held that another commoner was not a competent witness (*u*). Neither is a commoner competent to extend the limits of such rights. But the same reason does not apply where common is claimed by prescription in right of a particular estate; for if *A.* has a prescriptive right of common belonging to his estate, it does not follow that *B.*, who has also an estate in the same manor, has the same right; and the judgment for *A.* would not be evidence for *B.* (*x*). So if *A.*, *B.*, *C.* and *D.*, claim common in Dale, exclusively of Competency.

(*l*) 2 Roll. Ab. 706, p. 41. *Sloper* v. *Allen*, 1 Brownl. 171; 1 Will. Saund. 346, *d*.

(*m*) But *qu.* whether in such case the commoner might not help himself, by entering a *nolle prosequi* as to the cattle which were not *levant* and *couchant*, and proceed for the rest?

(*n*) See tit. TRESPASS; and 2 Will. Saund. 346, *d*.

(*o*) Co. Litt. 283, *a*; Gil. Ev. 216.

(*p*) Vol. I. tit. REPUTATION. *Weekes* v. *Sparke*, 1 M. & S. 679; Carth. 181. For further observations, see tit. CUSTOM.

(*q*) *Arlett* v. *Ellis*, 7 B. & C. 346. See further, *The Attorney-general* v. *Gauntlett*, 3 Y. & J. 93.

(*r*) 3 T. R. 32; 1 T. R. 302.

(*s*) Per Buller, J., 1 T. R. 302.

(*t*) B. N. P. 283; and see *The Duke of Somerset* v. *France*, 1 Str. 658.

(*u*) *Anscombe* v. *Shore*, 1 Taunt. 261.

(*x*) Per Buller, J., 1 T. R. 303. "And yet," adds the learned Judge, "there are

all other persons, and the right of *A.* comes in dispute, *B.* may be a witness to prove *A.*'s right of common there, for in effect he charges himself by proving that another has a right of common there (*y*).

One who claims common *pur cause* of vicinage is not, it is said, incompetent; for this is no interest, but only an excuse for a trespass (*z*).

CONFESSION. *See* ADMISSION.

CONFIDENTIAL COMMUNICATION.

General rule.

THE rule that a counsel, solicitor or attorney, shall not be permitted to divulge any matter which has been communicated to him in professional confidence, has already been adverted to as one that is founded on the most obvious principles of convenience (*a*). This is the privilege of the client, and is founded on the policy of the law, which will not permit a person to betray a secret which the law has entrusted to him (*b*). To allow such an examination would be a manifest hindrance to all society, commerce, and conversation (*c*).

With respect to such communications, the mouth of the witness is for ever sealed, and he cannot reveal them at any time or in any proceeding, although the client be no party to it, however improbable it may be under the circumstances that any injury can result to him from the disclosure (*d*), and although the relation of attorney and client has ceased by the dismissal of the attorney (*e*).

To what persons the rule is confined.

The rule is strictly confined to counsel (*f*), solicitors and attornies (*g*). It has even been held at *Nisi Prius*, that where a communication was made to the witness under the mistaken idea that he was an attorney, when the fact was otherwise, the witness was bound to reveal it. It extends, indeed, to a communication made to the clerk of an attorney (*h*); to an interpreter between a client and his counsel or attorney, for this may be essential to the communication between the parties, and the privilege rests upon the same grounds (*i*). But it does not, it seems, extend to a communication made to an attorney, which has been accidentally overheard by another witness (*k*), for this is owing to the negligence of the client himself (*l*). Nor to a letter written by the attorney to the client, and indorsed by the client (*m*). Nor to a communication made to an interpreter in the absence of the attor-

cases which lay it down as a general rule, that one commoner cannot be a witness for another."

(*y*) Per Holt, L. C. J., in *Hockley* v. *Lamb*, 1 Ld. Raym. 731.

(*z*) B. N. P. 285. Where one of two adjoining commons, with common of vicinage, is fenced off but incompletely, so as still to admit of cattle straying from one to the other by means of a highway, the common by vicinage still continues. *Gullett* v. *Lopez*, 13 East, 348.

(*a*) Vol. I. tit. PRINCIPLES OF EVIDENCE.

(*b*) B. N. P. 284; Rayner Read. 111; 9 St. Tr. 387. *R.* v. *Earl of Anglesea.*

(*c*) See 12 Vin. Ab. B. a. pl. 1.

(*d*) *Wilson* v. *Rastall*, 4 T. R. 753. Per Buller, J., 4 T. R. 759. *Vide etiam, Sloman* v. *Herne*, 2 Esp. C. 695. *Rex* v. *Withers*, 2 Camp. 579. *Maddock* v. *Maddock*, 1 Ves. 262. *Bishop of Winton* v. *Fournier*, 2 Ves. 446.

(*e*) *R.* v. *Withers*, 2 Camp. 178.

(*f*) In the case of *Foote* v. *Hayne*, 1 R. & M. 165, in an action for breach of promise of marriage, the L. C. J. would not allow the law-clerk of defendant's counsel to be examined, to prove the fact of the counsel's retainer by the defendant.

(*g*) *R.* v. *Duchess of Kingston*, 11 St. Tr. 246.

(*h*) *Taylor* v. *Foster*, 2 C. & P. 295.

(*i*) *Madame Du Barré's Case*, cited 4 T. R. 756.

(*k*) *Wilson* v. *Rastall*, 4 T. R. 753.

(*l*) *Gainsford* v. *Grammar*, 2 Camp. 10.

(*m*) *Meyer* v. *Sefton*, 2 Starkie's C. 274.

ney (*n*). Nor to what took place at the execution of a deed (*o*). Nor to an admission of a debt made by the attorney to the adverse party by direction of his client (*p*). Nor to proof of identity (*q*).

To what communications.

The rule is not confined to communications made in the course of a cause, or with a view to a cause (*r*); but extends to all cases where the party applies for professional assistance (*s*), in respect of a cause contemplated, or matter in dispute or controversy. Though not to cases where the attorney is employed in matters which are not professional, as in a treaty for the purchase of an estate. The rule extends to facts which the attorney becomes acquainted with in the character of an attorney, although the communication was not made by his client (*t*). Such as communications made

(*n*) *Du Barré* v. *Livette*, Peake's C. 77.

(*o*) 5 Esp. C. 52. See *Bicknell* v. *Keppell*, 1 N. R. 21.

(*p*) *Turner* v. *Railton*, 2 Esp. C. 474.

(*q*) 2 D. & R. 347.

(*r*) *Cromacke* v. *Heathcote*, 2 B. & B. 4. *Gainsford* v. *Grammar*, 2 Camp. 9; 6 Madd. 47. But see below, note (*e*); and *Wadsworth* v. *Hamshaw*, 2 B & B. 5, in the note, where the contrary is said to have been decided in the Court of K. B.

(*s*) In *Williams* v. *Mundie*, 1 Ry. & M. 34, Lord Tenterden is said to have held, that the rule extended to such communications only as were made pending a cause. In *Broad* v. *Pitt*, 1 M. & M. 233, Best, C. J. said, that when called upon he should rule conformably with Lord Tenterden's ruling; but in the case of *Clarke* v. *Clarke*, 2 M. & M. 3, Lord Tenterden, C. J. held, that communications made to an attorney respecting a matter in dispute and controversy are privileged, though no cause was then commenced. His lordship, referring to what he had been supposed to have said in the case of *Williams* v. *Mundie*, observed, "I think I could not have said that it must relate to matters communicated strictly for the purpose of bringing an action, or to a cause actually existing. I certainly have been more inclined to restrict the privilege more than many other Judges; and I have been so very much in consequence of a cause to which my attention was drawn at a very early period of my professional life (before I was at the bar), which was tried on the Midland circuit, and in which Serjeant Adair went specially as counsel. It was an action for bribery; and on its appearing that a witness, who was called to prove conversations, was the attorney of the party, the Judge at once refused to allow the evidence to be gone into, and nonsuited the plaintiff. The nonsuit was set aside and a new trial had, on the ground that though the witness was the defendant's attorney, the communication was not made to him in his professional character. *Bramwell* v. *Lucas*, 2 B. & C. 745, proceeded on the same principle; and accordingly an attorney there was held to be at liberty to give evidence of inquiries made of him by his client as to a mere matter of fact, for that his professional character was not then concerned. Suppose a party to consult his attorney whether or not he should bring or resist an action, I cannot doubt that such a communication would be privileged, though no suit was pending at the time. In the present case no suit was pending at the time; but after dispute had arisen, the plaintiff consulted an attorney on the subject, put documents into his hands, and steps were taken on them to render them effectual. I think that was a communication made to the attorney in his professional character, with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it, and I think that such a communication is privileged." See *Parkhurst* v. *Lowton*, 2 Swanst. 190. In *Hargreave* v. *Hutchinson*, York Sum. Ass. 1834, Lyndhurst, L. C. B., said, that it had been held by the Judges, after consideration, that the rule was, that a communication to an attorney is privileged, if an action be pending or contemplated; and see 6 Madd. 47.—The Court (of Chancery) discharged so much of an order to produce papers as were sworn to be communications between the defendant and her country solicitor, and between her and her town solicitor, or between those persons, either during the cause or with reference to it, though previous to its commencement. *Hughes* v. *Biddulph*, 4 Russ. 190. So where the papers were written after the dispute had arisen, with a view to taking the opinion of counsel upon the matter in question, and which afterwards became the subject of suit. *Vent* v. *Pacey*, 4 Russ. 193. The attorney in a cause may be called on the opposite side, and asked who is his employer, in order to let in his acts and declarations. *Levy* v. *Pope*, 1 M. & M. 410. Where the defendant's attorney's clerk was called merely to prove the fact of the receipt of a particular paper from the defendant, held that it was not a privileged communication. *Eicke* v. *Nokes*, 1 M. & M. 305. The attorney cannot be asked whether, before the action brought, his client, the plaintiff, did not say that he would waive it. *Goodlight* v. *Bridge*, Lofft, 27.

(*t*) *Robson* v. *Kemp*, 5 Esp. C. 52.

To what communications.

by third persons who accompanied the client when he came to consult the attorney (*u*); and to the contents of a written instrument, which he has by delivery from his client (*x*). No other communication, however confidential in its nature, is privileged, either by the relation or rank of the parties.

All other professional persons, whether physicians, surgeons, or divines, are bound to disclose the secrets which have been reposed in them in the practice of their profession, when called upon to do so for the purposes of justice (*y*). It has been held that a Roman-catholic priest is bound to reveal secrets confided to him in the course of confession (*z*). So a steward, servant, or private friend, is bound to disclose a communication, however confidential it may be in its nature (*a*). And a peer has no greater privilege in this respect than a commoner (*b*). In one case, indeed, it is reported that Lord Holt would not permit a trustee for the plaintiff and defendant, who had been employed by them in the purchase of offices, to be examined, on the ground that he should not be allowed to betray his trust (*c*). This, however, seems to be inconsistent with later authorities.

In a late case, where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony; and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act (*d*).

Time of the communication.

As the rule is one of policy or necessity, and operates to the exclusion of evidence, its operation is strictly limited to communications made in the course of professional business, pending the relation of counsel or attorney, and client; for the policy on which the rule is founded extends no farther; and therefore it does not extend to any communication, although made to an attorney, if he was not employed as such, but only as a mere agent at at the time (*e*); nor to any which was made before the commencement of the suit, whilst the witness did not act in the capacity of an attorney or clerk in court (*f*); nor to a gratuitous communication made to an attorney after the termination of the suit. Thus, upon an action brought to recover a sum paid on the compromise of a cause after interlocutory judgment, and the execution of an inquiry, it was held that the attorney in the first cause might be called upon to disclose, that his client, after the termination of that cause, said that his demand arose upon a lottery transaction (*g*). Nor

Nature of the communication.

in general to any communication, although made to an attorney, which is not made in professional confidence. In the case of *Annesley* v. *The Earl of Anglesea*, it was held, that a conversation which had been held twenty years ago between the Earl of Anglesea and his attorney, as to the prosecution

(*u*) *R.* v. *Withers*, 2 Camp. 579.

(*x*) *Beard* v. *Ackerman*, 5 Esp. 120.

(*y*) *Wilson* v. *Rastall*, 4 T. R. 753. *R.* v. *Duch. of Kingston*, 11 St. Tr. 243; Keb. 505; Vent. 197; Bac. Ab. Ev. A. 2; Skinn. 404.

(*z*) Peake's C. 77. *Butler* v. *Moore*, *cor.* Sir Mich. Smith, bart. Master of the Rolls, Macnall, 258. *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*a*) 2 Atk. 524.

(*b*) 11 St. Tr. 246.

(*c*) Ld. Raym. 783. His giving such evidence would have been objectionable on another ground, since it exposed him to penalties.

(*d*) *Lee*, q. t., v. *Birrell*, 3 Camp. 337.

(*e*) *Wilson* v. *Rastall*, 4 T. R. 753; B. N. P. 284. *Crofts* v. *Pickering*, Vent. 197; 12 Vin. Ab. 38, B. a.

(*f*) *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*g*) *Cobden* v. *Kendrick*, 4 T. R. 431

of the plaintiff for murder, might be inquired into, since it was not matter of professional confidence (*h*). Nor to any fact which the attorney acquired by any other means than by the *confidential* communication by the client. Thus, an attorney is compellable to identify the person of his client (*i*); to prove that his client swore to and signed an answer in Chancery, upon which he is indicted for perjury (*k*); to prove the execution of an instrument by his client, to which he is an attesting witness (*l*); to prove any collateral fact within his own knowledge, independently of any professional communication; as, to prove the hand-writing of his client (*m*), in an action of debt upon a bond, to prove that the consideration was usurious (*n*); to prove, where the question is as to an erasure in a deed or will, any facts as to the state of the instrument which he knows independently of a professional communication by his client (*o*): or to prove the contents of a written notice to produce papers (*p*): in short, the attorney may disclose any matter except that which has been confidentially and professionally entrusted to him by a client (*q*). Nature of the communication.

The privilege is that of the client, and not of the witness (*r*); and therefore the Court will interfere to protect the client, although the witness be willing to betray his trust (*s*); and a Court of Equity has ordered such matter to be expunged (*t*). But the client may, if he will, waive this privilege, as he may any other (*u*) And if a counsel or attorney be called as a witness by his client, he is not protected from cross-examination as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not be extended to other points in the cause (*x*). Waiver, &c.

The rule applies, whether the question be asked upon an examination in chief, or upon cross-examination (*y*).

The course of proceeding in Mr. *Aylott's Case* was somewhat singular. He had been counsel for the defendant, and being called as a witness for the plaintiff, the Court acceded to his request that he might not be sworn in the usual way on the *general oath*, but only to reveal such things as he knew before he was counsel, or as had come to his knowledge since by other persons, and the particulars to which he was to be sworn were specifically proposed; viz. what he knew concerning the will in question (*z*). Such a precaution, however, seems to arise out of an excessive tenderness of conscience. The general obligation of the oath to declare the whole truth, must, with reference to the subject-matter and occasion of the oath, be Form of the oath.

(*h*) *Annesley* v. *Earl of Anglesea*, 8 St. Tr. 380. See *Crofts* v. *Pickering*, 1 Vent. 197. *Oneby's Case*, 12 Vin. Ab. B. a pl. 2; March, 83; L. E. 81.

(*i*) *R.* v. *Watkinson*, 2 Str. 1122; B. N. P. 284; Cowp. 846.

(*k*) Per Ld. Mansfield, Cowp. 845.

(*l*) *Doe* v. *Andrews*, Cowp. 846. Every man, by attesting an instrument, pledges himself to come forward to prove it. *Ibid.* and *Ld. Say and Sele's Case*, 10 Mod. 40.

(*m*) 2 Haw. c. 46, s. 89.

(*n*) *Duffin* v. *Smith*, Peake's C. 108.

(*o*) B. N. P. 284; 1 Vent. 197.

(*p*) *Spencely* v. *Schullenberg*, 7 East, 357.

(*q*) It has been said that it does not extend to a communication made by a client to his counsel, where it is mere conveyance. *South Sea Company* v. *Jolliffe*, cited 2 Atk. 522.

(*r*) B. N. P. 284; *Petrie's Case*, cited 4 T. R. 751. 759.

(*s*) 9 T.R. 759; 2 Ves. jun. 189.

(*t*) *Sandford* v. *Kensington*, 2 Ves. jun. 189.

(*u*) Phill. Ev. 108.

(*x*) *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*y*) *Waldron* v. *Ward*, Styl. 449; 12 Vin. Ab. a.

(*z*) *Sparke* v. *Sir Hugh Middleton*, 1 Keb. 505, pl. 68; 12 Vin. Ab. B. a pl. 4.

necessarily understood to mean the truth, so far as it ought legally to be made known (*a*).

Exceptions.

It has been seen, that where an informer makes a disclosure to a magistrate, or agent of government, neither the names of the parties to whom the information has been given, nor the nature of the communication itself, is allowed to be revealed (*b*).

A clerk attending on a grand jury was not allowed to reveal what was given in evidence before the inquest, the jurors themselves being sworn to keep secret all that passes before them (*c*).

CONFIRMATION.

If the issue in tail does any act towards carrying an agreement or contract of his ancestor into execution, it will become binding on him, and he will be compelled in equity to perform it (*d*).

CONSPIRACY.

Direct evidence.

Upon an indictment for a conspiracy, the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the offence, is *circumstantial.* It is not necessary to prove any direct concert, or even meeting, of the conspirators (*e*). If several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy (*f*).

Circumstantial evidence.

A concert may be proved by evidence of a concurrence of the acts of the defendant with those of others, connected together by a correspondence in point of time, and in their manifest adaptation to effect the same object. Such evidence is more or less strong, according to the danger, publicity, or privacy of the object of concurrence,, and according to the greater or less degree of similarity in the means and measures adopted by the parties; the more secret the one, and the greater the coincidence in the other, the stronger is the evidence of the conspiracy. In general, proof of concert and connection must be given before the prisoner can be affected by the acts of others (*g*).

Where it appeared that there was a conspiracy to levy war in the North Riding of Yorkshire, and that there was at the same time a similar conspiracy in the West Riding, in which latter only it took place, and there was no evidence to show that those in the one Riding knew of the conspiracy in the other, it was held that the former could not be implicated in the acts of the latter (*h*), although they concurred at the same time to the same object.

Upon an indictment against a card-maker, his wife and family, for a conspiracy to ruin another card-maker, it was proved that each had given money

(*a*) See Paley's Moral Philosophy.

(*b*) Vol. I. Witness. On the trial of *Stone* for high treason (6 T. R. 527), Lord Grenville produced a letter of Jackson's, a fellow-conspirator, which had been transmitted to him from abroad in a confidential way, and stated that he could not possibly divulge by whom it had been communicated.

(*c*) Vin. Ab. Ev. 38.

(*d*) Com. Dig. Estate, b. 22; Co. Litt. 32; 3 Com. Dig. 41. 85. See also *Doe* v. *Morse*, 1 B. & Ad. 365.

(*e*) 1 Bl. R. 392. 401. *R.* v. *Cope*, Str. 144.

(*f*) *R.* v. *Lee*, MS.

(*g*) East's P. C. 97. A prisoner against whom the bill was ignored may, if not discharged, be called into the dock to be identified as one in company with the other prisoners (*cor.* Garrow, B.), *R.* v. *Deering*, 5 C. & P. 165.

(*h*) Kel. 19; East's P. C. 97.

to the apprentices of the prosecutor to put grease into the paste which he used, in order to spoil the cards; it was objected that no two of the defendants were ever together when this was done; but Pratt, C. J., said, that as they were all of one family, and concerned in making cards, this was evidence to go to a jury (*i*). Circumstantial evidence.

Upon the trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock-lane, Lord Mansfield informed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances (*j*).

Where the charge of conspiracy is in its nature cumulative, it may be proved by evidence of repeated acts. Thus, where the charge was of a conspiracy by the defendants, to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, and evidence was given of their having hired a house in a fashionable street, and that they represented themselves to a tradesman employed in furnishing it, as persons of large fortune, evidence of a similar representation to another tradesman having been objected to, Lord Ellenborough admitted the evidence, saying, that as it was an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence (*k*).

Upon an indictment which charged the defendants with a conspiracy to cheat and defraud the prosecutor, *General Maclean*, by selling him an unsound horse, it appeared that one of the defendants (*Pywell*) had advertised the sale of certain horses, with a warranty of their soundness; and that another of the defendants, upon an application by the prosecutor at *Pywell's* stables, stated that he had lived with the owner of a horse then shown to the prosecutor, and that he knew him to be perfectly sound, and, as the agent of *Pywell*, would warrant him to be sound; the prosecutor purchased the horse, and discovered, soon after the sale, that he was nearly worthless. Lord Ellenborough held that no indictment in such a case could be maintained without evidence of concert between the parties to effectuate a fraud; and the defendants were acquitted (*l*).

Where several conspire to procure an employment under Government by corrupt means, it seems that a banker who receives the money in order to pay it over for that purpose, becomes a party to the conspiracy (*m*). Acts of conspiracy.

Where several combine together for the same illegal purpose, each is the agent of all the rest, and any act done by one in furtherance of the unlawful design, is, in consideration of law, the act of all (*n*). And as a declaration accompanying an act strongly indicates the nature and intention of the act, or, more properly, perhaps, is to be considered as part of the act, a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators. It is for the Court to judge whether a sufficient connection has been established to affect one person with the acts of others (*o*). Act of one, evidence against the rest.

In *Stone's Case* (*p*), the defendant was indicted for treason, and charged

(*i*) *R.* v. *Cope*, Str. 144.
(*j*) *R.* v. *Parsons*, 1 Bl. B. 392.
(*k*) *R.* v. *Roberts and others*, 1 Camp. C. 399.
(*l*) *R.* v. *Pywell and others*, 1 Starkie's C. 402.
(*m*) *R.* v. *Pollman and others*, 2 Camp. 233.
(*n*) *R.* v. *Stone*, O. B. 1796.
(*o*) East's P. C. 97.
(*p*) 6 T. R. 527. Note, in this case Ld. Kenyon said that he should have doubted as to the admissibility of such evidence, if it had not been sanctioned by the authority of the Judges who sat at the Old Bailey on the late trials for treason; but he after-

Act of one, evidence against others.

with conspiracy with *Jackson* to collect and communicate intelligence to the French government, in order to assist the King's enemies, &c.; after evidence had been given of a conspiracy for this purpose, a letter of *Jackson's* containing treasonable information, which had been transmitted to Lord Grenville from abroad, was admitted in evidence against the prisoner; and the case of *The King* v. *Bowes and others* was cited, where Buller, J., upon an indictment against the defendants for a conspiracy to carry away *Lady Strathmore*, had laid down the same doctrine (*q*). So in the cases of murder and burglary, the acts of one are frequently received against another engaged in the same design.

In *Watson's Case* (*r*), after evidence of a treasonable conspiracy, to which the prisoner, who was upon his trial, was a party, it was held that papers found in the lodgings of a fellow-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, although no absolute proof had been given of their previous existence, strong presumptive evidence having been adduced to show that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers (*s*). The papers in this case were proved to be intimately and immediately connected with the objects of the conspiracy, as detailed in evidence. Upon the same trial, evidence having been given that a paper containing seditious questions and answers had been found in the possession of a fellow-conspirator, but had not been published, the Court doubted whether the paper was sufficiently connected by evidence with the object of the conspiracy to render it admissible, and it was not read; but they held, that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible (*t*).

It seems, however, on the other hand, that a mere gratuitous assertion inculpating himself and others, although made by a fellow-conspirator, would not be evidence against any one but himself. As against himself it would be evidence, upon the general ground that any declaration or admission connected with the charge, be it oral or written, is admissible in evidence against the party who makes it (*u*); but, as against another person, it is no more than the mere gratuitous declaration of a stranger not upon oath.

Evidence to prove the existence of a conspiracy.

Although in general, upon principles already adverted to (*x*), the act or declaration of one man is not evidence against another who is charged as a fellow-conspirator, until such a privity and community of design has been established between them as affords a reasonable presumption that the act or declaration of one is the act or declaration of the other, made with his sanction, and therefore indicating his mind and intention; and although it follows, from these principles, that such a connection must be established

wards said that, on consideration, he thought they had done right in admitting the evidence.

(*q*) 30th May, 1787. The cases of *The King* v. *Hardy and Tooke*, O. B. 1794, were also cited. See also *R.* v. *Salter*, 5 Esp. C. 125; where, on an indictment for a conspiracy to procure the discharge of a coachman, after proof was given of a meeting and conspiracy, at which the defendants were present, it was held that declarations made by others who had been so present were admissible.

(*r*) 2 Starkie's C. 140.

(*s*) But it would be otherwise, if, as in *Hardy's Case*, the papers were found in the possession of persons after the prisoner's apprehension; those persons might have obtained possession of them after his apprehension. 2 Starkie's C. 141.

(*t*) *Watson's Case*, 2 Starkie's C. 141.

(*u*) See tit. ADMISSIONS.

(*x*) *Supra*, tit. ADMISSIONS; and see below, 328.

before the acts and declarations of one man can properly be used as evidence to show the designs of another, yet, in some peculiar instances, where it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from this rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy, previous to the proof of the defendant's privity.

Evidence to prove the existence of a conspiracy.

In *Hardy's Case* (*y*), Buller, J., said, "In an indictment of this sort there are two things to be considered: first, whether any conspiracy exists; next what share the prisoner took in that conspiracy." But the same learned Judge afterwards added, "Before the evidence (that is, of the conspiracy so proved to exist) can affect the prisoner materially, it is necessary to make out another point, namely, that he consented to the extent that the others did" (*z*).

The rule that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the Courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence in order to establish the fact of a conspiracy, it is to be remembered that this is an inversion of the usual order, for the sake of convenience; and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved.

The case admits of this illustration:—Suppose a witness to overhear a conspiracy actually entered into between three persons whom he cannot identify; if there be circumstantial evidence to prove that *C. D.*, the defendant, was one of those conspirators, proof of the fact of conspiracy would first be admitted, and then the question would be, upon the circumstantial evidence, whether *C. D.* was one of the parties who so conspired.

It seems, however, that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy (*a*), although consultations for the purpose (*b*), and letters written in prosecution of the design, though not sent (*c*), are admissible.

Mr. J. Buller, indeed, in *Hardy's Case*, seems to have considered mere declarations of strangers to be evidence to prove the existence of a conspiracy, upon the ground of *necessity*. There appears, however, to be no authority for admitting such evidence in criminal cases upon the plea of necessity, which, in principle, is inadmissible.

Mere declarations.

The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others, to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on

(*y*) Gurney's edition, vol. i. p. 360 to 369.

(*z*) See also the observations of Eyre, C. J., in the course of the same trial; where he says, "In the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the court is to be effected for his share of it."

(*a*) *Infra*, 328.

(*b*) *Lord Russel's Case*; and see the observations of Buller, J., in *Hardy's Case*, upon that case.

(*c*) *Infra*, 328.

principles fully established, would not make the assertion evidence of the fact against strangers (*d*).

These positions are illustrated by the following authorities:

In the case of *Lord Stafford* (*e*) evidence was first given of a general conspiracy, before any proof of the particular part which the accused took in that conspiracy. And a similar course was adopted upon the trial of *Lord Lovat* (*f*).

Acts to prove a conspiracy.

In *Lord William Russel's Case* (*g*), *Lord Howard* was permitted to go into evidence of a conversation between himself and *Lord Shaftesbury*, as to the number of forces which he had in readiness, and (as observed by Mr. J. Buller) the Chief Justice repeated this to the jury as evidence of a *consult*, but not as affecting *Lord Russel*.

In *Hardy's Case*, upon an indictment for high treason, in conspiring the death of the King, it was proved that *Thelwall* (who was indicted for the same offence, but was not upon his trial), and the prisoner, were both members of the Corresponding Society. Evidence was admitted to prove that *Thelwall* brought a paper with him to a printer, and desired him to print it, on the ground that both being members of the society (of which the prisoner was secretary), and the paper having been produced by one of them, it was evidence to prove a circumstance in the conspiracy, although whether it would ultimately be so brought home to the prisoner, that he should be responsible for the guilt of publishing it, might be another question (*h*).

In the same case it was proposed to read a letter written by *Thelwall* to a private friend, containing several of the addresses of the society, and three of the Judges (*i*) were of opinion that the evidence was inadmissible, since the letter amounted to nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot, for the furtherance of the plot; it was a sort of confession by *T.*, and not like a fact done by him; as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the Judges (*k*) were of opinion that the evidence was admissible, on the ground that everything said, and *à fortiori*, everything done by the conspirators, was evidence to show what the design was.

In the same case it was proposed to read a letter written by *Martin* in London, and addressed, but not sent, to *Margarot* in Edinburgh (both being members of the Corresponding Society), on political subjects calculated to inflame the minds of the people in the North. Eyre, C. J., was of opinion that this letter was not admissible in evidence, being in the nature of a confession only, and therefore not evidence against any but the party confessing; two of the Judges (*l*) agreed that a bare relation of facts by a conspirator to a stranger was merely an admission which might affect himself, but which could not affect a conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as an act to show the nature and tendency of

(*d*) *Supra*, tit. ADMISSIONS. *Infra*, 328.

(*e*) 32 Car. 2, 3 St. Tr. 101.

(*f*) 19 Geo. 2, 9 St. Tr. 616.

(*g*) 35 Car. 2, 3 St. Tr. 306.

(*h*) Per Eyre, C. B., to which the other Judges assented.

(*i*) Eyre, C. J., Macdonald, C. B., and Hotham, B.

(*k*) Buller and Grose, Js.

(*l*) Macdonald and Hotham, Bs.

the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy.

Acts to prove a conspiracy.

Buller, J., was of opinion, that evidence of conversations and declarations by parties to a conspiracy, were in general, and of necessity, evidence to prove the existence of the combination; Grose, J., was of the same opinion, but added, that he considered the writing *as an act* which showed the extent of the plan.

Upon the last point it is observable, that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion, that a mere declaration or confession, unconnected with any act, would not have been admissible.

In the case of *Horne Tooke*, who was afterwards tried upon the same indictment, the draught of a letter intended to have been sent by *Hardy*, in answer to a letter, as secretary to the Corresponding Society, and found in his possession, was admitted in evidence (*m*).

Upon the same trial, a letter, purporting to have been written by the secretary of a society in Sheffield, and addressed to the prisoner, the secretary of the London Corresponding Society, but found in the possession of *Thelwall*, another member of the society, who also acted as agent for the society, was admitted in evidence (*n*) without dissent.

Upon an indictment against the defendants, who were journeymen shoemakers, charging them with a conspiracy to raise their wages, evidence was admitted of a plan for a combination of journeymen shoemakers, formed and printed several years before; and it was proved by a witness, who was a party to the association, that he and others acted upon the rules and regulations so proved in execution of the conspiracy; and this evidence was admitted by Lord Kenyon as introductory to the proof that the defendants were members of the society, and equally concerned; but he stated, that this would not be evidence against the defendants until it was proved that they were parties to the conspiracy (*o*).

Where one of several charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried (*p*).

It seems to make no difference as to the admissibility of the act or declaration of a fellow-conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.

Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest (*q*).

Where part of a correspondence between two defendants, indicted for a

(*m*) O. B. 1794.

(*n*) *Hardy's Trial*, by Gurney, vol. i., 412, 413.

(*o*) *R.* v. *Hammond and Webb*, 2 Esp. C. 718.

(*p*) *R.* v. *Horne Tooke*, O. B. 1794. During the same sittings the indictment itself, with the officer's notes, are evidence, without the record formally drawn up. *Ib.*

(*q*) See 6 T. R. 528. See also Lord Ellenborough's observations, 11 East, 584, *infra*, tit. TRESPASS.

conspiracy to defraud the prosecutor in the sale of an annuity, had been read upon the trial against the party on trial, whose defence was that he had been deceived by the other party, it was held that the whole of the correspondence previous to the consummation of the purchase was admissible, but not the subsequent part (*r*).

Evidence is admissible of a conspiracy either before or after the day laid in the indictment (*s*).

Conspiracy to marry paupers.

Upon the trial of an indictment for a conspiracy to marry a poor couple in order to charge a parish, it must be proved that the husband is unable to maintain himself and his family; and it is not sufficient to show that he was a servant employed in husbandry (*t*). An averment that *J. S.* is *now* legally settled in a particular parish, is supported by evidence that he was settled there shortly before the finding of the indictment (*u*). It has been said, that it is necessary to show that the marriage was against the will of the parties (*x*).

To marry paupers.

Buller, J., held, that the procuring the marriage by the gift of money was insufficient, without proof that some threat or contrivance was used for the purpose (*y*), and that it was against their consent.

Proof as to the means used.

In the case of *Lord Grey* and others, who were tried upon an information which charged them with conspiring and intending to ruin *Lady Henrietta Berkeley*, a virgin, unmarried, and within the age of eighteen years, she being under the custody, &c. of the *Earl of Berkeley*, her father, and with soliciting her to desert her father, and commit whoredom and adultery with *Lord Grey*; and which also charged, that in prosecution of such conspiracy, they took away the *Lady Henrietta* at night from her father's house and custody, and against his will, the defendants were found guilty, although there was no proof that any force was used, and although it appeared, on the contrary, that *Lady Henrietta*, who was examined as a witness, concurred in the measures which were taken for her removal (*z*).

Competency.

The wife of one defendant, in a case of conspiracy, is not a competent witness for another defendant, since an acquittal of the other defendants would occasion the acquittal of her husband (*a*).

Variance.

The indictment alleged that *A.*, *B.*, *C.* and *D.*, conspired together to obtain to the use of them, the said *A.*, *B.*, *C.* and *D.*, and certain other persons to the jurors unknown, a sum of money for procuring an appointment under Government, the evidence negatived *D.*'s knowledge that *C.* was to have any part of it; the money having been lodged in his hands, to be paid over to *B.*; it was held, that the averment as to the application of money was material, and that as to *D.*, the conspiracy was not proved as laid (*b*).

Where the indictment charged a conspiracy to prevent masters from taking into their employment *any* apprentices, and the evidence was, that

(*r*) *R.* v. *Whitehead*, 1 D. & R. 61.

(*s*) *R.* v. *Charnock & Keys*, 4 St. Tr. 570.

(*t*) 1 Esp. C. 304; and per Ashurst, J., indictments which have been sustained for injuries of this nature have been for procuring a marriage where the man was a pauper, and actually chargeable

(*u*) *R.* v. *Tanner & al.* 1 Esp. C. 304.

(*x*) 4 Burr. 2106. In *R.* v. *Edwards* (8 Mod. 320), this offence seems to have been considered as indictable on the ground of conspiracy only; but in *R.* v. *Tarrant*, (Burr. 2106), an information was granted against a single overseer.

(*y*) *R.* v. *Fowler and others*, East's P. C. 461. See CRIM. PLEAD. 2d. edit. 685, 6.

(*z*) *R.* v. *Lord Grey & others*, East's P. C. 460; 3 St. Tr. 519.

(*a*) *R.* v. *Locker and others*, *cor.* Lord Ellenborough, 5 Esp. C. 107; 2 Stra. 1094. As to the competency of a person convicted of a conspiracy, see tit. INFAMOUS WITNESS.

(*b*) *R.* v. *Pollman*, 2 Camp. 231.

the defendants attempted to prevent the masters from taking any apprentices in addition to those which they then had, it was held that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking any apprentice into their service, as alleged in the indictment (*c*).

Where on an indictment for a conspiracy against *A.*, *B.* and *C.*, *C.* called a witness, and examined him as to a conversation between himself (*C.*) and *A.*, it was held that the counsel for the prosecution were at liberty to examine as to other conversations between *A.* and *C.*, although they tended chiefly to criminate *A.*, who had called no witnesses (*d*).

CONSTABLE.

THE regular proof that *A. B.* is a constable, is by the production and proof of his appointment, and swearing at the court-leet (*e*), or by justices of the peace (*f*), on default of an appointment by the leet (*g*). It has, however, been seen, that even on a trial for murder, evidence that a party has acted as a constable is evidence to prove that he is one (*h*).

Where a constable acts under a warrant from a magistrate, it seems that he ought to keep the warrant for his own justification (*i*). For the proofs in actions against constables, see tit. JUSTICES.

CONVICTION.

FOR the proof of a conviction, see Vol. I. and Index tit. CONVICTION.

For the effect of a conviction in proof, as a judgment, see Vol. I. Index tit. CONVICTION; and see also below tit. JUSTICES.

A conviction is no evidence in a collateral proceeding for the party on whose evidence it has been obtained, although his name does not appear on the face of it (*k*); nor is it evidence to contradict the witnesses in a collateral proceeding, by showing that they had before given a different account before the committing magistrate (*l*).

Upon summary proceedings before magistrates, they are placed in the situation of a jury, and the degree of credit to be attached to the evidence is for their consideration and judgment. Since, however, the proceedings before them are usually of a criminal and penal nature, and as they are substituted for a jury of twelve men, who must, in order to convict, have all been satisfied by the evidence of the criminality of the defendant, the evidence ought to be fully satisfactory, and convincing to the mind and conscience of the magistrate, before he pronounces the party to have been guilty. If any reasonable doubt exist in his mind, the party charged is entitled to the benefit of that doubt. Such cases, it is to be recollected, differ very

(*c*) *R.* v. *Ferguson and Edge*, 2 Starkie's C. 489. See further, VARIANCE; and 1 Esp. C. 304.

(*d*) *R.* v. *Kroehl & others*, 2 Starkie's C. 343. *Qu.* whether in such case the counsel for *A.* would be entitled to address the jury in answer to such fresh evidence?

(*e*) The wardmote-book, containing the entry of the election, should be produced. *Underhill* v. *Watts*, 3 Esp. C. 56.

(*f*) See the stat. 13 & 14 Ch. 2, c. 12, s. 15; 2 Haw. B. 2, c. 10, s. 37; Str. 1149; 1 Bac. Ab. 439; 5 & 6 W. 4, c. 49.

(*g*) Haw. B. 2, c. 10, s. 49.

(*h*) *Supra*, tit. CHARACTER. *R.* v. *Gordon*, Leach, 581. *Berryman* v. *Wise*, 4 T. R. 366; and *supra*, tit. AGENT, *R.* v. *Verelst*, 3 Camp. 432. *R.* v. *Gardner*, 2 Camp. 513. *Lister* v. *Priestly*, Wightwick, 67.

(*i*) See Burn's J., tit. Constable, sec. 6. 24 Geo. 2, c. 44, s. 6.

(*k*) *Smith* v. *Rummens*, 1 Camp. 9. *Burdon* v. *Browning*, 1 Taunt. 520.

(*l*) *R* v. *Howe*, 1 Camp. C. 461.

materially indeed from those where mere civil rights are concerned, and where the mere preponderance of evidence may be sufficient to decide the question (*m*).

In point of law, the evidence will support a conviction by a magistrate, if there was such evidence before him as would have been sufficient to have been left to a jury. If such evidence appear on the face of a conviction removed into the Court of King's Bench, the Court will not disturb the magistrate's decision, or examine to see whether the conclusion drawn by him be, or be not, the inevitable conclusion to be drawn from the evidence (*n*). So if the magistrate acquit, where there seems to be *primâ facie* evidence to convict, his judgment cannot be questioned; for no other court can judge of the credit due to witnesses which are not examined there (*o*).

Though the commitment be under a defective warrant, the Court, if there was a precedent conviction, will, on a motion for a certiorari, presume a conviction sufficient to support the warrant (*p*).

Although a conviction may be formally drawn after the time of conviction, a different information cannot be substituted (*q*).

COPYHOLD.

Proof of title.

A COPYHOLD tenant proves his title by evidence of his own admittance, upon the surrender of a former tenant, by the production of the court-rolls, or by examined copies of them (*r*). These are the public rolls by which the inheritance of every tenant is preserved, and are the proceedings of the Manor-Court, which was formerly a court of justice (*s*).

Title of tenant.

And they are evidence even for one who claims under the lord (*t*); but they are not conclusive to the exclusion of evidence or mistake (*u*). And it is not necessary to produce a copy of the entries of the surrender and admittance stamped according to the stat. 48 Geo. 3, c. 149 (*x*).

The legal title is completed by the admittance of the tenant; till the admittance, the legal title remains in the surrenderor, who is a trustee for the surrenderee (*y*). But after admittance, the title of the tenant has relation to the time of the surrender, as against all but the lord, and consequently after admittance the tenant may recover in ejectment on a demise laid on a day subsequent to the surrender, but before the admittance (*z*). A copy of the copyholder's admittance of thirty years standing is evidence, although not signed by the steward (*a*).

(*m*) *Vide supra*, Vol. I.

(*n*) *R.* v. *Davis*, 6 T. R. 178. Paley on Convictions, 37; *R.* v. *Reason*, 6 T. R. 376; where, on a conviction for having in his possession a private and concealed still for the purpose of distillation, the evidence was that the still was found in the garden of the defendant's house, and that the house was in the county, but there was no evidence that the garden was in the county, the conviction was held to be bad. *R.* v. *Chandler*, 14 East, 267.

(*o*) *R.* v. *Reason*, 6 T. R. 376. Paley on Convictions, 38. For the evidence in particular cases, see their respective titles, GAME, &c.

(*p*) *R.* v. *Taylor*, 7 D. & R. 623. See tit. JUSTICES.

(*q*) K. B. Mich. T. 1827.

(*r*) B. N. P. 247.

(*s*) *Ib.*

(*t*) *Roe* v. *Hellier*, 3 T. R. 162.

(*u*) 25 Coke's Copyholder, sec. 40. Ld. Ray. 735. *Burgess* v. *Foster*, 1 Leon. 189. *Doe* d. *Priestly* v. *Calloway*, 6 B. & C. 484.

(*x*) *Doe* ex dem. *Bennington* v. *Hall*, 16 East, 208.

(*y*) 5 T. R. 132.

(*z*) *Holdfast* v. *Clapham*, 1 T. R. 600.

(*a*) *Dean of Ely* v. *Stewart*, 2 Atk. 44. As to presumptive evidence of a surrender, see *Wilson* v. *Allen*, 1 J. & W. 620.

Where the tenant brings ejectment, it is necessary to give some evidence to establish his identity with the party admitted (*b*).

Where a surrender has been made to the use of one for life, with remainder over to another, it is sufficient for the latter to prove the surrender, the admittance of the tenant for life, and his death; for the several interests constitute but one entire estate, and the admittance of the tenant for life enures to the benefit of the remainder-man (*c*). So if a copyholder devise to one for life, remainder over in fee.

Title of tenant by devise.

Formerly, the practice was for the owner to surrender to the use of his will, and upon this surrender the will operated as a declaration of the use, and not as a devise of the land. Hence, a devise of copyhold lands or of customary lands which passed by surrender or admittance, did not require any attestation under the Statute of Frauds, nor any signature, unless the signature were rendered necessary by the terms of the surrender to the use of the will (*d*). But by the stat. 55 Geo. 3, c. 192, it is enacted, that the disposal of copyhold estates by will shall be effectual, without a previous surrender to the use of the will (*e*). The will must be produced and proved. And now by the late statute 7 W. 4, and 1 V. c. 20, a will of copyhold, properly executed, is good, although the testator may not have surrendered to the use of his will, and though being entitled as heir, devisee, or otherwise, to be admitted, he may not have been admitted, and though there may be no custom, or only a limited custom, to devise or surrender to the use of the will. Although copyhold rolls mention a surrender to the use of the tenant's last will (*f*), and the admittance of *A.* as devisee under the will, it is no evidence of the title of *A.* without producing the will, because the land does not pass by surrender without the will, which must be shown as the best evidence of *A.*'s title (*g*).

Surrender.

Instructions for a will of copyhold lands, or of a customary estate passing by surrender and admittance, taken in writing by another in the presence and from the oral dictation of the party, although without the signature of the party, or any attestation, constitute a sufficient devise of the copyhold estate, and a good will under the statute of wills (*h*). So also, short notes of a will taken by a lawyer from the testator's mouth, have been held to be a good will in writing, although the testator died before they could be reduced to form (*i*). So is a draft of a will, the signing and publication of

(*b*) *Doe* d. *Hanson* v. *Smith*, 1 Camp. 197.

(*c*) 5 Mod. 306; Cro. Jac. 31; 1 Saund. 151; Com. Dig. Copyhold, [C.] 11.

(*d*) *Tuffnell* v. *Page*, 2 Atk. 37. *Carey* v. *Askew*, 2 Bro. Ch. Rep. 58. *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258. *Doe* d. *Cooke* v. *Danvers*, 7 East, 299. 322.

(*e*) Copyholds do not, under the 53 Geo. 3, c. 192, pass under the will of a devisor who died before admittance; the statute applies only to cases where a surrender alone would have made good the will. *King* v. *Turner*, 2 Sim. 547. Where a testator, possessed of freeholds and copyholds, after a specific devise of part of his copyhold to *R.*, devised all his real estates to the lessor of the plaintiff, held that as since the 55 Geo. 3, c. 192, where a surrender alone is necessary to the validity of the devise, validity to that extent is supplied by the Act, the copyhold passed under the residuary clause, independently of any question of intention. *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275, and 5 M. & P. 46.

(*f*) It is said that, previous to the late statute, the will need not have been in writing. 1 Watk. Cop. 130.

(*g*) *Jenkins* v. *Barber*, *per Tracy*, 1705. Bac. Ab. Ev. F. 632. The probate is no evidence of the devise of a copyhold. *Jervoise* v. *The Duke of Northumberland*, 1, J. & W. 520.

(*h*) *Doe* v. *Danvers*, 7 East, 299. There had been in that case (which was before the stat. 55 Geo. 3, c. 192) a surrender to the use of the will, and a probate had been granted in the Ecclesiastical Court.

(*i*) 1 Anderson, 34. See also 3 Leon. 79; 2 Keb. 128.

which have been prevented by the testator's death (*k*). But now by the late st. 7 W. 4, 1 Vict. c. 20, s. 1, wills of copyhold and customary lands must be executed with the formalities which are requisite for the devising of freehold lands.

Proof of admittance.

After proof of the will, the claimant must prove the admittance of the testator, as also his own admittance; for till admittance, although after the surrender, the legal estate remains in the surrenderor, and descends to his heir (*l*). Some evidence of identity is requisite (*m*). The surrender by the testator to the use of his will is not evidence of seisin (*n*).

Surrenders and admittances are proved either by the original entries on the court-rolls, or by copies (*o*). Or, where there is no entry on the roll, by collateral evidence. Thus a surrender duly presented by the homage, but of which there is no entry on the roll, may be proved by extrinsic evidence (*p*). The surrender and admittance constitute but one entire conveyance, and the admittance has relation back to the time of the surrender, so as to vest the title in the surrenderee from that time (*q*). But now by the statute 7 Will. 4, & 1 Vict. c. 26, above cited, a will of copyhold properly executed is good, although the devisor, being entitled, as heir, devisee, or otherwise, to be admitted, may not have been admitted, and although there be no custom, or merely a limited custom, to devise or surrender to the use of the will. One who claims as grantee by the lord is tenant before admittance (*r*).

Title of tenant by descent or custom.

Custom is the very essence of copyhold tenures, and frequently regulates the course of descent; but where custom is silent, the descent is according

(*k*) *Wagstaff* v. *Wagstaff*, 2 P. Wms. 259. *Carey* v. *Askew*, 2 Bro. C. C. 58, cited by Lord Ellenborough, in *Doe* v. *Danvers*, 7 East, 324.

(*l*) *Roe* v. *Wroot*, 5 East, 137. *Roe* v. *Hicks*, 2 Wils. 15; Cro. Eliz. 148; 1 T. R. 600; Com. Dig. Copyhold, D. 2. *Wilson* v. *Weddell*, Yelv. 144. The admittance of tenant for life being the admittance of him in remainder, a devisee in remainder, after proof of the admission of the tenant for life, need not prove his own admittance. See *Auncelme* v. *Auncelme*, Cro. J. 31. An heir might before admittance devise copyholds descending to him. *King* v. *Turner*, 1 M. & R. 456. Although an unadmitted devisee or surrenderee (previously to the late stat.) would not. See *Doe* v. *Lawes*, 7 Ad. & Ell. 211. Upon a devise of copyhold for life, remainder to the devisor's heir at law, who died intestate, and without ever having entered or in any way dealt with the reversion; held, that the right heir of the devisor was entitled to maintain ejectment without admittance. *Doe* v. *Crisp*, 1 P. & D. 37. Where, upon a devise of copyhold for life, and a full fine paid upon the admission of the tenant for life, the heir of the devisor had surrendered his reversion; held, that the lord might refuse admittance to the surrenderee, unless on payment of the fines payable in respect of the descent on the heir. *R.* v. *Dullingham, Lady of the Manor of*, 1 P. & D. 172. The words "lands of any tenure" in 3 & 4 Will. 4, c. 74, s. 77, extend to copyholds. *Shirly, ex parte*, 7 Dowl. 258.

(*m*) *Doe* v. *Smith*, 1 Camp. 197.

(*n*) Per Taunton, J., Win. Sum. Assizes, 1831. Roscoe on Ev. 456.

(*o*) These must be duly stamped. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. The lord may admit to a copyhold out of the manor even at a void court. The steward cannot without special authority. But an admittance by the latter at a void court, the proceedings being entered on the rolls, was held to be sufficient, as at the next court the tenants would have information of the fact. *Doe* v. *Whitaker*, 5 B. & Ad. 409.

(*p*) As by the draft of the surrender from the muniments of the court, and the testimony of the foreman of the homage jury, who made the presentment. *Doe* d. *Priestly* v. *Calloway*, 6 B. & C. 484. An entry on the roll is not conclusive, and a new title may be shown by averment or by evidence. *Burgess* v. *Foster*, 1 Leon. 289. *Brend* v. *Brend*, Cas. T. Finch, 254; Coke's Copyholder, s. 40. Lord Holt at Nisi Prius held that the rough draft of the steward was good evidence of admittance. Ld. Ray. 785.

(*q*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208. *Holdfast* d. *Williams* v. *Clapham*, 1 T. R. 600. *Vaughan* v. *Atkins*, 5 Burr. 2764. *Roe* v. *Hickes*, 2 Wils. 15. In the case of bargainor and bargainee, the estate is in the bargainee before enrolment. Com. Dig. Bargain and Sale, B. 9.

(*r*) *Doe* v. *Whitaker*, 5 B. & Ad. 409.

to the course of the common law (*s*), and therefore, upon the death of the tenant, if no custom intervene, the legal estate descends to the heir-at-law (*t*), who by the general law of copyhold may maintain an ejectment before admittance (*u*). His title is proved by evidence of the admission of the ancestor, his death, and the fact of heirship (*x*). Heir at law.

If the party claim as customary heir he must show his title by proof of the custom (*y*). He must prove that the usage has existed time out of mind (*z*); and such usages are construed strictly (*a*). The most usual evidence to prove the custom are the court-rolls of the manor. Entries by the homage on these rolls are evidence, as between tenants of the manor, to prove the mode of descent, although no instances can be proved in which persons have taken according to that course (*b*). So the customary of a manor handed down with the court-rolls from steward to steward, is evidence of the course of descent within the manor, although not signed by any one (*c*). Customary heir.

Entries on the rolls of a manor-court of the admissions of tenants in remainder, after the estate of the last tenant's widow, who held during her *chaste viduity*, are evidence of a custom for a widow to hold on that condition, so that ejectment may be maintained against her, as for a forfeiture on proof of incontinence, although no instances are in fact stated on the rolls, or proved, that such a forfeiture had ever been enforced (*d*). Three instances on the rolls, of husbands having been admitted as tenants by the curtesy, according to the custom, whose wives had been admitted during their lives, were held to be evidence to prove the custom, so as to entitle the husband of a deceased wife, who was heir-at-law, but who died before admittance (having first borne a child to her husband which died an infant), to hold for his life (*e*). Title of tenant by custom, &c.

A single instance of a surrender in fee by a tenant in special tail of a copyhold, has been held to be evidence of a custom within the manor, to bar entails by surrender, although the surrenderor had not been dead twenty

(*s*) *Doe* v. *Mason*, 3 Wils. 63. *Denn* v. *Spray*, 1 T. R. 466.

(*t*) *Denn* v. *Spray*, 1 T. R. 466. The succeeding lord of a manor is entitled to avail himself of a custom to seize copyhold land *quousque*, which accrued to the preceding lord in default of the heir coming in to be admitted, and that although he be only devisee and not heir to the late lord; to entitle him however to enter and seize, the law requires that, on the death of the tenant, there shall be three proclamations for the heir to come in and be admitted, and that such should be made at three consecutive courts; and there is no distinction between proclamations in cases of seizure for a forfeiture, and for seizure of a copyhold *quousque*. *Doe* v. *Trueman*, 1 B. & Ad. 726.

(*u*) See *Doe* v. *Brightwen*, 10 East, 583. *Doe* v. *Hellier*, 5 T. R. 169. *Roe* v. *Hickes*, 2 Wils. 13. So in ejectment by the grantee of the reversion of a copyhold from the lord. *Doe* v. *Loveless*, 2 B. & A. 453.

(*x*) See Tit. EJECTMENT BY HEIR—PEDIGREE.

(*y*) Co. Copyhold, 43; 3 Wils. 63. A custom to present a surrender at an indefinite period is void; *semble*, per Lord Tenterden. K. B. Easter T. 1827.

(*z*) 4 Leon. 242.

(*a*) 1 Roll. Ab. 624, pl. 1; 2 T. R. 466.

(*b*) *Roe* v. *Parker*, 5 T. R. 26.

(*c*) *Denn* v. *Spray*, 1 T. R. 466; 5 T. R. 26; 12 Vin. Ab. 215.

(*d*) *Doe* d. *Askew* v. *Askew*, 10 East, 520.

(*e*) *Doe* v. *Brightwen*, 10 East, 583. For the title of the wife as heir was complete without admittance, and that of the husband was also complete by operation of law; and the possession of the copyhold by the husband after the death of the wife, was referred to that title, and not to an adverse title, although he had been admitted after the death of the wife to hold to him, pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir-at-law of the wife in ejectment brought within twenty years after the husband's death.

Title of tenant by custom.

years, and although one instance was proved of a recovery suffered by a tenant in tail to bar the entail (*f*).

A paper signed by many deceased copyholders of a manor, stating what was the general right of *common* in each copyholder, and agreeing to restrict it, is evidence against other copyholders who do not claim under those who signed it (*g*), for it is at least evidence of the reputation which existed at the time within the manor. The custom of one manor is evidence to prove the custom in another, where both are subject to one common law of tenure (*h*).

Evidence of manorial rights.

Evidence of reputation is *admissible* to prove the existence of a manor; a great number of manors rest upon no other evidence (*i*); but it is in itself very weak evidence to establish any right, without proof of an enjoyment consistent with it (*k*).

The general presumption is, that the waste land which adjoins to a road belongs to the owner of the adjoining freehold, and not to the lord of the manor; this of course is liable to be rebutted by evidence of acts of dominion and ownership (*l*) by the lord.

Where the question was, whether certain common land was the soil and freehold of the plaintiff, who had a right of common there, or of the defendant, who was the lord of the manor, it was held that counterparts of leases, by which the lord granted minerals to other persons in other parts of the uninclosed waste, were not admissible in evidence, without preparatory evidence by the defendant that the *locus in quo* was part of the entire waste, to parts of which those leases were applicable (*m*). And it was also held, that if the leases had been admissible in evidence, they would merely have shown the lord's title to the minerals, and not to the surface (*n*).

It has already been seen, that licences on the court-rolls granted by the lords of the manor to fish in a particular fishery, are evidence for one who claims under the lord, evidence having been given of the payment of the reserved rents, and of acts of enjoyment by the lords of the manor in modern times (*o*).

Title of the lord.

Where the tenant holds according to the custom of husbandry of the manor, evidence that the lord has leased, for more than a century past, the coal and limestone in different parts of the manor, and has received rent for it, is evidence to explain the nature of the tenure, and to show that the freehold is in the lord, and not in the tenant (*p*).

Ancient admissions of the copyholder to *tres acras prati*, may be explained

(*f*) *Roe* d. *Bennett* v. *Jeffery*, 2 M. & S. 92.

(*g*) *Chapman* v. *Cowlan*, 13 East, 8.

(*h*) 5 T. R. 26, per Lord Kenyon. See tit. CUSTOM; and *Clarkson* v. *Woodhouse*, 5 T. R. 412.

(*i*) Per Abbott, L.C.J., *Steele* v. *Prickett*, 2 Starkie's C. 466.

(*k*) Vide Vol. I. Index, tit. REPUTATION.

(*l*) *Steele* v. *Prickett*, 2 Starkie's C. 463. Abbott, L. C. J., observed, "In some of the more ancient books of law a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but as far as my own experience goes, (and I have heard the opinions of many learned judges on the subject,) it has uniformly been laid down, that land under such circumstances is presumed, in the first instance, to belong to the owner of the adjoining freehold, and not to the lord of the manor." See *Grose* v. *West*, 7 Taunt. 39; *infra*, tit. TRESPASS, *Liberum Tenementum*.

(*m*) *Tyrwhitt* v. *Wynn*, 2 B. & A. 554.

(*n*) *Ibid.*

(*o*) *Supra*, Vol. I. Index, tit. PRESCRIPTION. *Rogers* v. *Allen*, 1 Camp. 309.

(*p*) *Brown* v. *Rawlins*, 7 East, 409. As to title under a power of appointment, see the case of *The Lord of the Manor of Oundle*, 1 Ad. & Ell. 283.

to mean the fore-crop, or *prima tonsura* only, by evidence that no more has been enjoyed under such admissions (*q*). Title of the lord.

The enfranchisement of a copyhold may be presumed from the long possession of the premises as freehold, and other circumstances, even as against the Crown (*r*). A copyholder in the manor *A.* has common in the wastes of the same lord's manor of *B.*, for cattle *levant* and *couchant* on his tenement in *A.*; this is evidence that the manors were formerly in different hands, for the estate of a copyholder is too weak to support a grant of common appurtenant in another manor (*s*).

Under a custom that the remainder-man coming into possession on the death of the tenant for life must be admitted, and pay a fine, if on the death of the tenant for life the next in remainder does not come in to be admitted and pay his fine, after proclamations made, and presentment made to a jury, the lord, it was held, may seize *quousque*, and maintain ejectment to recover possession in the meantime (*t*). The court-rolls are evidence of the *proclamations* recited to have been made in them (*u*). But where on the death of a copyholder of inheritance, the lord, after three proclamations to the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it in fee to another, it was considered as an absolute seizure, and there being no custom to warrant it, it was held that it was irregular, and that the lord could not afterwards insist upon it as a seizure merely *quousque* (*x*).

The lord may recover from a copyholder the fine assessed by him upon admittance, not exceeding two years value of the tenement, although there be no entry of the assessment of such fine on the court-rolls, but only a demand of such sum for a fine, after the value of the tenement has been found by the homage (*y*). To a fine.

An assessment of a copyhold fine entered on the court-rolls as 100 *l.*, cannot be reduced to 60 *l.* by the lord's favour, without a new assessment (*z*); and therefore in such a case, where the lord sued for the fine, and the jury found the annual value of the premises to be 30 *l.*, and gave a verdict for 60 *l.*, it was held that the lord could not retain his verdict for 60 *l.* (*a*).

Where the lord insists that the tenant has committed a forfeiture (*b*) by cutting down trees, and the tenant insists that they were cut down for the purpose of repairs, it is a question for the jury whether they were cut down with a *bonâ fide* intention so to apply them (*c*), although in fact none have been actually so applied till the expiration of several months after they were Proof of forfeiture.

(*q*) *Stammers* v. *Dixon*, 7 East, 200.

(*r*) *Roe* v. *Ireland*, 11 East, 280. A surrender had been made of the premises to churchwardens and their successors in 1636, without naming any rent. In 1649 the Parliamentary survey charged the churchwardens 6 *d.* rent, under the head of freehold rents; and there was no evidence of any different rent having been paid since that time; and receipts had been given as for a freehold rent by the steward of the manor from 1803 to 1805 (the trial was in 1809). Lord Ellenborough, in giving judgment, said, "I would presume anything capable of being presumed, in order to support an enjoyment of so long a period. As Lord Kenyon once said, on a similar occasion, that he would presume not only one, but a hundred grants, if necessary, to support such a long enjoyment." See tit. PRESUMPTION; and see *Cowlam* v. *Slack*, 15 East, 108.

(*s*) *Barwick* v. *Matthews*, 5 Taunt. 365.

(*t*) *Doe* v. *Jenney*, 5 East, 522.

(*u*) *Roe* v. *Hellier*, 3 T. R. 162.

(*x*) Ibid.

(*y*) *Lord Northwick* v. *Stanway*, 6 East, 56.

(*z*) Ibid.; and 3 B. & P. 346.

(*a*) Ibid.

(*b*) The estate of a copyholder (*semble*) is not forfeitable for the act of his lessee. *Clifton's Case*, 4 Co. 27, a; 1 Roll. Ab. 408, Copyhold (D.) pl. 17; 4 Leon. 241; Co. Litt. 63, a.

(*c*) *Doe* v. *Wilson*, 11 East, 56.

Proof of forfeiture.

cut down, and until after an action of ejectment has been brought by the lord for a forfeiture, and although many of them still remain unapplied, part of the premises being still out of repair (*d*). An appointment of one as steward may be proved to have been by parol (*e*).

COPYRIGHT. *See* PRIVILEGE.

CORPORATION.(*f*).

Variance in name.

A MISTAKE in the name of a corporation, who are plaintiffs, will not be material as a variance in evidence under the plea of the general issue. Where the corporation were sued in the names of "the mayor and burgesses of the borough of Stafford," and it appeared in evidence from the charter that they were incorporated by the name of "the mayor and burgesses of the borough of Stafford, in the *county of Stafford*," it was held that the variance could not be objected to except by plea in abatement; and that to make it pleadable in bar, it should appear that there is no such corporation (*g*).

Where a party had granted to a corporation certain rights, it was held, in an action brought by the corporation against an assignee of the grantor, that the grant was evidence that the corporation was known by the name and description specified in the grant at the time of the grant, issue having been joined upon that fact (*h*).

Evidence of title.

The payment of rent to the bailiffs of a borough by the party, as tenant to a corporation, admits a tenancy from year to year, although a deed of demise has been prepared and executed by the bailiffs and some of the aldermen of the corporation, but has not been sealed with the corporation

(*d*) The jury found for the defendant; and there being no evidence that the trees were to be applied otherwise than for repairs, the Court refused to disturb the verdict. 11 East, 56. See also *Blackett* v. *Lowes*, 2 M. & S. 494, where it was held that if a copyholder entitled to estovers cut down trees for *aliene* purposes, the lord will be entitled to them.

(*e*) Co. Litt. 61, b.; Dyer, 248, a.; Com. Dig. Copyhold, R. 5. But see *Carmarthen Mayor, &c. of* v. *Linns*, 6 C. & P. 608, where it was held that the corporation might sue for tolls, although no interest passed by grant under seal.

(*f*) See as to municipal corporations, the stat. 5 & 6 Will. 4, c. 76; 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78; 1 Vict. c. 84. As to the oaths of allegiance and supremacy to be taken with oath of office, 13 C. 2; stat. 2, c. 1. The declaration in lieu of the sacramental test, 9 Geo. 4, c. 17. See OATH. Conservators were empowered to purchase lands in fee to them and their successors, to make bye-laws affecting strangers using the navigation, and the acts of any five of the committee appointed by the majority, under their hands and seals, were to bind the whole, and they were directed also to sue and be sued by the name of the conservators in the county of *S.*; held, that as it clearly appeared that they should take such lands by succession, and not by inheritance, although not created a corporation by express words, they were so by implication, and were therefore entitled to sue in their corporate name for injuries done to their lands, and were also entitled to receive the tolls as part of the profits of the lands of which an account was to be rendered. *Tone, Conservators of*, v. *Ash*, 10 B. & C. 349. A bond by mayor and commonalty to the mayor is not good. Bro. Corp. pl. 63; 21 E. 4. 7. 12. 27. 69. So of presentation to living. Bro. Corp. pl. 63; 14 H. 8; Vin. Ab. tit. Corp. G. 2; Watson's Parson's Counsellor. And see *Salter* v. *Grosvenor*, 8 Mod. 303; Burn's E. L. tit. Dean and Chapter.

(*g*) *Mayor and Burgesses of Stafford* v. *Bolton*, 1 B. & P. 40; Bro. Misno. 73; 22 Edw. 4, c. 34. *Mayor, &c. of Lynn's Case*, 10 Coke, 122.

(*h*) *Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487; vide *supra*, Vol. I. Index, tit. ESTOPPEL.

seal (*i*). If in ejectment by a corporation a demise by deed be alleged, it need not be proved (*k*).

The payment of rent by the predecessors of bailiffs of a corporation as bailiffs, is evidence of a tenancy by the corporation, and not by the bailiffs, and consequently an ejectment cannot be maintained against the two existing bailiffs (who have not paid rent) without notice to the corporation, in order to determine the tenancy (*l*).

On an election of town councillors, under the statute 5 & 6 Will. 4, c. 76, the returning officer's duty is only ministerial, to return the candidate who has the actual majority, and the elector must take it upon himself to decide whether the candidate for whom he votes is properly qualified or not; the voting papers are the proper evidence of the election, although not the record of it; but when produced, they must be proved to be the same that were given in at the election (*m*).

Actions against.

An action of trespass or trover lies against a corporation (*n*). In an action of trover for a detention by the servants of a corporation within the scope of their employment (as where the agents of the Bank of England detain a number of bank-notes), it appears to be unnecessary to prove that the detention was authorized by the corporation under their seal (*o*); at all events, an authority will be presumed after a verdict which finds the fact of a conversion by the corporation. So they may be guilty of a disseisin (*p*), or false return (*q*).

Assumpsit lies against a corporation whose power of drawing and accepting bills has been recognized by a statute (*r*) But unless authorized by a statute, an action of *assumpsit* does not lie either by or against a corporation (*s*).

A bye-law may narrow the number of electors, but cannot limit the number of the eligible, nor disqualify an integral part of the electors (*t*).

Competency.

Where a member of a corporate body can derive any personal advantage from the verdict, he is excluded by the general principle; accordingly, upon an issue on a *mandamus*, whether the election of common councilmen in a borough was not confined to persons of a particular description, it was held that one who fell within that description was not competent, since the limitation enhanced the value of his own situation (*u*).

(*i*) *Wood* v. *Tate*, 2 N. R. 247; and see tit. EJECTMENT. An entry in the minutes of a corporation, not being under seal, is not evidence of an agreement with a tenant as to allowance in respect of rent. *Ludlow Corporation* v. *Charlton*, 9 C. & P. 242.

(*k*) *Furley* v. *Wood*, 1 Esp. C. 198.

(*l*) *Doe* v. *Woodman*, 8 East, 228. See *Goodtitle* v. *Wilson*, 11 East, 334.

(*m*) *R.* v. *Ledgard*, 3 N. & P. 513.

(*n*) See the authorities, *Yarborough* v. *The Bank of England*, 16 East, 6. Where the mayor *de facto* ordered weights and measures, which were afterwards examined at a full meeting of the corporation, and used to regulate those in the market, held that the corporation was liable, although there was no contract under the corporate seal, and the mayor was subsequently displaced. *De Grave* v. *Monmouth, Corp. of*, 4 C. & P. 111.

(*o*) Ibid. And see tit. AGENT; and *R.* v. *Bigg*, 3 P. Wms. 427. And *Smith* v. *Birmingham Gas Comp.* 1 Ad. & Ell. 526. *Tolson* v. *Warwick G. L. Comp.* 4 B. & C. 962. *Doe* v. *Pearce*, 2 Camp. 96.

(*p*) Bro. Corp. pl. 24; and Lord Ellenborough's judgment, 16 East, 9.

(*q*) 16 East, 7, and the cases there cited.

(*r*) *Murray* v. *East India Comp.* 5 B. & A. 204. See *Starke* v. *Highgate Archway Comp.* 5 Taunt. 792. *Broughton* v. *Manchester Waterworks Comp.* 3 B. & A. 1.

(*s*) *East London Waterworks Comp.* v. *Bailey*, 4 Bing. 283.

(*t*) Per Lord Mansfield, *R.* v. *Spencer*, 3 Burr. 1827. As to notice of meeting, see *R.* v. *Kynaston*, 2 Selw. 1143.

(*u*) *Stevenson* v. *Nevinson*, Lord Raym. 1353.

Competency.

But upon the question, whether to qualify a man to be a common councilman it was not necessary that he should be an inhabitant, and also have a burgage tenement, the Court held that one who was an inhabitant only was competent, because he came to disqualify himself (*x*).

Where an action was brought by a corporation on a custom, it was held that one who had acted in defiance of the custom was not competent to disprove it (*y*).

A freeman is not competent to support a corporate title to rent, where the rent is reserved to the use of the corporation (*z*). The corporation of Kingston being lords of a manor, approved part of the common, reserving a rent to the use of the corporation, and a freeman was held to be incompetent (*a*). But where the question was, whether the defendants had a right to be freemen, and it appeared that there were commons belonging to the freemen, an alderman was permitted to prove the negative, none but aldermen being privy to the making persons free (*b*). Where the members of a corporation cannot derive *any private* advantage from the subject-matter which concerns the public only, they are competent witnesses; and therefore, although the mayor and commonalty of the City of London are entitled to tonnage on coal, but the mayor and sheriffs have the toll for the benefit of the corporation at large, and no particular individual is benefited by it, the freemen, it has been held, are competent witnesses to support the privilege (*c*). Where a freeman of a corporation is interested, the usual mode of removing the objection is by disfranchisement (*d*). A release to the corporation of his interest in the subject-matter of the suit is insufficient when he has still an interest in the general funds (*e*).

An admission by an indifferent member of a corporation is not evidence against the corporation (*f*). But what is said by an officer respecting his office in a corporation is evidence against the corporation in an action of disturbance of office (*g*). And so are admissions by the surveyor of a corporation, in respect of a house belonging to the corporation (*h*).

COSTS.

Costs must be included in the amount for which the debtor is in *execution*, under the compulsory clause in stat. 33 Geo. 3, c. 5, s. 3 (*i*).

Costs are not to be allowed to any plaintiff upon any counts or issues on

(*x*) Ld. Raym. 1353. Str. 583.

(*y*) *Company of Carpenters* v. *Hayward*, Doug. 360.

(*z*) *Burton* v. *Hinde*, 5 T. R. 174.

(*a*) Ibid.

(*b*) *R.* v. *Phillips & Archer*, per Lee, C. J., B. N. P. 289.

(*c*) *R.* v. *Mayor, &c. of London*, 2 Lev. 231; Vent. 351; 1 Vern. 254; 4 Burn's Ecc. Law, 94. *R.* v. *Carpenter*, 2 Show. 47. But see *Dowdeswell* v. *Nott*, 2 Vern. 217; and the observations of Buller, J., B. N. P. 290. And see tit. Interest; Witness; and Append. Vol. II. 340.

(*d*) 2 Jones, 116; 2 Lev. 236. A judgment of disfranchisement on a *scire facias* in the Mayor's Court, and two *nihils*, returned, the witness not having been summoned, and knowing nothing of his disfranchisement, does not render him competent, the corporation being interested. *Brown* v. *Corporation of London*, 11 Mod. 225; and see *The Saddlers' Company* v. *Jones*, 6 Mod. 166. *Weller* v. *Governors of the Foundling Hospital*, Peake's C. 153.

(*e*) *Doe* v. *Tooth*, 3 Y. & J. 19. A corporator is not competent to prove a custom which excludes foreigners. *Davis* v. *Morgan*, 1 C. & J. 587.

(*f*) *Mayor of London* v. *Long*, 1 Camp. 23.

(*g*) Ibid. 25. Per Lord Ellenborough.

(*h*) *Peyton* v. *Governors of St. Thomas's Hospital*, 4 M. & R. 625.

(*i*) *Robins* v. *Cresswell*, 2 Ad. & Ell. 23.

which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs (*k*).

COUNSEL.

Defence by. *See* Stat. 6 & 7 W. 4, c. 114.

COUNTY. *See* VENUE.

In general, by the common law, it is necessary to prove the offence to have been committed within the county or division where the indictment is found, and for which the jurors are returned.

By the 5 & 6 Edw. 6, c. 10, upon an indictment for homicide where the death happens, the jurors may inquire as to the stroke, though given in another county. And by a number of other statutes, offences under particular circumstances may be inquired of in other counties than those in which they are committed (*l*).

Locality of crimes.

The common-law rule, that the offence must be proved to have been committed in the county where the indictment is laid, does not exclude collateral evidence, although arising in another county, tending to show the commission of the crime in the first. Thus, proof of possession of stolen goods by the prisoner in one county, is evidence on a charge of his having stolen them in another (*m*). And in the case of treason, it seems, that after evidence given of the treason in the county in which it is laid, evidence may be given of other instances of the same crime committed in another county, as explanatory of the acts committed in the first (*n*). Thus where a levying war is laid as the treason, the levying war in another county is evidence to show the nature of the acts in the county in which the treason is laid (*o*). So in the case of conspiracy, evidence of acts done in any other county may be adduced tending to prove the existence of a conspiracy, provided an overt act be proved in the county in which the indictment is laid (*p*).

By the stat. 7 G. 4, c. 64, s. 12, felonies or misdemeanors committed on the boundaries of two or more counties, or within the distance of 500 yards of any such boundary, or begun in one county and completed in another, may be tried in any or either. And by s. 13, offences committed on any person, or in respect of any property in or upon any coach, waggon, cart, or other carriage employed in any journey, or on board any vessel employed in any voyage, may be tried in any county through any part of which such coach, &c. shall have passed in the course of such journey or voyage; and in all cases where the side, centre, or other part of any highway, or the side, centre, or other part of any river, canal, or navigation, shall constitute the boundary between any two counties, the felony or misdemeanor may be tried in either of those counties through or adjoining to, or by the boundary.

(*k*) R. G. Hil. T., 2 Will. 4. A distinct issue is raised on each count by the general issue pleaded to the whole. *Cox* v. *Thomson*, 2 C. & J. 498. *Bright* v. *Bevan*, 1 D. P. C. 730.

(*l*) See Crim. Plead. C. 1.

(*m*) *Butler's Case*, East's P. C. 776. Although the contrary has been held, *Evans's Case*, East's P. C. 776, per Holt, C. J.

(*n*) Kel. 33; 4 St. Tr. 410. *R.* v. *Hensay*, Burr. 650; 2 Haw. c. 46, s. 183.

(*o*) Cases of *Damaree*, *Purchase*, and *Willes*, 8 St. Tr. 218. *Deacon's Case*, Fost. 8.

(*p*) *R.* v. *Brisac*, 4 East, 164. *R.* v. *De Berenger and others*, 3 M. & S. 67.

whereof such waggon, &c. shall have passed in the course of the journey or voyage.

See further, tit. FALSE PRETENCES.—FORGERY.—LARCENY, &c.

COVENANT.

THE evidence in an action of covenant is closely confined by the nature of the pleadings; the plaintiff is bound to show his title to sue, and to point out the particular breaches of covenant of which he complains, and the defendant is obliged to show the grounds of his defence specially upon the record. The most usual pleas are the—

1. Plea of *non est factum.*
2. That the deed was obtained by *duress.*
3. Denial of the plaintiff's performance of a *condition precedent.*
4. Denial of the *breach* of a covenant, { not to assign without license; for quiet enjoyment.
5. Of entry and *eviction.*
6. Denial of plaintiff's title as *assignee.*
7. Denial of the defendant's liability as *assignee.*
8. A release, &c. (*q*).

Non est factum.

By the rules of Hil. Term, 4 W. 4, in covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Upon the plea of *non est factum* the plaintiff must produce the deed, if pleaded with a profert, and prove the execution in the usual way (*r*). If

(*q*) See Ind. tit. DEED.—RELEASE.

(*r*) See Ind. tit. DEED. A party named in a deed of covenant may sue, though he does not execute the deed. If there be mutual covenants between *A.* and *B.* on the one part, and *C.* and *D.* on the other, and *B.* does not seal the deed, yet covenant lies by him against *C.* and *D.* 2 Roll. 22, l. 35; Com. Dig. tit. Fait. (A. 2.) (G. 2.) See also *Cooper* v. *Child*, 2 Lev. 74; *Gilly* v. *Copley*, 8 Lev. 138. Abbott on Shipp. 166, 5th edit. *Secus*, where the party who sues is a stranger to the deed. Where an indenture of lease was made between *A.* for and on behalf of *B.* on the one part, and *C.* on the other part; *A.* being authorized by a writing, but not under seal, and *A.* executed the deed in his own name; it was held, that *B.* could not maintain covenant on the deed, although *C.*'s covenant purported to be made with *B.* *Berkeley* v. *Hardy*, 5 B. & C. 355. Note, that the execution of a counterpart by a lessee is but *evidence* of his execution of the original. *Ibid.* As to the construction of covenants, see *Barton* v. *Fitzgerald*, 15 East, 530; *Gainsford* v. *Griffiths*, 1 Saund. 59; *Howell* v. *Richards*, 11 East, 633; *Browning* v. *Wright*, 2 Bos. & Pull. 13. A recital in a lease of mines of an agreement to pull down a smelting-house and rebuild it larger, followed by express covenants to maintain and leave it in good and sufficient repair, amount to a covenant in law to erect the building, and the covenant tending to the support and maintenance of the thing demised passes with the reversion, and the assignee may therefore maintain the action. The agreement appearing to have been between the assignor of the plaintiff and two others, reciting that he had an interest of one undivided third of the premises; held, that it was to be considered as a separate contract with him according to his interest, and the covenants were to be construed with reference to such separate and limited interest. *Simpson* v. *Easterby*, 9 B. & C. 505, and judgment was affirmed in error, 6 Bing. 645. And see *Saltoun* v. *Houston*, 1 Bing. 433; *Balby* v. *Wells*, Wilmot, 346. *Spencer's Case*, 5 Co. 16 b. Shep. Touch. (Preston's edit.) 171.

Where the tenant for life with remainder over, by indenture demised to the plaintiff, his executors, &c. for a term of 15 years without any express covenant for quiet enjoyment, and died before the term expired, the plaintiff was evicted by the remainder-man; held, that the executor of the tenant for life was not chargeable with the covenant at law, and that no covenant could be implied from the recital of the agreement for a lease for 15 years subject to the covenants thereinafter contained, the demise by indenture being the

there be no other plea on the record, all the other averments stand admitted; and after proof of the defendant's execution of the deed, nothing remains on the part of the plaintiff but to prove the amount of his damages (*s*). It may be observed that the deed itself, when proved, is evidence against the defendant who has executed it, of all the facts recited in the deed. If, for instance, a lease describe the demised land as meadow-land, this is evidence that it was such at the commencement of the term (*t*). And an assignment of the original lease by the lessor, executed on the back of the original deed, is evidence against the assignee of such original deed (*u*). But if the defendant by his plea admit the execution of the deed, he admits so much of the deed as is stated in the declaration, but no more; and if the plaintiff seeks to prove some other recital of the deed not specified in the declaration, he must prove the execution of the deed (*x*). Non est factum.

If there be any material variance between the declaration and the deed proved, it will be fatal under this plea. The declaration stated, that by a certain indenture it was witnessed, that as well in consideration of certain furnaces to be erected by the plaintiff, *A. B.* did demise, &c.; but on the production of the deed, it appeared to be as follows, "That as well in consideration of the erecting the furnaces, as also of building certain houses and payment of rent, *A. B.* did demise," &c.; and it was held that the variance was fatal (*y*). Variance.

completion and performance of that agreement. *Adam* v. *Gibney*, 6 Bing. 656. And see *Swan* v. *Searles*, Dyer, 257, and Bendl. 150; *Hyde* v. *Canons of Windsor*, Cro. El. 553; Shep. Touch. 160, and Com. Dig. 100. An action of covenant does not lie against a subsequent chairman of a board of directors on a deed under the seal of the former one, although executed by him for and on behalf of the company. *Hall* v. *Bainbridge*, 1 M. & G. 42; 1 Sc. N. R. 151; and 8 Dowl. 583.

(*s*) B. N. P. 172. *Michael* v. *Stockwith*, Cro. Eliz. 120.

(*t*) *Smith* v. *Woodward*, 4 East, 585.

(*u*) *Nash* v. *Turner*, 1 Esp. C. 217.

(*x*) *Williams* v. *Sills*, 2 Camp. 519. *Watson* v. *King*, 4 Camp. 272.

(*y*) *Swallow* v. *Beaumont*, 2 B & A. 765. See tit. DEED. 2 Ld. Raym. 792. *Howell* v. *Richards*, 11 East, 633. See also tit. VARIANCE. A covenant by articles of agreement, between the commander of a post-office packet with the several owners, to pay the yearly sum of — *l.*, or such other sum as should be allowed by Government, to each and their several and respective executors, &c. in such parts and proportions as were set against their respective names, was held to be a several covenant, and that each was entitled to sue in respect of his separate interest, and that they could not maintain a joint action. *Servante* v. *James*, 10 B. & C. 410.

Where in covenant the allegation was, that four "demised by indenture;" held, that it imported a sealing and delivery by the four; and that, upon the issue "*non est factum*," after proof by the plaintiff of the execution of the counterpart by the defendant, the latter might produce the lease, and show that it was executed by two only, and that it was a fatal variance between the proof and the declaration. *Wilson* v. *Wolfryes*, 6 M. & S. 341.

Covenant by the reversioner against the assignee of the grantee. The declaration stated, that *A.* and *B.* did grant license for a term of years to *C.* to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of *C.*, the latter paying a certain annual sum therein mentioned. Breach, non-payment of that annual sum. *Semble*, that upon the face of the declaration *A.* and *B.* must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner, within the statute 32 Henry 8. By the deed produced in evidence, *A.* and *B.* were described as persons having the greatest proportion or share in the profits of the navigation. Held, that by this deed it appeared that the grantors had not the power of granting the privilege of which the deed, as set out in the declaration, purported to be a grant, and therefore that there was a variance. Held also, that the deed showed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in an hereditament. *Earl of Portmore* v. *Bunn*, 1 B. & C. 694.

In covenant by a lessor against lessee it is no variance if the plaintiff makes profert of the said indenture, and at the trial produces the counterpart executed by the lessee (*z*).

For the defendant's evidence under this plea, see tit. DEED.

Plea of duress.

The proof of this plea lies upon the defendant (*a*); and it has been said that it is sufficient, in support of such a plea, to prove that the deed was given under an arrest made by the plaintiff without any cause of action, or under an arrest without good authority, though for a just debt; or under an arrest by warrant from a justice for felony, when no felony has been committed; or that a felony having been committed, the arrest was unlawfully made use of to procure the execution of the deed (*b*). There are contradictory decisions upon the question, whether duress of the goods as well as of the person will avoid a deed (*c*); since, however, duress must be specially pleaded, the question cannot well arise upon the evidence in an action upon the deed. It is however to be observed, that in the case of *Astley* v. *Reynolds* (*d*), it was held that *assumpsit* would lie to recover money paid under duress of goods.

It is laid down in Buller's Nisi Prius, that if *A.* menace me, except I make unto him a bond of 40*l.*, and I tell him I will not do it, but I will make unto him a bond of 20*l.*, the Court will not expound this bond to be voluntary, upon the maxim: "*Non videtur consensum retinnuisse si quis ex præscripto minantis aliquid immutavit* (*e*).

Condition precedent*.

Proof of the performance of a condition precedent, when put in issue by the defendant's plea, cannot be dispensed with, although the condition has been performed according to a subsequent parol agreement. The plaintiff covenanted to build two houses for 500*l.*, and in an action for the money, averred that he had built the houses within the time. It was held that he could not be admitted to show that the time had been enlarged by a subsequent parol agreement, and that the houses had been built within the enlarged time (*g*).

Breach, &c.

Proof of the breach.—The breach must be proved as it is laid in the declaration (*h*).

(*z*) *Pearse* v. *Morrice*, 3 B. & Ad. 306.

(*a*) 5 Co. 119; B. N. P. 172. See tit. DURESS.

(*b*) B. N. P. 172; Aleyn, 92. *Wooden* v. *Collins*, Mich. 9 Geo. 2. See tit. DURESS.

(*c*) This is affirmed in 1 Roll. Ab. 687, and denied in *Sumner* v. *Feryman*, Hil. 1708; 11 Mod. 201. But in *Astley* v. *Reynolds*, Str. 915 it was held that *assumpsit* would lie for money obtained under duress of goods.

(*d*) Stra. 915. But see *Lindon* v. *Hooper*, Cowp. 414. * Vide *supra*.

(*e*) B. N. P. 173; Bac. Reg. 22.

(*g*) *Littler* v. *Holland*, 3 T. R. 590.

(*h*) Where the lessee of premises, demised as a public-house, covenanted that he would use his best endeavours to keep it open as a licensed house, and it having been underlet to several tenants, at length, through the misconduct of one, the license was refused by the magistrates; held, that it lay on the defendant to show that after the withdrawal of it, he did some act to obtain the renewal of the license, but that it was for the jury to say whether the plaintiff, in never having himself taken any steps to obtain the grant of the license, had sustained any substantial damage, and if not, that he was entitled only to nominal damages. *Linder* v. *Pryor*, 8 C. & P. 518. Upon a covenant in the assignment

* See tit. ASSUMPSIT, 67. Where the declaration stated an agreement by the plaintiff's testator to sell premises and the defendant to purchase, and that by the indenture of bargain and sale the defendant did covenant to pay the purchase-money on a day stated, "as the consideration of such sale and purchase, with interest, to the completion of the purchase;" held, to be an independent covenant, and that the money might be recovered without tender of a conveyance. *Mattock* v. *Kinglake*, 2 P. & D. 343; and 10 Ad. & Ell 50.

Where it was assigned thus, "that the defendant had not used a farm in a husbandlike manner, but, on the contrary, had committed waste;" it was held that it was not sufficient to prove that the defendant had used the farm in an unhusbandlike manner, but that he was bound to prove that the defendant had been guilty of *waste* (*i*).

Where the covenant was to keep all trees standing in an orchard whole and undefaced, reasonable use and wear only excepted; the cutting down trees past bearing, the landlord being likely to get back his premises at the end of the term in an improved condition, was held to be no breach of the covenant (*k*).

In covenant, the mean tenant may recover against his under-lessee, for not repairing, the costs of an action for not repairing brought by the original lessor (*l*).

The proof of the breach not to assign must of course depend upon the terms of the covenant (*m*).

On a covenant not to set, let, or assign over (*n*), without leave, it was held that an under-lease amounted to a breach (*o*). But where the covenant was not to assign, transfer, or set over, it was held that an under-letting was not a breach of the covenant (*p*). Where the proviso was that the lease

Not to assign, &c. without license.

of a lease, that the assignor would not keep any licensed victualling house, &c. within the distance of half a mile from the premises assigned; held that the covenant was to be construed half a mile by the nearest mode of access between the places. *Leigh* v. *Hind*, 9 B. & C. 774.

Defendant on a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of 19,000 *l.* within a year. Held, that on his failing to do so, the trustees were entitled to recover the whole 19,000 *l.* in an action of covenant, though no special damage was laid or proved, and an inquisition on which nominal damages had been given was set aside and a new writ of inquiry awarded. *Lethbridge* v. *Mylton*, 2 B. & A. 772. Where the Crown lessee of duchy lands had underlet on a building lease, with a covenant that he would apply for and do his utmost to procure a renewal, but his offer was only of a fine to the amount of two years' rack-rent, paid by the occupiers, the Crown requiring as a fine a sum short of three years annual value of the premises; held, that the covenant was to be construed to impose on the covenantor no more than to pay a reasonable fine, but that the fine so claimed by the Crown being found by the jury as reasonable, and that the covenantor having declined to renew on those terms, could not be said to have done his utmost endeavour to obtain a renewal within the meaning of the covenant. *Simpson* v. *Clayton*, 4 Bing. N. C. 758; and 6 Sc. 469. Upon a covenant for appearing at any insurance office within the bills of mortality, and answer questions, and do any act to enable the plaintiff to effect a policy on the defendant's life, and not to do any act to avoid such insurance, breach, that the defendant went beyond the limits of Europe; held, that the defendant, being bound to take notice of the conditions of the policy, the declaration was bad for want of averring that he had notice of the policy having been effected, the defendant having no means of knowing at what office, or the terms of their policies, at which the plaintiff might, at his own option, insure. *Vyse* v. *Wakefield*, 8 Dowl. 377; and 6 M. & W. 442.

(*i*) *Harris* v. *Mantle*, 3 T. R. 307.

(*k*) *Good* v. *Hill*, 2 Esp. 690.

(*l*) *Neale* v. *Wyllie*, 3 B. & C. 533. Action by mean tenant against under lessee for overloading chamber with meal. Lord Abinger held, Liv. Sum. Ass. 1835, that the plaintiff was not entitled to recover damages recovered against him by the original lessor. Note, there was no distinct evidence of application by plaintiff to defendant to defend an action brought against plaintiff.

(*m*) In an action of covenant, the breaches are specified in the declaration; but in an action on a bond for the performance of covenants, or to indemnify, the defendant may require a particular of the breaches on which the action is brought. Tidd's Pract. 526.

(*n*) An assignment by a deed which is void, is no breach of the covenant. *Doe* v. *Powell*, 5 B. & C. 308.

(*o*) *Roe* v. *Harrison*, 2 T. R. 426. Such a covenant is a fair and usual covenant. *Morgan* v. *Slaughter*, 1 Esp. C. 8. But the taking a lodger is not a breach of covenant not to underlet. *Doe* v. *Laming*, 4 Camp. 77.

(*p*) *Crusoe* v. *Blencowe*, 2 Bl. R. 766; 3 Wils. 224.

Not to assign, &c. without license.

should be void if the lessee assigned, or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term, without leave, in writing, it was held that the terms included an under-lease (*q*). A covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees (*r*).

Under a covenant not to assign, it is not sufficient to show an assignment by operation of law (*s*). As under a sale by the sheriff who has seized the lease under a *fieri facias* (*t*); or where the assignees under a commission assign the bankrupt's lease (*u*); or where, as it seems, executors dispose of the testator's term (*x*); otherwise where an assignment is effected in fraud of the covenant, as by means of a warrant of attorney to confess a judgment, in order that the judgment-creditor may take the lease in execution (*y*). Where the covenant is not to assign, set over, or otherwise let the demised premises, it is not sufficient to show that a stranger is in possession of the premises, for he may have been a tortious intruder (*z*). But where the covenant was not to *aliene*, assign, or part with the possession, it was held to be sufficient to prove a stranger to be (*a*) in possession (*b*).

Breach.—Quiet enjoyment*.

Where the plaintiff declares on a covenant for quiet enjoyment (*c*), if the covenant be *general*, he must show in his declaration that the eviction was

(*q*) *Doe* v. *Worseley*, 1 Camp. 20, *cor.* Lord Ellenborough. A lease by the lessee for the whole term amounts to an assignment. *Halford* v. *Hatch*, Doug. 178. Where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it was held that proof that the lessee had entered into partnership with *A.* and agreed that he should have the use of a back room, and other parts of the premises exclusively, was evidence of a forfeiture. *Roe* d. *Dingley* v. *Sales*, 1 M. & S. 297.

(*r*) *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795.

(*s*) Assigns are construed to mean voluntary assigns, as contradistinguished from assigns by operation of law; per Lord Ellenborough, 3 M. & S. 358. But the alienation by executors, as in case of bankruptcy, may be restrained by express words. See below, note (*u*).

(*t*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 57.

(*u*) *Doe* v. *Bevan*, 3 M. & S. 353; 3 Wils. 237. *Fox* v. *Swan*, Sty. 483. *Weatherill* v. *Gearing*, 12 Ves. 513. The Courts have construed assigns to mean voluntary assigns, as contradistinguished from assigns by operation of law; and further, that the immediate vendee from the assignee in law is not within the proviso. The reason is, that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in the case of carrying on the bankrupt's trade in a public-house. *Secus* under a covenant for re-entry in case lessee should become bankrupt, or the lease be assignable under a commission of bankrupt. *Doe* v. *Smith*, 5 Taunt. 795. So where the party expressly covenants for his executors. *Roe* v. *Harrison*, 2 T. R. 425. As to the case of a devise by will, see *Berry* v. *Taunton*, Cro. Eliz. 331; Shepp. Touchstone, 144; *Crusoe* v. *Bugby*, 3 Wils. 237; *Swan* v. *Fox*, Styles, 482.

(*x*) *Seers* v. *Hind*, 1 Ves. jun. 295.

(*y*) *Doe* v. *Carter*, 8 T. R. 300. *Doe* v. *Skeggs*, cited 2 T. R. 134.

(*z*) *Doe* v. *Payne*, 1 Starkie's C. 86.

(*a*) 4 Taunt. 766; but see Ld. Ellenborough's observations in *Doe* v. *Payne*, 1 Starkie's C. 87.

(*b*) For other decisions on this subject, see tit. EJECTMENT.—FORFEITURE.

(*c*) This covenant runs with the land, and binds the assignees; and there is no difference between an assignment of an inheritance and a term for years. *A.* devised for a term to *B.*, who assigned his interest to *C.*, and covenanted with him and his assigns for quiet enjoyment; *C.* demised to *D.*, who was evicted for a forfeiture by *B.* before the assignment to *C.*; and it was held that *D.* might maintain an action of covenant against *B.* *Lewis* v. *Campbell*, 3 Moore, 35. And see *Thursby* v. *Plant*, 1 Will. Saund. 241, b.

* * The words "*concessi & demisi*" import a covenant in law. Bac. Ab. tit. Covenant, [B.] Shepp. Touch. 160; Com. Dig. Cov. [A.] 4. The covenant in such case ceases with the estate out of which it is granted. *Adams* v. *Gibney*, 6 Bing. 656. In an action for not accepting shares in a railroad, which by the contract were to be transferred

made by a person claiming by a legal title inconsistent with his own (*d*); and his proof must correspond with such averment (*e*). If the eviction has been obtained by means of legal process, the plaintiff should prove the execution and judgment, and show how it was obtained. Where the covenant is particular against interruption or eviction by the lessor or grantor, or some other specified person, the plaintiff need not allege, and of course need not prove the title of the party interrupting or evicting him (*f*). Breach.—Quiet enjoyment.

The plaintiff must show some act done, or disturbance of his possession, which amounts to a breach of the covenant. A mere verbal disturbance, by prohibiting the tenant of the covenantee from paying rent, will not amount to a disturbance (*g*).

In support of this plea in excuse for the non-performance of a covenant, the defendant must prove such an entry or eviction as was sufficient to prevent the performance of the covenant. Plea of entry and eviction.

On a covenant to repair the dwelling-house, proof, under this plea, of an entry into the back-yard would not be sufficient, unless it appeared that this entry wholly prevented the defendant from repairing the house (*h*).

In an action of covenant for quiet enjoyment against *A.*, and any person by his means, title or procurement, it is sufficient to prove, by way of breach, a claim of dower by the wife of *A.* (*i*); or an entry by the wife of *A.*, the latter having purchased jointly with his wife (*k*); or by the appointee of

(*d*) *Tisdale* v. *Sir W. Essex*, Hob. 34. *Foster* v. *Pierson*, 4 T. R. 617. *Buckley* v. *Williams*, 3 Lev. 325; Lofft, 460. *Hurd* v. *Fletcher*, 1 Doug. 43. *Evans* v. *Vaughan*, 4 B. & C. 261. *Spencer* v. *Marriott*, 1 B. & C. 457. *Brooks* v. *Humphries*, 5 Bing. N. C. 55.; 6 Sc. 756. Where the lease contains a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title, implied in the word "demise." *Merril* v. *Frame*, 4 Taunt. 329.

(*e*) *Hobson* v. *Middleton*, 6 B. & C. 295.

(*f*) *Perry* v. *Edwards*, 1 Str. 400. *Lloyd* v. *Tomkins*, 1 T. R. 671. Such a covenant extends to *tortious acts* by the specified person. 1 Str. 400. *Nash* v. *Palmer*, 5 M. & S. 374. *Forte* v. *Vine*, 2 Roll. R. 21; 2 Saund. 181, a.

(*g*) 1 Brownl. 81.

(*h*) B. N. P. 165.

(*i*) Godbolt, 333; Pal. 340.

(*k*) *Butler* v. *Swinnerton*, Pal. 339.

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ferred and paid for by the 1st of March or any intermediate period, paying for them at par, with all calls, the plaintiff binding himself to *execute* a legal transfer to the defendant on that day, it appeared that the plaintiff had procured the transfers from a third party, executed, as to the name of the transferee, in blank, which he tendered on the 1st of March to the defendant, and that calls due before that day had not been paid as required by the local Act previous to any transfer; held, upon objection, that the plaintiff having contracted for a conveyance from *him*, it must be intended to be a conveyance in the statutory form, and upon the implied covenant of the plaintiff for title, and that the implied covenant from the third party was not the same thing; secondly, that the objection upon the local Act had been waived by an agreement by the defendant that the plaintiff should not pay such instalments; and lastly and chiefly, that the conveyance required by the Act being clearly one by *deed*, an instrument with the name of the vendor in blank at the time of the sealing and delivery was void. *Hibblewhite* v. *M'Morine*, 6 M. & W. 200. A covenant in law is restrained by a particular covenant. *Nokes* v. *James*, 4 Co. 80; 1 Will. Saund. 60; and *supra*, note (*c*). *Line* v. *Stephenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 183; where express covenants for warranty are introduced, none can be implied from the general terms. See *Stannard* v. *Forbes*, 6 Ad. & Ell. 572; and see *Line* v. *Stephenson*, 4 Bing. N. C. 678. Where a superior landlord distrains on an under-tenant by deed, the latter cannot sue in assumpsit, but must resort to an action of covenant against his lessor. *Schlenker* v. *Moxey*, 3 B. & C. 789. The covenant for quiet enjoyment relates to the assignor's own acts subsequent to the term vesting in him against any subleases or assignment before granted by the assignor. Per Lord Ellenborough. *Barton* v. *Fitzgerald*, 15 East, 542. A covenant by the lessor, that the lessee *paying rent* shall quietly enjoy, is not a conditional covenant. *Dawson* v. *Dyer*, 5 B. & Ad. 584.

A., under a power to which *A.* was party (*l*); or by the eldest son of *A.*, claiming under a settlement made by *A.* (*m*).

Where the defendant covenanted that he had not *permitted*, nor suffered to be done, any act whereby an estate was encumbered, it was held that the assenting to an act which he could not prevent was not a breach of the covenant (*n*).

Covenant to repair.

Under a covenant to keep a house in repair, it is sufficient to keep it in substantial repair, according to the nature and circumstances of the building (*o*); therefore evidence is admissible as to the state and circumstances of the house at the time of the demise (*p*).

On a covenant to keep in repair during the term, an action may be brought during the term (*q*). It is not sufficient evidence of a breach of covenant to show that the house was destroyed by a tempest, unless the covenantor has delayed to repair it beyond a reasonable time (*r*).

Covenant not to sue.

Upon the execution of a bond, the obligee by deed-poll (releasing a former bond payable by the party's executors, &c. for which the latter had been substituted) covenanted not to sue on the latter bond in the lifetime of the obligor; and that if any other should sue in his name, and recover, that the obligee would pay the obligor, during his life, the interest on the sum recovered; held, that it was no bar to an action by an assignee of the bond suing in the name of the obligee; and that, if the action had been brought for the benefit of the obligee, the defendant should have pleaded the fraud (*s*).

Covenant not to assign.

Covenant by lessor against the assignee of lessee, for non-payment of rent; plea, that before the rent became due the defendants assigned, the replication setting forth a covenant by lessee, his executors and administrators, not to assign without licence: held, that the action being founded on privity of estate, the obligation ceased when that privity was destroyed; the plain-

(*l*) *Hurd* v. *Fletcher*, 1 Doug. 43.

(*m*) *Evans* v. *Vaughan*, 4 B. & C. 261.

(*n*) *Hobson* v. *Middleton*, 6 B. & C. 295. A tortious disturbance by a stranger is insufficient. 2 Saund. 178 (n). *Dudley* v. *Folliott*, 3 T. R. 587.

(*o*) It is not meant that the house should be delivered up in an improved state, or that the effect of the elements should be averted, but only that it should be kept in the state in which it was before the demise, by the timely expenditure of money and care. *Gutteridge* v. *Munyard*, 1 Mo. & R. 334. *Burdett* v. *Withers*, 7 Ad. & Ell. 136. And see below, tit. WASTE; and *Dreworth* v. *Johnson*, 5 C. & P. 239. *Harris* v. *Jones*, 1 Mo. & R. 334. *Gutteridge* v. *Munyard*, 1 Mo. & R. 334. A covenant to repair is not broken by alterations and improvements, where improvements are contemplated in the lease, as where the covenant is to keep in repair; (*inter alia*) *Improvements*. *Doe* v. *Jones*, 4 B. & Ad. 126. But under a covenant to repair and uphold (*inter alia*) brick walls, the pulling down a brick wall, separating the court-yard from another yard, is a breach. *Doe* v. *Bird*, 6 C. & P. 196. So if a doorway be broken into the adjoining house, it is a breach of the covenant to repair. *Doe* v. *Jackson*, 2 Starkie's C. 93. A covenant to put the premises, within a reasonable time, in a state of habitable repair, and deliver them up in such state, means such a state, as well with respect to safety as the comfort of the class of persons, and the purpose for which they were to be occupied. *Belcher* v. *M'Intosh*, 2 M. & R. 186. A tenant under a covenant to repair is liable for repairs only; he is not liable for any extra expense, *e. g.* for expense which would be incurred by laying a floor on an improved plan. *Soward* v. *Leggatt*, 7 C. & P. 613. A tenant from year to year is bound merely to keep the premises wind and water tight. *Leech* v. *Thomas*, 7 C. & P. 327. Under a covenant to keep and leave the house in as good repair as it was in at the time of making the lease, the tenant is bound only to do his best to keep it in the same plight; ordinary and natural decay, is no breach of the covenant. Fitz. Ab. Cov. 4; Shepp. Touch. 169.

(*p*) *Burdett* v. *Withers*, 7 Ad. & Ell. 636. *Stanly* v. *Towgood*, 3 Bing. N. C. 4. *Muntz* v. *Goring*, 4 Bing. N. C. 451.

(*q*) *Luxmore* v. *Robson*, 1 B. & A. 584.

(*r*) Shepp. Touch. 173.

(*s*) *Morley* v. *Frere*, 6 Bing. 547.

tiff's remedy against the defendant, if within the covenant, was on the covenant not to assign (*t*).

Where the plaintiff declares as assignee (*u*), and his title is put in issue by one or more of the defendant's pleas, he must prove his title as alleged (*x*); whether as assignee of the reversion, by proof of the due execution of the assignment (*y*); as assignee of the estate of a bankrupt, by proof of the several steps of bankruptcy, and of the assignment (*z*), if an assignment be essential to title; as heir (*a*) of the covenantee; or as his devisee or his executor, according to the circumstances of the case. Plea denying title of plaintiff.

The production of an original lease for a long term, with proof of possession for seventy years, affords presumptive evidence of all mesne assignments (*b*).

Where the action is by an assignee of the reversion on a covenant to pay rent, and the assignment is traversed, the plaintiff may either prove a conveyance duly and regularly made, or a payment of rent to him by the defendant (*c*).

So if the defendant, by one or more pleas, deny that he is bound by the covenant, the plaintiff must prove the liability as assignee (*d*). Upon a Plea denying derivative liability of defendant.

(*t*) *Paul* v. *Nurse*, 8 B. & C. 486.

(*u*) Before the stat. 32 Hen. 8, c. 34, the action of *debt* for rent lay for the assignee of the reversion at common law; and the action being founded on privity of estate, was local. *Walker's Case*, 3 Rep. 22, b.; 4 Mod. 81. *Glover* v. *Cope*, 4 Mod. 80; 1 Will. Saund. 241, *c.* in note. The effect of the above statute was to transfer a privity of contract, and to enable the assignee of the lessor to maintain covenant against the lessee. *Thursby* v. *Plant*, 1 Will. Saund. 237. The lessor might, at common law, maintain debt or covenant for rent, or not repairing, or other covenant running with the land, against the assignee of the lessee; but the action was local, as founded in privity of estate. *Walker's Case*, 3 Rep. 22; 5 Hen. 7, 19, a.; 1 Will. Saund. 241, *c.* in note; and consequently such an action by the assignee of the reversion against the assignee of the lessee is also local, and must be brought in the county where the land lies. *Ibid.* Where *J. B.* seised in fee conveyed to the defendant in fee, to the use that *J. B.*, his heirs and assigns, might take to his use a rent issuing out of the premises, and the defendant covenanted with *J. B.*, his heirs and assigns, to pay the rent, and to build on the premises; it was held that the lessee of *J. B.* could not maintain an action on either covenant against the defendant, for there was no privity either of contract or of estate. *Milnes* v. *Branch*, 5 M. & S. 411.

(*x*) After a lease for twenty-one years, the lessee sublet the premises to *M.* for the term wanting twenty-one days, and afterwards assigned all his interest in the underlease and reversion to the original lessor, which the latter assigned, with all his interest in fee, to the plaintiff by way of mortgage; *M.* also afterwards assigned all his interest in the term granted to him, to the defendants by way of mortgage, but the latter never entered. Held, first, that the intermediate interest in the underlease, carved out of the original lease, still remained as a barrier between the original term and the inheritance, and that the immediate reversion did not merge in the larger estate; secondly, that it was not necessary that the original lessor should have been the grantee of the whole of his immediate lessee's reversion, in order to enable him to sue upon the covenants incident to that reversion; and lastly, that the defendants having received the lease in pursuance of the assignment to them, they became legally possessed, and their legal liability as assignees could not be affected by any trusts created in the deed of assignment; the plaintiffs were therefore entitled to sue on the covenants in such underlease for rent. *Burton* v. *Barclay*, 7 Bing. 745.

(*y*) See tit. DEED.

(*z*) See tit. BANKRUPTCY.

(*a*) See the several titles DEVISEE, EXECUTOR, HEIR, &c.

(*b*) *Earl* v. *Baxter*, 2 Bl. 1228.

(*c*) Peake's Ev. 283, *Doe* v. *Parker*, there cited; and see *Carrick* v. *Blagrave*, 1 B. & B. 531.

(*d*) If he be charged as assignee of the whole, when in fact he is assignee of part only, the non-joinder of the other tenants in common ought, it seems, to be pleaded in abatement. *Mureson* v. *Dawson*, 5 B. & C. 479. In covenant by the lessor against the executor of the assignee of the lessee, become insolvent, for rent accruing subsequently to the death of such assignee; held, that if the latter assented to the assignment made under the 7th Geo. 4, c. 57, and acted as tenant of the premises, his executor was liable as representing the assignee. *Abercrombie* v. *Hickman*, 3 N. & P. 676.

covenant which runs with the land, proof that the defendant is heir will support a declaration which charges him generally as assignee (*e*).

So the assignee, under a plea to that effect, may show an assignment of the term to another before breach (*f*). Notice of such assignment to the plaintiff is unnecessary (*g*); the assent of the assignee will be presumed (*h*).

The defendant may object that he is assignee of part only, where he is charged as assignee of the whole (*i*).

Where the plaintiff declared against the assignees under a commission of bankrupt against the lessee, and averred in the usual form that the estate, right, title, &c. of the lessee came to the defendants by assignment thereof duly made, by virtue of which said assignment they entered into the demised premises, and were possessed thereof for the residue, &c.; it was held, that the averment was not satisfied by proof that the assignees had advertised the lease for sale, (without stating themselves to be the owners,) and without taking any possession of the premises (*k*). But it was said by Lord Ellenborough, that if a bidder had been found, and the defendants had accepted the bidding, that would have been evidence of their assent to take to the premises. And where the assignees of a bankrupt paid rent, not as tenants, but for the purpose of preventing a distress upon the premises where the bankrupt's goods remained, under a protest that they did not mean to adopt the term, unless upon a trial made it should be found to be valuable, and the premises were put up to sale with the plaintiff's concurrence, it was held that they were not liable to covenant for rent, although they had kept the keys of the premises for four months, no application having been made to them to deliver them up (*l*).

(*e*) *Derisley* v. *Custance*, 4 T. R. 75.

(*f*) Where the defendant proved that he had executed the assignment, but it had not been delivered to the assignee, but remained in the hands of the defendant's solicitor, who had a lien upon it, it was held to be sufficient. *Odell* v. *Wake*, 3 Camp. 394.

(*g*) *Pitcher* v. *Tovey*, 1 Salk. 81. *Taylor* v. *Shaw*, 1 B. & P. 21.

(*h*) *Ibid.*

(*i*) *Hare* v. *Cator*, Cowp. 766.

(*k*) *Turner* v. *Richardson and another*, 7 East, 335. See also 1 Esp. C. 234; and see *Page* v. *Godden*, 2 Starkie's C. 209. Where a party assigned all his property in trust for his creditors, and the assignees, shortly after, advertised the property assigned for sale, including a lease, for which there being no bidder, they tendered the key of the premises; held, that the words of the assignment being large enough to include leasehold interests, it was a question for the jury whether, after the defendants were aware of the existence of the lease, they had so dealt with the property as to make themselves assignees of it, and liable to the covenants; but not, if they had done no more than fairly try, by putting up the lease for sale, whether any benefit could be made of it. *Carter* v. *Warne*, 1 M. & M. 479. And see *Wheeler* v. *Bramah*, 3 Camp. 340. *Hanson* v. *Stevenson*, 1 B. & Ad. 303; and *Clarke* v. *Hume*, 1 Ry. & M. 207. In order to charge the assignees of a bankrupt, some evidence must be given of their acceptance of the lease; see 6 G. 4, c. 16, s. 75. *Copeland* v. *Stephens*, 1 B. & A. 593. The allowing the bankrupt to carry on the trade upon the premises for the benefit of creditors, under the occasional superintendance of the assignee, is an acceptance, although the assignee by letter to the landlord disclaim the acceptance. *Clarke* v. *Hume*, 1 Ry. & M. 207. So where assignees, chosen on the 8th, suffered the bankrupt's cows to remain on the premises till the 10th, during which time they were, however, milked by order of the assignees, who had received the key of the premises from the messenger. *Welsh* v. *Myers*, 4 Camp. 368. See further *Hastings* v. *Wilson*, Holt's C. 290. *Hanson* v. *Stevenson*, 1 B. & A. 303. It has been held, that the provisional assignee of an insolvent must be taken to have consented to accept the property. *Crofts* v. *Pick*, 1 Bing. 354. *Doe* v. *Andrews*, 4 Bing. 348. Under the Insolvent Acts, 53 G. 3, c. 102, and 1 G. 4, c. 119, the permanent assignees are not bound to accept it. See the stat. 7 G. 4, c. 57, s. 93, and 1 & 2 Vict. c. 110, ss. 37 & 50. A trustee under an assignment for the benefit of creditors has a reasonable time for consideration whether he will take the lease. *Carter* v. *Warner*, M. & M. 479.

(*l*) *Wheeler* v. *Bramah*, 3 Camp. 340; and now see the statute 6 Geo. 4, c. 16, s. 75.

If the plaintiff state the particulars of the defendant's title, they must, if traversed, be proved as laid (*m*). But under a general allegation, it is sufficient *primâ facie* evidence to prove payment of rent or possession by the defendant (*n*).

Proof of possession by the defendant, or of payment of rent, is *primâ facie* proof that he is assignee. But still the defendant may show that the title is in another, and prove that he is under-tenant only, even though the reversion of but one day be left in the original lessee (*o*). So the devisee of the equity of redemption, the legal estate being in a mortgagee, is not liable to a covenant running with the land (*p*). So he may show that he is but *appointee*, and as being in by the *appointor*, not liable on a covenant binding on assigns (*q*). But an actual entry or possession is not essential to render the assignee of the whole term of a lease liable to the covenant for payment of rent (*r*).

If the plaintiff charge the defendant through a variety of deeds, instead of charging him generally by virtue of divers mesne assignments, and these be put in issue by the plea, the plaintiff must prove the deeds as stated (*s*). In respect of a defence on the ground of illegality of contract, there is no difference between a contract by parol and one under seal (*t*).

Under the plea of release (which must be by deed), it must be proved that the release was executed subsequently to the breach of covenant.

In covenant for non-repair, the defendant, it is said, may examine the plaintiff's witnesses generally as to the state of the premises at the time of the demise, but not as to particular defects, and when they arose (*u*).

A plea of expulsion to a declaration on covenant for non-payment of rent, is not supported by evidence of a mere trespass (*x*). But an expulsion from part suspends the whole rent (*y*).

The evidence peculiar to the pleas of Accord and Satisfaction, Infancy, is treated of elsewhere, under the proper titles.

(*m*) *Turner* v. *Eyles*, 3 B. & P. 461.

(*n*) *Doe* v. *Williams*, 6 B. & C. 41.

(*o*) *Holford* v. *Hatch*, Doug. 178. *Hare* v. *Cator*, Cowp. 766.

(*p*) *Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487.

(*q*) *Roach* v. *Wadham*, 6 East, 289. Where the contract for the purchase of leasehold premises amounted only to an equitable agreement, and there was no legal assignment, it was held that, being equitable assignee of the whole interest, the obligation was co-extensive with that interest, and that the purchaser was liable to indemnify the plaintiff, the equitable assignor, against all damages incurred by reason of breaches of covenant on the lease subsequent to the date of the agreement. *Close* v. *Wilberforce*, 1 Beav. 112.

(*r*) *Williams* v. *Bosanquet*, 1 B. & B. 238, overruling *Eaton* v. *Jaques*, Doug. 438. See 7 T. R. 312; *Stone* v. *Evans*, Woodfall's L. & T. c. 3, s. 15; Co. Litt. 46. b.; 1 Ld. Raym. 367. *Grattan* v. *Diggles*, 4 Taunt. 766. But it seems that in order to charge an executor as assignee, it must be proved that he entered on the premises. *Tilney* v. *Norris*, 1 Ld. Raym. 553.

(*s*) 3 B. & P. 461.

(*t*) In covenant for rent, it is a good plea that the premises were let for the express purpose of being used for drawing oil of tar or pitch, contrary to the provisions of the Building Act. *Gas-light and Coke Company* v. *Turner*, 5 Bing. N. C. 666; 7 Sc. 778; 6 Bing. N. C. 324. On an agreement for relinquishment of a trade for a consideration, and covenant against exercising at any time thereafter the trade of a common carrier to and from certain places, held that the Court could not enter into the reasonableness of the restraint in respect of the consideration, nor declare the covenant void by reason of the restriction being unlimited. *Archer* v. *Marsh*, 6 Ad. & Ell. (Q. B.) 959; and 2 Nev. & P. 562. Also *Hitchcock* v. *Coker*, 6 Ad. & Ell. 438; overruling *Horner* v. *Graves*, 7 Bing. 735. A covenant in a lease of a brewery, that the lessor would not carry on the trade during the demise, is void, as being an instrument of trade. *Hinde* v. *Gray*, 1 Sc. N. S. 123. But see *Archer* v. *Marsh*, and *Hitchcock* v. *Coker*, *supra*.

(*u*) *Young* v. *Mantz*, 6 Sc. 277. See *Stanley* v. *Towgood*, 3 Sc. 313; and 3 Bing. N. S. 4.

(*x*) *Hodgkin* v. *Queenborough*, Willes, 131. B. N. P. 177.

(*y*) Co. Litt. 148. b. *Walker's Case*, 3 Rep. 22. b.

COVERTURE. *See* HUSBAND AND WIFE.

CRIMINAL CONVERSATION.

THE plaintiff, in an action for criminal conversation with his wife, must prove, 1st. The marriage; 2dly. The fact of adultery; 3dly. It is usual to adduce evidence in aggravation of damages.

Marriage. 1st. *His Marriage.*—The plaintiff must prove a marriage in fact; proof of cohabitation and reputation are insufficient (*z*). But this is the only instance in civil cases in which such evidence is insufficient, and the exception in this case is founded partly on the consideration that the proceeding is of a penal nature, and partly as a rule of policy and convenience, to prevent the setting up of pretended marriages for bad purposes (*a*). Even the defendant's admission of the fact has been said to be insufficient (*b*).

The defendant was surprised at a lodging with the plaintiff's wife, and on being asked where *Major Morris*'s wife was, he answered, "in the next room;" this was holden to be insufficient, for it was nothing more than a confession of the reputation that she went by the name of the plaintiff's wife, and not a confession of the fact of marriage (*c*).

Where, however, the defendant has seriously and solemnly recognised the marriage, it seems, upon principle, that his acknowledgment is admissible evidence of the fact (*d*).

Since the action is against a wrong-doer, it seems to be sufficient to prove

(*z*) *Morris* v. *Miller*, 4 Burr. 2057. The reason assigned by Lord Mansfield is, that otherwise parties might be liable to such actions on evidence made by the plaintiff who brings the action. In an action for criminal conversation, the plaintiff and his wife being Quakers, the register of their marriage and proof of its having been celebrated according to the forms of that society, held sufficient. *Deane* v. *Thomas*, 1 M. & M. 361. In an action for criminal conversation, the letters of the wife to her husband and others are admissible in evidence to show the state of the wife's feelings, although they may also state that which would not strictly be evidence. *Willis* v. *Bernard*, 8 Bing. 376.

(*a*) 4 Burr. 2057. *Birt* v. *Barlow*, Doug. 162.

(*b*) Peake's L. Ev. 358. *Birt* v. *Barlow*, Doug. 162. But see tit. ADMISSION. —POLYGAMY.

(*c*) *Morris* v. *Miller*, Burr. 2057; B. N. P. 27. In strictness, however, and upon general principles, it is difficult to exclude such evidence from the consideration of the jury. To rely upon such evidence to prove a fact, the circumstances of which are peculiarly within the plaintiff's own knowledge, and consequently where better proof might be had, and to substitute for it the mere declaration of the defendant, which may be founded on nothing more than the mere assertion of the parties themselves, would fully warrant the highest degree of suspicion and jealousy, so as to induce the jury, on the recommendation of the Court, to require better evidence. Still cases may occur where evidence resting on the same foundation, but merely stronger in degree, would be not only evidence, but almost conclusive of the fact. Suppose, for instance, that in some other proceeding where it was necessary to prove the same marriage, the present defendant had made an affidavit setting forth all the circumstances of the marriage, and that he was himself present at the ceremony, could it be said that such evidence would not be most cogent to prove the fact of marriage? And yet it would be evidence of the same class with the former, and its admissibility would rest on no other basis than any other assertion made by the defendant would do. (Vide *supra*, tit. ADMISSIONS; *Rigg* v. *Curgenven*, 2 Wils. 399; and Lord Ellenborough's observations in *Dickenson* v. *Coward*, 1 B. & A. 679; where he says, "I take it to be quite clear, that any recognition of a person standing in a given relation to others is *primâ facie* evidence, against the person making such recognition, that such relation exists.") These observations, which are made for the purpose of preserving the entirety of a general principle, regard the theory rather than the practice in such cases; for it is quite clear that a jury would be fully warranted in refusing to find the fact of marriage upon evidence so slight, when evidence so much better might be adduced.

(*d*) See the last note, and *supra*, 20.

a marriage according to any religion, as in the case of Anabaptists, Quakers, and Jews (*e*). The evidence to prove a marriage, in fact, which will be more fully considered hereafter (*f*), usually consists in proving an examined copy of the register, and in the testimony of some one who was present at the ceremony, or who can identify the parties, by evidence of their signatures in the register (*g*). So the identity may be proved by other circumstances sufficient to satisfy the jury; such as that a wedding dinner was given upon the occasion of the marriage; that the lady left her house for the purpose of being married, and afterwards was known and addressed by her husband's name (*h*).

2dly. *The fact of Adultery.*—The evidence of this fact, which, from its very nature, is usually circumstantial (*i*), must be sufficient to satisfy the jury (*j*) that an adulterous intercourse has actually taken place. Proof of familiarities, however indecent, is insufficient, if there be reason to apprehend, from the fact of the parties being interrupted, or on any other circumstance, that a criminal conversation has not actually taken place. Fact of adultery.

The nature of the proofs upon this head are too obvious to require specification. They usually consist in evidence of indecent familiarities between the parties (*k*); their elopement; their passing as man and wife at the inn; of the season, frequency and privacy of their meetings, and of all other circumstances attending their intercourse, and indicating the nature of it.

Where a discovery has been made by a servant, it is of importance to show that it was promptly communicated to the party injured; if it was not made till after a quarrel or dismissal from the service, or after a long interval, the evidence labours under great suspicion.

Letters written by the defendant to the wife frequently afford strong evidence of the nature of their intercourse (*l*).

Where the statute of limitation has been pleaded so as to exclude the recovery of damages for adulterous intercourse, which took place at a greater distance of time than six years previous to the commencement of the action, it has been held that anterior acts of adultery are still evidence for the purpose of showing the nature of the connection which subsisted within the six years (*m*).

(*e*) B. N. P. 28, cites *Woolston* v. *Scott*, per Denison, J., at Thetford, where the plaintiff was an Anabaptist, and recovered 500*l*. See *Ganer* v. *Lady Lancsborough*, Peake's C. 17. But it was formerly doubted whether it was not necessary to prove that the marriage was celebrated according to the rites of the church.

(*f*) Tit. MARRIAGE.—POLYGAMY.

(*g*) In consequence of an expression by Mr. J. Buller, in the case of *Birt* v. *Barlow*, a doubt has been raised whether, if the original register be produced, the subscribing witnesses ought not to be called. This doubt seems to be wholly destitute of foundation: the object of such proof is not to bind a party by the contents of an instrument, but merely to prove the identity of the parties; and therefore the objection does not arise, that evidence is adduced to authenticate the instrument different from that which the parties have themselves constituted.

(*h*) See *Birt* v. *Barlow*, Doug. 162.

(*i*) In the Causes Celèbres, tom. 18. p. 451, the law of *England* on this subject is thus caricatured: "Les preuves de l'adultere des femmes sont très difficiles: il faut que le mari puisse prouver qu'il a, comme dit Madame Pernelle du Tartuffe, *vû de ses propres yeux*: autrement il n'est pas ecouté."

(*j*) Presumptive evidence of the fact is sufficient in the Ecclesiastical Courts. See *Loveden* v. *Loveden*, 2 Hagg. Con. 2. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; per Sir W. Scott, Ib. And see *Chambers* v. *Chambers*, 1 Hagg. Con. 444. *Williams* v. *Williams*, Ib. 299. *Elwes* v. *Elwes*, Ib. 277. *Cadogan* v. *Cadogan*, 2 Hagg. Con. 4. *Wood* v. *Wood*, 4 Hagg. Eccl. Rep. 138 (*n*).

(*k*) *Duke of Norfolk* v. *Germaine*, 8 St. Tr. 27.

(*l*) B. N. P. 28.

(*m*) *Duke of Norfolk* v. *Germaine*, 8 St. Tr. 27.

The confession of the wife will be no evidence against the defendant (*n*); but a discourse between the wife and the defendant is evidence (*o*), as also are letters written by the defendant to the wife.

Damages. 3dly. *Evidence of Damage.*—There is no case in which the damages depend more upon the particular circumstances of the case than in the action for adultery. The injury to the husband in the dishonour of his bed—the alienation of his wife's affections—the destruction of his domestic comforts, and the suspicion cast upon the legitimacy of her offspring, is usually visited with considerable damages where there has been no fault on the part of the plaintiff. It is a trite observation, that such a loss does not admit of any pecuniary estimate or compensation; this is true: but, on the other hand, such damages, if not an adequate retribution, constitute the only one which the law can award; and the impossibility of giving full redress is a bad reason for giving none, and for depriving morality of one of its safeguards.

Evidence in aggravation. Evidence in aggravation usually consists in showing the rank and quality of the plaintiff; the condition of the defendant; that he was received by the plaintiff as a friend or relation; that he was dependent on the plaintiff; that he was a man of fortune and condition; that the plaintiff and his wife, previous to the seduction, lived upon terms of affection and domestic comfort. For this purpose general evidence (*p*) is admissible by any witness acquainted with the family, who can testify to their demeanour and conduct, and to the terms on which they lived. Letters written by the wife to the plaintiff previous to any suspicion of a criminal intercourse are also admissible with the same view; but, in order to obviate all suspicion of collusion in such case, it is essential to give reasonable evidence to show that the letters had existence at the time (*q*); as by proof that the wife, at the time of writing, showed or read them to a witness (*r*); and it is desirable, under such circumstances, to explain the reason of the wife's living apart from the husband at the time when she wrote such letters (*s*). But it does not appear to be essential to give such explanatory evidence where there is no ground to suspect collusion (*t*).

The wife's letters to a third person, written before suspicion of the criminal intercourse, are also admissible, although they contain facts which are not in themselves admissible evidence (*u*).

The opinion which a witness has formed of the wife's affection for her husband, from the anxiety which she has expressed for him, and her mode of speaking of him during his absence, is also evidence to the same end (*v*).

Proof of a settlement, and provision for the children, is also evidence in aggravation (*x*).

(*n*) B. N. P. 28. *Baker* v. *Morley*, Guildhall, 1739.

(*o*) *Ibid.* So letters written by the wife to the defendant and received by him, would, coupled with his conduct after the receipt, be evidence against him. See the observations of Sir W. Scott, *Loveden* v. *Loveden*, 2 Hagg. 52.

(*p*) Ld. Ellenborough, in *Trelawney* v. *Coleman*, 1 B. & A. 90, is reported to have said, "What the husband and wife say to each other is evidence to show their demeanour and conduct." But *qu.* whether the evidence in such case ought not to be general.

(*q*) *Trelawney* v. *Coleman*, 2 Starkie's C. 191; 1 B. & A. 90. *Edwards* v. *Crock*, 4 Esp. C. 39. *Willis* v. *Bernard*, 8 Bing. 376.

(*r*) *Ibid.* *Edwards* v. *Crock*, 4 Esp. C. 39.

(*s*) *Trelawney* v. *Coleman*, 2 Starkie's C. 191.

(*t*) *Ibid.*

(*u*) *Willis* v. *Bernard*, 8 Bing. 376.

(*v*) *Ibid.*

(*x*) B. N. P. 27. Evidence of the amount of the *defendant's* property is not admissible with a view to damages, per Alderson, B. *James* v. *Beddington*, 6 C. & P. 589. Contra, 1 Selw. N. P. 25. See tit. MARRIAGE.

The representation made by the wife to her husband on the eve of her elopement is admissible, as part of the *res gestæ*, in order to remove all suspicion of connivance on the part of the husband (*y*).

The plaintiff cannot go into general evidence of the wife's good conduct until an attempt has been made to impeach it (*z*).

Evidence for defendant in bar.

The defendant, under the general issue, will be entitled to enter into any evidence to disprove the marriage, or the fact of adultery, or to show that the plaintiff has sustained no injury in law or fact. It has, in one instance, been held that the defendant might prove the plaintiff's connection with other women after his marriage, in bar of the action (*a*); but in a subsequent case (*b*), it was decided that the fact went in mitigation of damages only.

The defendant may show in mitigation the misconduct of the plaintiff, in respect of illicit connection with other women (*c*), or ill treatment of the wife; that he turned her out of doors, and refused to maintain her (*d*).

It was laid down by Lord Mansfield as clear law, that if a woman be suffered to live as a prostitute with the privity of her husband, and a man be thereby drawn into criminal conversation, no action will lie: it is a damage without an injury. But if it be not with the husband's privity, it will only go to the damages, let her be ever so profligate. And Pratt, C. J., declared himself to be of the same opinion, in a similar case, about the same time (*e*).

So if the criminal connection can be shown to have taken place with the husband's privity and *consent*, the action will not be maintainable (*f*); for a plaintiff cannot be allowed to recover damages in a court of justice grounded on his own turpitude; and besides, the maxim applies *volenti non fit injuria*.

In one case it was held (*g*), that proof that the husband and his wife were

(*y*) *Hoare* v. *Allen*, 3 Esp. C. 276.

(*z*) See tit. CHARACTER.

(*a*) By Ld. Kenyon, in *Wyndham* v. *Ld. Wycomb*, 4 Esp. C. 16. *Sturt* v. *Marquis of Blandford*, there cited.

(*b*) *Bromley* v. *Wallace*, 4 Esp. C. 237.

(*c*) *Bromley* v. *Wallace*, 4 Esp. C. 237.

(*d*) B. N. P. 27. A witness called to prove the previous harmony of the husband and wife, may be cross-examined as to declarations made by her previous to the adultery, of ill usage by him. *Winter* v. *Wroot*, 1 Mo. & R. 404.

(*e*) *Smith* v. *Allison*, Sittings at West. cor. Ld. Mansfield, after Trin. 5 Geo. 3, B. N. P. 27. But in a previous case of *Cibber* v. *Sloper*, (per Lee, C. J., cited B. N. P. 27,) it was holden that the action lay, although the privity and consent of the husband to the defendant's connection with the wife were fully proved.

(*f*) B. N. P. 27. *Hodges* v. *Windham*, Peake's C. 39. *Duberley* v. *Gunning*, 4 T. R. 655. The plaintiff is entitled to recover, unless he is shown to have been in some degree a party to his own dishonour, by giving a general license to the wife to conduct herself generally as she pleased towards men, or to have assented to the particular instance, or to have renounced totally and permanently all advantage from her society; all which, as well as the amount of damages for the loss of the society of such a person, are questions for the jury. *Winter* v. *Henn*, 4 C. & P. 494. And even where the husband had never published his marriage, and only occasionally visited her, whilst living with her mother as an unmarried daughter, and permitted her to receive the visits of other men, and to follow a profession particularly exposed to danger; held, that such circumstances were only in mitigation of damages, and not in bar of the action. *Calcraft* v. *Lord Harborough*, 4 C. & P. 499. In *Trevanion* v. *Daubuz*, Bodmin Sum. Assizes, 1834. Roscoe on Evidence, 482. Patteson, J. told the jury that the neglect or misconduct of the husband was only matter of mitigation, but that if his conduct was occasioned by a desire to get rid of his wife, if he had thereby encouraged the advances of the defendant, and testified a desire to throw her away, they would properly find for the defendant; and see *Winter* v. *Henn*, 4 C. & P. 498. *Howard* v. *Burtonwood*, 1 Sel. N. P. 10. *Hoare* v. *Allen*, Sel. N. P. 11. 3 Esp. C. 276.

(*g*) *Weedon* v. *Timbrel*, 5 T. R. 357. *Bartelot* v. *Hawke*, Peake's C. 7. In the

parted upon articles of separation, was a bar to the action; but in a later case, the propriety of that decision has been doubted. And at all events, where the husband does not, by the articles of separation, renounce all future intercourse and society with his wife, and all assistance to be derived from her in respect of the education of his children, the separation will not be a bar to the action (*h*).

Mere separation for the sake of convenience, as where the parties are servants in different families (*i*), is no bar; neither is any voluntary separation without deed (*k*).

Evidence for defendant in mitigation.

The defendant may show, in mitigation of damages, that the wife had before eloped, or had been connected with others; that she had borne a bastard before marriage (*l*); that she had been a prostitute previous to her connection with the defendant (*m*); that she was a woman of loose conduct, and notoriously bad character; that she made the first overtures and advances to the defendant (*n*); that his means and expectations are inconsiderable.

Where, on cross-examination of the plaintiff's witnesses, it was insinuated that the plaintiff had left his wife abroad against her will; a letter written by her on that occasion, and before the criminal acquaintance with the defendant commenced, was held to be admissible evidence (*o*).

Evidence aimed against the previous character and conduct of the wife is obviously of a dangerous nature, and not to be resorted to, unless it be of a strong and decisive cast; a failure in the attempt to affect the character of the wife at a time previous to the criminal intercourse, would probably increase the amount of the damages very considerably.

A declaration made by the wife at the time of eloping from the husband, that she fled through fear of personal violence, is evidence in an action against the adulterer (*p*).

The letters of the wife to the defendant are not in general evidence for

latter case the husband and wife had been separated by articles, and Lord Kenyon said, that if the parties were separated by mutual consent at the time, he was of opinion that the husband could not maintain the action, for it was impossible to receive any injury by losing the society of a wife whom he had already abandoned; but proof being given of adultery previous to the separation, the plaintiff had a verdict. In *Hodges* v. *Windham*, Peake's C. 39, the parties living apart under articles of separation at the time of the adultery, Lord Kenyon himself said, that he doubted on the question, but allowed the case to proceed, taking a note of the objection. Lord Ellenborough, in *Chambers* v. *Caulfield*, 6 East. 248, *infra*, note (*h*), said, that he did not consider the question as concluded by the case of *Weedon* v. *Timbrel*; and Abbott, C. J., in *Graham* v. *Wigley*, 2 Roper's Husband and Wife, 323, 2d ed., held that a voluntary separation without deed, so that a suit was still maintainable for restitution of conjugal rights, was no bar.

(*h*) *Chambers* v. *Caulfield*, 6 East, 244.

(*i*) *Edwards* v. *Crock*, 4 Esp. C. 39.

(*k*) Per Abbott, C. J., in *Graham* v. *Wigley*, 2 Roper's Husb. & Wife, 323, 2d ed. *supra*, note (*f*).

(*l*) *Roberts* v. *Malston*, per Willes, C. J., Hereford, 1745; B. N. P. 296.

(*m*) B. N. P. 27. But it is there also laid down, that the defendant cannot give evidence of the general reputation of her being or having been a prostitute, for that may have been occasioned by her familiarity with the defendant; though, perhaps, having laid a foundation, by proving her being acquainted with other men, such general evidence may be admitted. But acts of misconduct by the wife with others after the adultery are not admissible. Per Ld. Kenyon, *Elsam* v. *Fawcett*, 2 Esp. C. 562.

(*n*) *Elsam* v. *Fawcett*, 2 Esp. C. 562; 1 Sel. N. P. 25. *Gardiner* v. *Jadis*, 1 Sel. N. P. 25.

(*o*) *Willis* v. *Bernard*, 8 Bing. 376.

(*p*) Per Ld. Ellenborough, 6 East, 188. Here the evidence is admissible, because it explains the nature of the act; the general rule is, that her unconnected declarations are not evidence on either side. *Winsmore* v. *Greenbank*, Willes, 577.

the latter (*q*). Where, however, they were written previously to any illicit intercourse, they may be admissible for the purpose of showing solicitation by the wife (*r*).

The recovery against another defendant, in respect of a similar cause of action, which accrued during the same period, is no bar to the action (*s*).

CRUELTY TO ANIMALS, 5 & 6 Will. 4, c. 59.

CUSTOM (*t*).

Different kinds of.

CUSTOMS, with a view to the present object, may be classed, 1. As the *general* and ancient customs of the realm; 2. Particular *local* customs; 3. *Mercantile* customs, which are not part of the ancient law, but have been ingrafted into it; 4. Customs, or rather *usages*, which are so common and prevalent as to afford a presumption of their adoption as matter of contract in particular instances.

General customs.

It would be foreign to the present purpose to observe upon the first of these classes. Such customs constitute a large portion of the *lex non scripta*, or common law of the land. These are not matter of evidence; where a doubt arises concerning them, it is to be resolved by the Judges in the several courts of justice. They are, to use the language of Sir W. Blackstone, the depositaries of the laws, the living oracles who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land (*u*).

Local customs.

2dly. Particular customs which affect the inhabitants of particular districts.

The customs of *Gavelkind* and *Borough English* are noticed by the law without proof (*v*), but other private customs must be pleaded and proved. The customs of London differ from others in point of trial. If the existence of the custom be brought in question, it is not tried by a jury, but by certificate from the lord mayor and aldermen by means of the recorder (*x*), unless the corporation be interested in the custom, as where they claim a right of taking toll, and then they are not allowed to certify in their own behalf (*y*).

In order to establish a particular local custom before a jury, it must be shown that it has existed so long that the memory of man runneth not to the contrary; for if it appear to have originated within time of legal memory, that is, since the beginning of the reign of Richard I., it is not a good custom (*z*).

Next it must appear, that the usage has been *continued*; for if there be any chasm or interruption of the right within the time of legal memory, there must have been a revival or beginning within the time of legal memory, which will avoid the custom. But an interruption in the possession or enjoyment only, though for 10 or 20 years, will not destroy the custom; as, if

(*q*) *Baker* v. *Morley*, B. N. P. 28.
(*r*) *Elsam* v. *Fawcett*, 2 Esp. C. 562.
(*s*) *Gregson* v. *M'Taggart*, 1 Camp. 415.
(*t*) Prescription is always personal, and made in the name of a certain person and his ancestors, and those whose estate he hath; custom is local and alleged in no person, but that within a manor, &c. is such a custom, and that serves for those who cannot prescribe in their own name, because not in the name of any person certain, as inhabitant of a town, &c. *Foiston* v. *Crachroode*, 4 Co. 31.
(*u*) 1 Comm. 69. A custom which runs through the whole land is the common law. Per Littleton, J.; Y. B. 8 Ed. 4, 18, 19.
(*v*) Co. Litt. 175.
(*x*) Cro. Car. 516.
(*y*) Hob. 85.
(*z*) 1 Bl. Comm. Introd. s. 3; 2 Roll. 269, l. 10. 45. See tit. PRESCRIPTION.

the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, although they do not use it for 10 years, it only becomes more difficult to be proved; but if the *right* be discontinued, though but for a day, the custom is at an end (*a*). It must also have been peaceable, and acquiesced in, and not subject to contention and dispute; for since customs originate in common consent, their being immemorially disputed at law, or otherwise, is a proof that such consent was wanting.

Customs must also be reasonable, or rather, taken negatively, must not be unreasonable, which according to Sir Edward Coke (*b*) is not to be always understood of every unlearned man's reason, but of artificial or legal reason, warranted by authority of law; upon which account a custom may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it (*c*).

Requisites of.

To constitute a legal custom, it is not only necessary that its existence should be established by evidence, and also that it should be reasonable, but that it should be certain, compulsory, and consistent (*d*).

The usual evidence of custom consists in acts of usage within the knowledge and experience of living witnesses; upon which alone, and without the aid of more remote evidence of a documentary or traditionary nature, the presumption of a custom may be built (*e*).

It consists also in the proof of court-rolls, customaries, and other ancient writings, the nature and force of which, in the proof of customary descents and tenures, have already been considered (*f*); and also in reputation and traditionary declarations, and in such decrees, judgments, and other docu-

(*a*) 1 Comm. Int. s. 3.

(*b*) 1 Inst. 62.

(*c*) 1 Comm. Int. s. 3; 1 Inst. 62. A custom that none but a freeman, or the widow or partner of a freeman, shall sell by retail in a city or the suburbs, is valid. *Mayor of York* v. *Welbank*, 4 B. & A. 438. Where there is a custom to exclude foreigners from exercising a trade within a corporation, a bye-law to support the custom, which gives a penalty to any but the corporation, is bad. *Totterdell* v. *Glazby*, 2 Wils. 266. A custom is good for a tenant to have a way-going crop; *Wigglesworth* v. *Dallison*, 1 Doug. 201; that he may leave the way-going crop in the barn, *Beavan* v. *Delahay*, 1 H. B. 5; that beech shall be deemed to be timber, *Aubrey* v. *Fisher*, 10 East, 446. A custom for the churchwardens to set up monuments in a church without the consent of the rector or ordinary is illegal. *Beckwith* v. *Harding*, 1 B. & A. 508. See also *Fryer* v. *Johnson*, 2 Wils. 28. So is a custom to appoint separate churchwardens and overseers, and make separate rates for a borough within a parish, and the rest of the parish. *R.* v. *Gordon*, 1 B. & A. 524. So, though a custom for all the *inhabitants of a parish* to play at all kinds of lawful games, at all seasonable times, within a particular close, is good, such a custom for *all persons* for the time being, being in the same parish, is bad. *Fitch* v. *Rawling*, 2 H. B. 393. So a custom for poor and indigent householders, living within a particular district, to cut and carry away rotten boughs and branches, cannot be supported, the description of persons being too vague. *Selby* v. *Robinson*, 2 T. R. 758; and see *Steel* v. *Houghton*, 1 H. B. 51. *Worlledge* v. *Maning*, 1 H. B. 53, n.; *R.* v. *Price*, 4 Burr. 1925. See tit. MANOR. A custom contrary to the principles of resulting trusts is bad. *Lewis* v. *Lewis*, 2 M. & R. 449. To seize and burn unwholesome meat is good. *Vaughan* v. *Howard*, 1 Mod. 202; 2 Mod. 56. So for a leet jury to destroy measures found by them to be false, is lawful. *Willcock* v. *Windsor*, 3 B. & Ad. 43. A custom for the lord of a manor to inclose without limit, is bad. *Arlett* v. *Ellis*, 7 B. & C. 346. And a custom depriving the rector of his common-law right when not immemorial, cannot be established by mere long usage; nor will an allegation of a custom "in parishioners" to elect be supported by evidence of the exercise by "parishioners paying church rates." *Arnold* v. *Bishop of Bath and Wells*, 5 Bing. 316; 1 B. & Ad. 605.

(*d*) See 1 Bl. Comm. 78, 9.

(*e*) Usage, though it be not ancient, which is admissible and unopposed by opposite evidence, is usually conclusive. *R.* v. *Hoyte*, 6 T. R. 430.

(*f*) See COPYHOLD; and Vol. I. Ind. tit. CUSTOM.

ments as fall within the general principle on which reputation is admissible (*g*).

With respect to reputation and traditionary declarations, as applied to the proof of customs, some rules are to be observed which have already been noticed. Proof by reputation.

1st. They must be supported by evidence of the exercise of such right or custom (*h*); 2dly, must be of a public nature (*i*); 3dly, derived from persons likely to know the facts (*k*); 4thly, must be general (*l*); 5thly, must be free from suspicion (*m*).

The entry by homage on the court-roll is evidence to prove a custom within the manor, although there be no evidence of the exercise of that custom in any particular instance; for it is the solemn opinion of the homage, delivered upon oath upon being convened to inquire into the point, and founded on all the information which tradition and personal observation can give them (*n*). So an ancient writing found amongst the court-rolls of a manor, and delivered down from steward to steward, and purporting to be *ex assensu omnium tenentium*, is evidence to prove a customary mode of descent, as that the lands shall descend to the eldest sister where there is no son or daughter (*o*). By court-rolls.

It has been held that a single instance of a surrender in fee by a tenant in special tail of a copyhold estate, was (being unresisted by other evidence) evidence to prove a custom within the manor to bar entails by surrender, although the surrenderor had not been dead twenty years (*p*).

In general, the custom of one manor or other district (*q*) is not admissible to prove the existence of the same custom in another manor, for without some general connecting link the existence of the custom in one place affords no presumption of the existence of a similar custom in another. But if the custom in question be a particular incident to some general tenure which is common to two manors or districts, then the existence of the incident custom in one is evidence of its existence in the other also (*r*); otherwise, a custom in one parish is no evidence of the existence of the same custom in an adjoining parish (*s*); and the custom in one archdeaconry is not admissible to show that the same usage prevails in another archdeaconry (*t*). Where the issue was upon a custom in the borough of Hastings, which was stated to be one of the Cinque-ports, it was held that a customal was evidence which represented the custom to exist in each of the Cinque-ports, although it was Custom of different districts.

(*g*) B. N. P. 295. *R.* v. *Eriswell*, 3 T. R. 709. *Morewood* v. *Wood*, 14 East, 327, n.

(*h*) Vol. I. Ind. tit. CUSTOM.

(*i*) Ibid.; and *Weeks* v. *Sparke*, there cited, 1 M. & S, 679; B. N. P. 295. Because, according to Lord Kenyon, all mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together about it, which cannot apply to private prescription. 14 East, 327, n.

(*k*) Vol. I. Ind. tit. CUSTOM.

(*l*) Ibid. B. N. P. 295.

(*m*) Ibid.

(*n*) 5 T. R. 26.

(*o*) *Denn* v. *Spray*, 1 T. R. 466.

(*p*) *Roe* v. *Jeffrey*, 2 M. & S. 92, *supra*.

(*q*) Where there was no evidence of the existence by custom, for the Crown to have the feudal right of primer seisin, or *l'année de succession*, upon a fief, being one of the five great fiefs in Jersey; held, that it could not be supported, the existence of such a right in one country affording no inference in favour of it in another; and parties claiming such a feudal burden are bound to establish by custom in the country where it is sought to be established. *Attorney-general* v. *Symonds*, 1 Knapp, 390.

(*r*) *Duke of Somerset* v. *France*, Str. 652; 3 Keb. 90; Fost. 41. 44; Doug. 495; Cowp. 808.

(*s*) *Furneaux* v. *Hutchins*, Cowp. 808.

(*t*) *Ruding* v. *Newell*, Str. 933, Fost. 41; Doug. 495.

urged that it was not admissible to prove a custom alleged to be the custom of Hastings and not co-extensive with the Cinque-ports (*u*).

So, in some instances, where an analogy arises from the nature of the subject-matter, one custom may be evidence to prove another; as with respect to the right of soil in fen lands, or the profits of mines (*x*). Where the question was as to the right of a copyholder in fenny and marshy lands to dig up the lord's soil for turf, evidence was admitted of the custom in an adjacent manor.

Mercantile customs.

3dly, The Customs of Merchants, or *Lex Mercatoria*.—These are, in strictness, a branch of the general law of England. For although the learned writer of the Commentaries has classed the Customs of Merchants under the same head with Local Customs (*y*), they are very different in many essential respects, particularly in the following: they are general and binding on all without proof, and it is not necessary that they should have prevailed for time beyond legal memory, and they may be valid, although inconsistent with the old common law. This system of customs is of mercantile invention and practice, and has been ingrafted into the common law for the benefit of trade and commerce. It is curious to observe the process by which those rules, which were in the first instance adopted by merchants for their own convenience, have become embodied with the common law; and it is useful to do so in order to distinguish between those mercantile customs which have been thus introduced, and others which are not already recognized by the law, but which may nevertheless be established by proof, and others again which may be used in evidence for the sake of the presumptions which they afford as to the intention of the parties in particular instances.

General mercantile customs, which have frequently become the subject of legal investigation in the course of evidence, when ascertained by long experience to be of public use and utility, are at last recognized and adopted by the law without further proof. It would be evidently fruitless and nugatory to go on requiring the same proof of usage in every particular instance. Hence that custom or usage which was at first but *evidence* of the intention of the parties becomes at last a general rule of law; and this has happened in some instances even where the mercantile custom has been inconsistent with the rules of common law, as in the instance of bills of exchange (*z*).

When such general customs have been adopted and recognized by the law, they are no longer subject to variation according to new practices and devices introduced by merchants.

Not subject to variation.

It is a mistake to suppose that the law, in recognizing the *lex mercatoria*, adopts it subject to all the new fashions of merchants, or liable to be explained *toties quoties* by their practice and understanding on the subject. Such evidence may indeed be applicable where no general rule has been established, and is frequently received for such purposes; but it may be laid down as a general position, that where a mercantile rule has become part of

(*u*) *Moore* v. *The Mayor, &c. of Hastings*, 10 St. Tr. Append. 137.

(*x*) Per Ld. Hardwicke, 2 Atk. 189.

(*y*) 1 Comm. 75; Winch. 24.

(*z*) The history of these instruments affords a singular instance of the tendency of such customs to ingraft themselves into the common law. Formerly the Courts would not recognize the custom of merchants with respect to any but foreign bills of exchange; they then relaxed in favour of inland bills drawn by *merchants*; and finally held that the custom was binding upon all. It is usual even at this day to describe a bill of exchange to have been drawn according to the custom of merchants, although the necessity of proof, or even of the allegation, has long been exploded.

the general law, no evidence of usage can be received to contradict or alter it, any more than such evidence would be admissible to impugn any other rule of common law. Custom of merchants not variable.

Thus in the case of *Edie* v. *East India Company* (*a*), where the question was whether a bill of exchange indorsed to *C.* without the addition of the words "*or order*," was negotiable, it was held that evidence was inadmissible to show that by the custom of merchants such an instrument was not negotiable, the Courts having already decided in two instances in the affirmative (*b*). In that case Mr. J. Foster said, "Much has been said about the custom of merchants, but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts; the true distinction is between general customs (which are part of the common law), and local customs, which are not so. This custom of merchants is the general law of the kingdom; part of the common law; and therefore ought not to have been left to the jury after it had been settled by judicial determinations." And in the case of *Pillans* v. *Van Mierop* (*c*), *Lord Mansfield* said a witness cannot be admitted to prove the law of merchants.

A custom, however prevalent it may be amongst merchants, must be sanctioned by the Courts as reasonable, before it can be considered as a general and legal custom (*d*). In the case of *Hawkins* v. *Cardy* (*e*), the plaintiff alleged a special custom amongst merchants in the declaration, to which the defendant demurred, and thereby admitted the existence of the custom, when the Court held that the custom was void, and gave judgment for the defendant.

If a mercantile custom be insisted upon which the law has not recognized, or if there be a doubt as to the existence of the custom, it is proper to prove it as a fact by evidence (*f*). Such a custom must be proved by evidence of facts, and not by mere speculative opinions (*g*); by means of witnesses who have had frequent and actual experience of the custom (*h*). The testimony of those who speak from report only and not from particular instances within their own knowledge, if receivable at all, is of no weight (*i*).

4thly, Customs or usages which are not recognized by the law of the land, but which may be used as presumptive evidence (*k*) as to the intention of the parties in particular instances. Common usage;

Where parties have not entered into any express and specific contract, a Presumptions from.

(*a*) Burr. 1216.

(*b*) *More* v. *Manning*, Comyns, 311. *Acheson* v. *Fountain*, 1 Str. 557.

(*c*) Burr. 1669.

(*d*) *Todd* v. *Reid*, 4 B. & A. 210.

(*e*) Carth. 466; 1 Ld. Raym. 130.

(*f*) By Wilmot, J., 2 Burr. 1228. Where a plaintiff, a ship-broker, claimed half commission as reasonable compensation for having done all in his power to procure the hire of the ship, a memorandum for the charter-party having been signed, but the contract went off, and the ship got employed; held, that the alleged custom not being proved, he could not maintain the action. *Read* v. *Rann*, 10 B. & C. 438.

By the custom of London, a ship-broker is not entitled to charge for trouble in procuring a charter for a ship, where the treaty goes off and the contract is incomplete, although it goes off through the act of the owner. *Broad* v. *Thomas*, 7 Bing. 99; and 4 C. & P. 338.

(*g*) Per Foster, J., *Edie* v. *The East India Company*, Doug. 519.

(*h*) Skinn. 54, pl. 7; Burr. 1228; Doug. 519.

(*i*) Per Lord Kenyon, C. J., *Savill* v. *Barchard*, 4 Esp. C. 53.

(*k*) If there be a general usage to deal with common carriers in their way (*i. e.* for a general lien), all persons dealing in the trade are supposed to contract with them on the footing of the general practice, adopting the general lien into their particular contract. Per Ld. Ellenborough, C. J. in *Rushforth* v. *Hadfield*, 6 East, 519. A custom which runs through the whole land is the common law. Per Littleton, J., Y. B. 8 Ed. 4, 18.

Common usage; presumptions from.

presumption nevertheless arises that they meant to contract and to deal according to the general usage, practice and understanding, if any such exist, in relation to the subject matter (*l*.) Thus in an action on a policy of insurance, evidence is admissible to show the custom of a particular branch of trade, for every insurer is presumed to be acquainted with the practice of the trade in which he insures, although it has been but recently established (*m*), and the usage has existed but for a year.

Although the custom of one manor be not evidence to prove the existence of a similar custom in a different one, yet the case is different where the question concerns a particular branch of trade (*n*), for then it seems that the manner of carrying on trade at one place may be evidence of the mode of carrying it on in another. Thus in an action on a policy on a ship on a fishing voyage to Labrador, evidence of the custom in the Newfoundland trade was admitted to prove that there had been no unnecessary delay in unloading the cargo (*o*).

Where an agreement between parties is general or doubtful, the custom and usage of the country in which it was made are frequently evidence of the terms upon which the parties meant to contract; for in the one case, their silence raises a presumption that they intended to be governed by the usual course of dealing, in such cases, prevalent in the neighbourhood; and in the latter, it is reasonable to suppose that they intended to use the dubious term in that sense in which it was generally understood, either in the neighbourhood, or in the particular course and habit of dealing to which the agreement relates. Thus a tenant from year to year generally is bound to manage the land in a husbandlike manner, according to the custom of the country (*p*). So, although in general six months notice is necessary to determine a tenancy from year to year of lands, a longer may be necessary, or a shorter sufficient, according to the custom of the country, without any express contract to that effect (*q*). So where the terms of the hiring of a servant are doubtful, they may, it seems, be explained by the custom as to hiring servants in that country (*r*).

So, where the tenant's time of entry is doubtful, the usage and custom of the country as to the time of entry is evidence (*s*). And even where the contract is special, and by deed, evidence of custom is admissible to establish rights consistent with and consequent upon the stipulations in the contract: as to show that a tenant under a lease is entitled to an away-going crop, according to the custom of the country (*t*); or that a heriot is due by custom on the death of a tenant for life, although not mentioned in the lease (*u*); for such customs are not repugnant to the contracts, but consistent with them, and the rights are consequent upon the taking of the land. But no customary right can be established which is *inconsistent* with the terms of a contract.

(*l*) Doug. 519. *Savill* v. *Barchard*, 4 Esp. C. 53.

(*m*) Per Ld. Mansfield, Doug. 495.

(*n*) Per Buller, J. *Noble* v. *Kennoway*, Doug. 495.

(*o*) *Noble* v. *Kennoway*, Doug. 493.

(*p*) *Powley* v. *Walker*, 5 T. R. 373; *sup.* 58.

(*q*) *Roe* v. *Wilkinson*, Butler's Co. Litt.; and *Roe* v. *Charnock*, Peake's C. 5; *infra*, tit. EJECTMENT.

(*r*) *Navestock* v. *Standon Massey*, B. S. C. 719; Bott, 238. But in that case it seems to have been unnecessary to resort to such evidence in order to establish the settlement; and Aston, J., did not put the case on that footing. And see *R.* v. *Skiplam*, 1 T. R. 490.

(*s*) Evans's Pothier, vol. ii. p. 335; and see tit. PRESUMPTION.

(*t*) *Wigglesworth* v. *Dallison*, 1 Doug. 101, affirmed in the Exchequer Chamber.

(*u*) P. C. *White* v. *Sayer*, Palm. 211.

Common usage; presumptions from.

A custom for a lord of a manor to have common of pasture in all the lands of his tenants for life or years, is void, because the custom is contrary to the lease (*x*); nor would the custom of the country be evidence to show a different time of quitting from that expressed in the lease (*y*).

Where, indeed, the terms used in a contract are of dubious meaning, the custom and usage of the country, or of any particular class of persons, as merchants conversant with the term, to use it in a particular sense, is evidence that the parties themselves so intended to use it. But where the meaning of the terms is plain and unequivocal, and *à fortiori*, where the law has annexed a particular meaning to the use of the term, it seems to be an universal rule that no evidence can be admitted of a custom or usage to receive such terms in a different sense (*z*).

Where a lease was from Michaelmas generally, it was held that it must be taken *primâ facie* to import new Michaelmas, and that evidence could not be admitted to show the understanding of the parties that the holding was to be from old Michaelmas (*a*); and the same rule seems equally to exclude the evidence of custom and usage for the purpose of showing that old Michaelmas was meant, since such evidence is merely the means of showing in what sense the contracting parties meant to use the particular term in question (*b*).

So a *reddendum*, in an old renewed lease, of so many quarters of corn, means the Winchester, and not the customary, bushel (*c*).

An agreement to sell a number of acres of land generally, must be understood of statute, and not of customary, acres (*d*).

On the question, whether a liberty to cruize for six weeks authorized the party to cruize for the space of six weeks in the whole, taken at different intervals, *Lord Mansfield* held that the conduct of the captain in other instances under similar circumstances was admissible in evidence (*e*).

On a question whether unnecessary delay had been practised, the witness was admitted to state in evidence that the delay had not been greater than they had practised upon similar occasions (*f*).

(*x*) P. C. *White* v. *Sayer*, Palm. 211.

(*y*) Per Le Blanc, J., 6 East, 122.

(*z*) See PAROL EVIDENCE.

(*a*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312. This case seems to overrule that of *Forley* v. *Wood*, there cited; in which Lord Kenyon held at *Nisi Prius*, that evidence was admissible, that, by the custom of the county of Kent, all demises to hold from Michaelmas commenced at old Michaelmas. *Qu.* however, whether, when the lease mentions a particular time for the commencement of the tenancy (as, Lady-day), and by the custom of the country it is usual to enter on the tillage lands at Candlemas, and the rest of the premises at Lady-day, the lease may not be considered as specifying the substantial time of holding, and as silent with respect to the subordinate terms of entry, so as to admit evidence of the custom. See the *dictum* of the Court in *Doe* v. *Snowden*, 2 Bl. R. 1225. *Doe* v. *Watkins*, 7 East, 551. *Doe* v. *Spence*, 6 East, 120. *Doe* v. *Howard*, 11 East, 498.

(*b*) In *Doe* v. *Benson*, 4 B. & A. 588, the distinction was taken between a letting by parol, in which case such evidence is admissible, and a letting by deed or other writing; but it seems that in the case of *Forley* v. *Wood*, there was a written lease. See Runnington's Eject. 112.

(*c*) *Master, &c. of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338. *R.* v. *Major*, 4 T. R. 750. By the stat. 22 & 23 Car. 2, c. 12, the buyer of corn by any other than the Winchester measure, forfeits 40 *s.* besides the value of the corn. See *R.* v. *Arnold*, 5 T. R. 353; and see *Hockin* v. *Cooke*, 4 T. R. 314; 1 Roll. R. 420.

(*d*) *Morgan* v. *Tedcastle*, Poph. 55. *Wing* v. *Earle*, Cro. Eliz. 267. *Waddy* v. *Newton*, 8 Mod. 276. But see 2 Roll. R. 67; Cro. Eliz. 665. *Sir J. Bruin's Case*, cited 6 Rep. 67.

(*e*) *Syers* v. *Bridge*, Doug. 509. It was held that the mere opinion of witnesses, that the six weeks might be made up of disjointed intervals, was inadmissible, none of them having known a case so circumstanced.

(*f*) *Noble* v. *Kennoway*, Doug. 492.

Upon the same principle, the law of a foreign country where a contract has been made, is evidence to show the intention of the parties, and the nature and effect of the contract (*g*).

Variance.

A custom, as well as a prescription, being entire, must be proved as laid. A plea of justification under a custom for the tenants of a *particular* copyhold estate to cut turf, is not supported by proof of a custom for all the copyholders generally to cut turf (*h*).

Where the defendant justified under an easement claimed by the *inhabitants* of a parish, it was held that he brought himself within the description of an inhabitant by proof that he rented a stall in the parish, which he used occasionally (*i*).

Competency.

One who would be benefited by the custom is not a competent witness to establish it, even in an action between other parties, since the verdict would afterwards be evidence for him (*k*).*

DAMAGES (*l*).

DAMAGES in a legal sense include *costs* (*m*). Damage is either in *law* or in *fact*. In law, where one deprives another of a defined legal right: as in case of slander charging a crime, or affecting a man in his trade or means of livelihood, &c. (*n*); or where a sheriff suffers an escape on mesne process (*o*). In such cases an action is maintainable, though no special damage be proved; for the privation of that to which the plaintiff was legally entitled, is a damage in law (*p*). In covenant by the mesne tenant against his under-lessee for not repairing, he may recover the costs of an action brought by the original lessor (*q*).

DEATH.

THE proofs and presumptions relating to the death of any individual person will be considered more at large under the title PEDIGREE.

The proof of the death of any person known to be once living, is incumbent on the party who asserts the death (*r*); for it is presumed that he still lives till the contrary be proved. But in analogy to the statute of bigamy (*s*),

(*g*) See tit. FOREIGN LAW.

(*h*) *Wilson* v. *Page*, 4 Esp. 71.

(*i*) *Fitch* v. *Fitch*, 2 Esp. 543.

(*k*) See COMMON.—COPYHOLD.—INTEREST.

(*l*) The subject of damages is considered under the specific heads of TRESPASS.—NUISANCE.—DISTURBANCE, &c.

(*m*) *Phillips* v. *Bacon*, 9 East, 298; and therefore a writ alleging that 80*s.* were awarded for costs, is satisfied by proof of a writ reciting that 80*s.* were awarded as well for damages, by reason of detaining the debt, as for costs. *Ibid.* See Tidd, tit. Costs. The 48 Geo. 3, c. 123, extends to damages for an assault. 1 A. & E. 24.

(*n*) See LIBEL.

(*o*) See SHERIFF.

(*p*) A *possibility* of damage is sufficient, per Powell, J., 6 Madd. 49; 11 East, 571. *Barker* v. *Green*, 2 Bingh. 317. *Pindar* v. *Wadsworth*, 2 East, 154. *Hobson* v. *Todd*, 4 T. R. 71. See tit. WATERCOURSE.

(*q*) *Neale* v. *Wyllies*, 3 B. & C. 533. But in an action by a mesne tenant against an under-lessee, for overloading the chamber with meal, Lord Abinger held that the plaintiff was not entitled to recover the damages recovered against him by the original lessor. Liv. Sum. Ass. 1835. There was no distinct evidence of an application by the plaintiff to the under-lessee to defend the action brought by the original lessor.

(*r*) *Wilson* v. *Hodges*, 2 East, 312. *Throgmorton* v. *Walton*, 1 Rol. R. 416. Whether proof is to be given of the death at any particular time within seven years, or after the expiration of seven years, *Doe* v. *Nepean*, 5 B. & Ad. 86. See *R.* v. *Harborne*, 2 A. & E. 540.

(*s*) 1 Jac 1, c. 11, s. 2. The presumption is merely as to the fact, not as to the time of the death within the seven years. *Doe* d. *Knight* v. *Nepean*, 2 M. & W. 894.

and the statute concerning leases for life (*t*), where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years. Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*u*). But the presumption is merely as to the fact, not as to the time of the death within the seven years (*x*).

Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case (*y*).

In establishing a title upon a pedigree, where it may be necessary to lay a branch of a family out of the case, it is sufficient *primâ facie* to show, that the person has not been heard of for many years (*z*).

Proof by one of the family that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married was held presumptive proof of his death without lawful issue (*a*).

The fact of a tenant for life not having been seen or heard of for 14 years, by a person residing near the estate, although not a member of his family, is *primâ facie* evidence of the death of the tenant for life (*b*).

Letters of administration are not evidence of the death of a party (*c*).

A remarkable case is mentioned in the Reports, where the question was, whether the son survived the father, so as to entitle the widow of the son to her dower, the father and the son having been hanged at the same instant; and it was found by the jury, that the son, who had been observed to struggle the longest, survived the father (*d*).

DE JURE AND DE FACTO.

As to the distinction between acts done by an officer *de jure* and such as are done by an officer *de facto*; see *R.* v. *Lisle*, Andr. 163; Str. 1090; 2 Barnard, 193. 264. *R.* v. *Hebden*, 2 Str. 1109. *R.* v. *Grimes*, 5 Burr. 2601.

DEATH-BED DECLARATIONS.

These are, as has been seen, evidence in particular cases, on account of the solemn obligation which the situation of the party imposes upon him to declare the truth (*e*); and such a declaration is not the less admissible

(*t*) 19 Car. 2, c. 6. Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. *Doe* v. *Deakin*, 4 B. & A. 433; see *R.* v. *Twyning*, 2 B. & A. 386.

(*u*) *Hopewell* v. *De Pinna*, 2 Camp. 113. See also *Doe* v. *Jesson*, 6 East, 80. See also *The Bishop of Salisbury's Case*, 10 Rep. 59, a. *Thorne* v. *Rolfe*, 1 Anders. 20. *Smartle* v. *Penhallow*, 2 Lord Raym. 994. *Benson* v. *Olive*, 2 Stra. 920.

(*x*) *Doe* v. *Nepean*, 2 M. & W. 894.

(*y*) *Watson* v. *King*, 1 Starkie's C. 121. *Paterson* v. *Black*, Park's Ins. 433; 1 Bl. R. 404. *Doe* v. *Griffin*, 15 East, 293. *Doe* v. *Wolley*, 8 B. & C. 22.

(*z*) *Rowe* v. *Hasland*, 1 Bl. 405.

(*a*) *Doe* d. *Banning* v. *Griffin*, 15 East, 293.

(*b*) *Lloyd* v. *Hunt*, 4 B. & Ad. 433.

(*c*) *Thompson* v. *Donaldson*, 3 Esp. C. 63.

(*d*) Cro. Eliz. 503; 2 Comm. 132. A similar question arose from the circumstance of *General Stanwix* and his daughter being lost in the same vessel. Cited *R.* v. *Dr. Kay*, 1 Bl. R. 640. Fearne's Essays; 2 Salkeld by Evans, 593; Evans's Pothier, vol. ii. p. 346. See tit. Presumption.

(*e*) *Supra*, Vol. I. Ind. tit. Dying Declarations. In general, evidence of the declarations of a man since dead, of

because it was made under the additional obligation of an oath extra-judicially administered.

Admissibility.

In *Woodcock's Case* (*g*), the wife of the prisoner having been mortally wounded by him, was taken to the poor-house, where she was attended by a magistrate, who, in the absence of the prisoner, administered an oath to her, and took down her statement in writing; and the declaration was afterwards admitted in evidence (*h*).

The presumption in favour of this species of testimony ceases where the party himself would not have been admitted to give evidence upon oath; and therefore the declaration of an attainted felon at the place of execution is inadmissible (*i*); but that of an accomplice is admissible, since the accomplice, if living, might have been examined upon oath (*k*).

Three several declarations had been made by the wounded person in the course of the same day, at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted (*l*).

How given in evidence.

In order to warrant the admission, it must be shown, in the first place, that the declaration was made under an apprehension of impending death; and this may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension (*m*). And it is not essential that the party should apprehend *immediate* dissolution; it is sufficient if he apprehend it to be impending. Whether such evidence be

facts done by others, or even by himself, are not admissible. *Garnons* v. *Barnard*, 1 Anst. 298. The declarations of persons in *articulo mortis* being only admissible when it clearly appears that they are under the impression of a future state and impending death, held that a child under the age of four years, not being supposed capable of such impressions, the declarations were inadmissible. *Rex* v. *Pike*, 3 C. & P. 598.

(*g*) Leach's C. C. L. 563.

(*h*) *Woodcock's Case*, Leach's C. C. L. 3d edit. 563. On an indictment for the murder of *A.* by poison, the dying declarations of *B.*, who died also of the same cause, admissible. *R.* v. *Baker*, 2 M. & R. 53. The dying declarations of a child of ten years of age, were received where the party was shown to be of quick intelligence, and before examination strongly impressed with the nature of an oath, and the danger of immediate death. *Reg.* v. *Perkins*, 2 Moody, 135.

(*i*) *R.* v. *Drummond*, Leach's C. C. L. 378, 3d edit.; 1 East's P. C. 353, S. C.

(*k*) By all the Judges, *Tinkler's Case*, East's P. C. 354. 356.

(*l*) *R.* v. *Reason and Tranter*, Str. 530; 6 St. Tr. 502. According to the latter report of this case, the C. J. and Powis, J. deemed the evidence inadmissible; Eyre and Fortescue, Js., were for admitting it; but it appears that it was admitted.

(*m*) *R.* v. *Woodcock*, Leach's C. C. L. 563, 3d edit. The Court will hear all that a party has said, in order to decide from what he has said whether he had that impression on his mind which would make his declarations admissible. *R.* v. *Van Butchell*, 3 C. & P. 631. Where the deceased, at the time of making a statement as to the cause of her death to a medical person, stated that she hoped he would do what he could for her for the sake of her family, held that the expression of such a hope excluded the declaration; to render it admissible, it must be made under the impression of an almost immediate dissolution. *R.* v. *Crockett*, 4 C. & P. 544.

admissible is a question for the Court, and not for the jury, to determine, under all the circumstances of the case (*n*).

In *Tinkler's Case* (*o*), a majority of the Judges were of opinion that the death-bed declaration of a deceased accomplice was alone sufficient to convict the prisoner, because the declarant in that situation could have no interest in excusing herself, or unjustly charging others; but other Judges were of opinion that confirmatory evidence was necessary. Force and effect.

In general, although it is for the Court to decide upon the admissibility of the evidence, it is for the jury, under the circumstances, to judge of the effect of it.

Sir D. Evans has justly observed (*p*), that "Much consideration should be given to the state of the mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment, of inference, and conclusion, which, however sincere, may be fatally erroneous. The circumstances of confusion and surprise, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related with the other facts established in evidence, is to be examined with peculiar circumspection; and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentation."

It is further to be remarked, that this seems to be the only instance in which evidence is admissible against a prisoner who has not had the power to cross-examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received except in cases of murder, where, if the dying person was certain as to the author of the violence, yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for

(*n*) *John's Case*, East's P. C. 357. By all the Judges. *Welborne's Case*, East's P. C. 359. Per Lord Ellenborough, *R.* v. *Hucks*, 1 Starkie's C. 522. In the previous case of *R.* v. *Woodcock*, Leach's C. C. L. 563, Eyre, C. B., left it as a question to the jury, whether the deceased was under the apprehension of death when she made the declaration. In *Mosley's Case*, 1 Ry. & M. C. C. L. 97, upon an indictment for murder, the wounds which occasioned the death were inflicted on the party on the evening of Thursday, the 30th September, and a surgeon attended him the same evening, and until his death, on the 10th October. The surgeon did not consider the case hopeless till the latter day, and always till then held out hopes of recovery, and then told him the case was hopeless. Another witness who attended him daily, stated that the deceased, on the evening of the 30th, said that he had been robbed and killed, that he should not get the better of it, and that all along he said he should never get better; and it was held that upon this evidence the declarations of the deceased on the Thursday evening, after he had said that he was robbed and killed, and also on subsequent days, were properly admitted.

(*o*) East's P. C. 354. 356. See also *Westbeer's Case*, Leach, 14. Declarations in *articulo mortis* of the circumstances of robbery, have been held inadmissible. *R.* v. *Lloyd and others*, 4 C. & P. 233.

(*p*) Pothier, by Evans, vol. ii. p. 293.

supposing so could have been investigated, they might have turned out to be very unsatisfactory.

In civil proceedings.

Declarations of this nature have also been admitted in civil cases, where they have been made by attesting witnesses to an instrument.

In the case of *Wright* v. *Littler* (*q*), the plaintiff claimed under a will dated 1743; the defendant claimed under a will dated in 1745, and proved the hand-writing of the witnesses by whom it purported to have been attested. To disprove this will, the plaintiff called *Mary Victor*, the sister of *William Medlicott*, one of the attesting witnesses, and upon cross-examination by the defendant's counsel, she stated that *William Medlicott*, in his last illness, acknowledged and declared that the will of 1745 was forged by himself. Lord Mansfield, in delivering the judgment of the Court, upon a motion for a new trial, said, "As the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, I am of opinion that the evidence was proper to be left to a jury (*r*)."

In a subsequent case (*s*), Mr. J. Heath, on the authority of the above case, admitted the declaration of a person who had set his name to a forged bond, and who, upon his death-bed, begged pardon of Heaven for having been concerned in the forgery.

The ground, however, upon which such evidence has been admitted, is this:—If the attesting witness had been living, he must have been called, and might have been cross-examined as to the validity of the instrument, the authenticity of which depends upon the credit given to it by his attestation (*t*).

In a late case (*u*), the Court of King's Bench said that as it did not appear that such evidence had ever been received, except in cases of homicide, where the declarations had been made by the deceased, and in civil cases, where the declarations had been made by attesting witnesses, they would not further extend the rule; and therefore the Court held the declaration of a dying person as to the relationship of the lessor of the plaintiff in ejectment to the person last seised (*x*), to be inadmissible.

(*q*) 3 Burr. 1244; 1 Black. 346.

(*r*) Lord Mansfield also observed upon the fact, that the evidence came out upon cross-examination by the defendant, and had not been objected to at the trial; and said, that even if it had been upon examination by the plaintiff, it would have been equally admissible, especially since the will was all written and witnessed by him (*William Medlicott*), and gave the premises in question to his wife.

(*s*) 6 East, 195, cited by Lord Ellenborough, C. J.

(*t*) 4 B. & A. 55. Upon the same principle, evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose handwriting is proved in order to substantiate the instrument. See tit. WITNESS.

(*u*) *Doe* v. *Ridgway*, Mich. 1 Geo. 4, MS., and 4 B. & A. 53.

(*x*) Ibid. *A.*, having been convicted of perjury, pending a rule for a new trial, shot the prosecutor, and it was held that an affidavit of his dying declarations on the subject of the perjury was not admissible; and it was held that such declarations were admissible in those cases only where the death was the subject of the charge, and where the declarations related to the circumstances of the death. *R.* v. *Meade*, 2 B. & C. 605. In *R.* v. *Hutchinson, cor.* Bayley, J., Durham Spring Ass. 1822, the prisoner being charged with administering savin to a pregnant woman, it was held that her dying declarations, although they related to the cause of her death, were inadmissible, the death not being the subject of inquiry. 2 B. & C. 608, in the note. Formerly it seems to have been the practice to receive in evidence the declarations of deceased paupers as to their settlements; and in the case of *R.* v. *Bury St. Edmunds*, Cald. 482, where a pauper had on his death-bed told his wife that she and her children would belong to and prove their settlement in the parish of *R.*, the declaration was held to be admissible; and Mr. J. Buller held that it was admissible, on the general principle

DEBT.

THIS action is founded either upon a specialty, or upon a parol contract, or duty (*y*). The proofs in the former class of actions are considered under the titles BOND—COVENANT—DEED. Those which belong to the latter are distributed under the titles of BILLS OF EXCHANGE, GOODS SOLD AND DELIVERED, &c.: and where the action is for a penalty, under the title PENAL ACTION.

The proofs now requisite in an action of debt, depend on the issues taken, according to the mode of pleading prescribed by the new rules. As the same defence may still be made by means of proper pleas which could formerly have been taken under the plea of *nil debet*, which put the whole of the plaintiff's material allegations in issue, the proofs will be stated as they stood before the rules, subject, however, to the operation of the new rules, which take away the general issue, and require the defendant to traverse some matter of fact alleged by the plaintiff, or to plead specially in confession and avoidance.

Previously to the new rules, the plaintiff, under the plea of *nil debet*, was bound to prove all the material allegations in his declaration, although the plea were an improper one, to which he might have demurred (*z*). The defendant might, in general, give in evidence such matter as showed that he was not indebted to the plaintiff.

Evidence under Nil debet, before the new rules.

Where, previously to the new rules, the action was immediately founded upon a record or specialty, *nil debet* was an improper plea; for the defendant could not by his plea admit the existence of the record or specialty, and yet deny the debt (*a*). But whenever a specialty or record was but inducement to the action, which was founded upon extrinsic matter of fact, *nil debet* was a good plea; as in debt for rent by indenture (*b*), or for an escape (*c*), or on a *devastavit* (*d*).

In an action of debt for rent, *nil debet* was a good plea, although the demise was by deed, for the deed did not acknowledge the debt, as an obligation to pay money does; the debt accrued by the subsequent enjoyment (*e*), and *non est factum* here would not have been an answer commensurate with the declaration. It might be very true that the deed was the deed of the lessee, and yet that no debt had arisen; for something *ultra* the deed, that is, the enjoyment of the land, was essential to the creation of the debt, which was,

on which such declarations are receivable on trials for homicide. Such a declaration was also received in the case of *Appotun* v. *Dunswell*, 2 Bott, 80. It is, however, observable, that in addition to the general principles on which mere declarations of deceased persons, though made in *articulo mortis*, are excluded, another objection is applicable to declarations as to settlements, viz. that they involve law as well as fact. The rule seems to be now established that such declarations are inadmissible. See *R.* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Chadderton*, Ibid. 27. *R.* v. *Abergwilly*, Ibid. 63.

(*y*) *A.* is indebted to *B.*, *B.* to *C.*; an agreement that *B.*'s debt and claim shall be extinguished, and that *A.* shall pay the amount to *C.*, is binding. *Fairlie* v. *Denton*, 8 B. & C. 795. Debt lies upon the decree of a colonial court of equity, if duly perfected. *Henley* v. *Soper*, 8 B. & C. 16; and 2 M. & Ry. 153.

(*z*) See tit. BAIL-BOND, *supra*, 119, note (*a*).

(*a*) Gilb. L. E. 79, 2d edit.; 1 Will. Saund. 39, n. (3.); Cowp. 589; Hard. 332. *Tyndal* v. *Hutchinson*, 3 Lev. 170. *Warren* v. *Consett*, 2 Lord Raym. 1500; 2 Str. 778; 8 Mod. 107. Although facts be mixed with it, as in an action by the assignee of the sheriff upon a bail-bond. Fort. 363; 2 Lord Raym. 1503; 2 Str. 780; 5 Burr. 2696.

(*b*) Cowp.

(*c*) Salk. 565.

(*d*) Ibid. and 1 Saund. 219.

(*e*) B. N. B. 170; Hard. 332; 1 Will. Saund. 39; Gilb. L. E. 239, 2d edit.; Cowp.

Nil debet: proof under, before the new rules.

technically speaking, a matter in *pais* to be proved before a jury (*f*). Consequently, the defendant, in an action of debt for rent, might prove under this issue that the lessor had kept possession of the premises, or (as it seems) of any part (*g*); for as the action arises not on the contract merely, but is also founded on the pernancy of the profits according to the contract, this was evidence to show that no debt ever existed (*h*).

So the lessee might show an entry, or expulsion from the premises by the lessor, or any suspension of rent by him, under this issue (*i*), or that the lessor had entered into part of the premises; for since the lessor by his own wrongful act deprives the party of the benefit of the entire contract, no apportionment can be made in his favour (*k*). So he might show an eviction by a third person. In order to prove this, he must have shown that the evictor had a title to enter, and did enter before the rent was due, and show also by what process he was evicted (*l*). This must have been done by the production of the judgment in ejectment, &c. or by proof of an examined copy of it, and by proof of the execution of the writ of possession under the warrant, and an examined copy of the return.

But the defendant could not, where the demise was by deed, give evidence to show that the plaintiff had no interest in the demised tenements; for if he had pleaded it, the plaintiff might have replied the indenture, or might have demurred, for the declaration being on the indenture, the estoppel appeared on record. But if the defendant had pleaded *nil habuit in tenementis*, and the plaintiff had joined issue on the plea, instead of relying on the estoppel, the defendant would not have been concluded by the deed, and the jury would have been bound, as has already been seen, to find according to the truth of the fact (*m*). Neither could the defendant, under this issue, give in evidence disbursements for necessary repairs, although the plaintiff was bound to repair; for the proper remedy was by an action of covenant (*n*), unless by the terms of the covenant the repairs were to be paid out of the rent (*o*). It was no defence that the lessee did not actually enter and enjoy, where he might without the hindrance of the lessor, have entered and enjoyed, for he could not defend himself by his own laches (*p*).

The general rule was, that the plaintiff might give in evidence, under this plea, any matter which showed that nothing was due at the time when the action was brought (*q*); as payment (*r*), or a release (*s*). But the Statute of Limitations must have been and must still be pleaded; and on a *qui tam* action to recover penalties, it has been held that the defendant could not give in evidence the record of a recovery against him by another person for the same forfeiture (*t*).

(*f*) Gilb. L. E. 280, 2d edit.; B. N. P. 170.

(*g*) See Gilb. L. E. 283, 2d edit; 1 Inst. 148, a.; Vent. 277; Rol. Ab. 398.

(*h*) 2 Rol. Ab. 677, pl. 21; Gilb. L. E. 283, 2d edit.

(*i*) It is frequently pleaded, but it seems that this is optional on the part of the defendant. 1 Will. Saund. 205, n. (2); B.N.P. 177; 1 Mod. 35; 1 Vent. 258; Ld. Raym. 566; 1 Sid. 151; 2 Keb. 762. *Contrà*, 2 Leon. 10; Goulds. 80; Ow. 85.

(*k*) 1 Inst. 148, a.; Vent. 277; Rol. Ab. 398; Gilb. L. E. 283.

(*l*) Fort. 360. *Cooper* v. *Young*, 8 Geo. 2. *Jordan* v. *Twells*, B. R. H. 171.

(*m*) Salk. 277; B. N. P. 170; *supra*, Vol. I. p. 343. But where the demise is by parol agreement, see 1 Raym. 746; B. N. P. 177.

(*n*) B. N. P. 177; 1 Ray. 370.

(*o*) 1 Lord Ray. 420.

(*p*) Rol. Ab. 605; Gilb. L. E. 284.

(*q*) Com. Dig. Pleader, 2, W. 17.

(*r*) Gilb. L. E. 285. See tit. BOND.—PAYMENT.

(*s*) Per Holt, J., *Hatton* v. *Morse*, 1 Salk. 394, S. C.; 2 Lord Ray. 787. See Co. Litt. 182, b. *contrà*; Gilb. L. E. 285.

(*t*) *Bredon* v. *Harman*, Str. 701. *Jackson* v. *Gisling*, B. N. P. 107. Vide *supra*, Vol. I. Ind. tit. JUDGMENTS.—RECORD; and *infra*, tit. RECORD.

New rules.

By the rules of Hilary Term, 4 W. 4: 1, in debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be specially pleaded as above directed in actions of assumpsit.

4. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession or avoidance.

DECEIT.

General requisites.

To support an action on the case for deceit, the plaintiff must allege, and prove, a *fraud* to have been committed by the defendant, and that a *damage* has resulted from the fraud to the plaintiff (*u*). The *fraud* must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect (*x*).

Deceitful means.

It is matter of evidence to prove that the deceitful and fraudulent means have been used as alleged, and that the plaintiff has in fact been deceived by them to his detriment; but it is usually a question of law, arising upon the facts, whether an action lies in respect of damage resulting from such means; for it is not a general rule, that wherever fraud and damage concur an action is maintainable. Such means must have been used as were likely to impose on a person of ordinary prudence and circumspection, to throw him off his guard on a point where he might reasonably place confidence in the representation of the defendant, and also such as deprived the party of a benefit which in point of law he had a right to expect (*y*). Thus no action

(*u*) 12 East, 636.

(*x*) The making a representation which the party knows to be false, and which is intended to induce another to act on it to his damage, is a fraud in law, and sufficient to support an action. *Polhill* v. *Walker*, 3 B. & A. 114. The defendant accepted a bill as per procuration of the drawee, believing that the acceptance would be sanctioned; the holder of the bill was in consequence nonsuited; held that the defendant was liable. Ibid. Where the plaintiff had been induced, through the false representations of the defendant, to employ a servant, and the Judge had drawn the attention of the jury to two classes of motive, viz. a false statement knowingly made, with intention to benefit himself; and, secondly, a desire to benefit another person; and directed them, that although he might have no intention to obtain any advantage for himself, yet that it would still be a fraud if he made false representations, productive of injury to another, knowing such representations to be false; and the jury found a verdict and damages for the plaintiff, adding that they considered there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term; the Court refused to enter the verdict for the defendant. *Foster* v. *Charles*, 7 Bing. 105.

(*y*) Per Lord Ellenborough, in *Vernon* v. *Keys*, 12 East, 631; B. N. P. 30. In *Bayley* v. *Merrell*, Cro. Jac. 386, on an agreement to carry goods at so much per cwt., it was held that no action lay for falsely affirming that a load of madder contained a less quantity of cwts. than it contained in fact. In 1 Roll. Ab. 801, pl. 16, it was held that one who was induced to buy a term by a false assertion on the part of a seller that a stranger had offered 20 *l.* for it, could not recover. Where the

is maintainable in respect of a false representation, by a vendor, of the intention or will of another in respect of the goods (*z*).

Proof of fraud.

The plaintiff must, in the first place, prove fraud, *in fact*; he must show that the representation was not only *falsely*, but that it was *fraudulently* made, with intent to deceive the plaintiff, for the fraud or deceit is the foundation of the action (*a*). Thus in all cases of deceit in the sale of personal chattels, in respect of the quality, soundness or goodness of the subject-matter, the plaintiff must prove not only the *falsity* of the representation, but also the *scienter*, the knowledge of the defect, on the part of the defendant (*b*).

If the defendant sell goods as his own, the plaintiff should show that he knew that they were not his own (*c*). For if the defendant had reasonable ground to suppose that they were his own property, as if, for instance, he had bought them *bonâ fide*, this action will not lie against him (*d*). But if the defendant represent them to be the goods of *A. B.*, and that he had authority from *A. B.* the owner, to sell them, it will be sufficient for the plaintiff to show that he had no authority from *A. B.*; and proof that they were the goods of some other person would be *primâ facie* evidence of the want of authority in the defendant, and sufficient to put him upon proving that he had authority (*e*).

So, if a man sell a horse, stating him to be of a certain age, according to

plaintiff sold to the defendant certain buildings, trade, and stock, under a false representation by the latter that he was about to enter into partnership with certain persons in the same trade (whose names he would not disclose), and that they would not consent to his giving the plaintiff more than a certain sum, but in fact they had authorized him to make the best terms he could, and would have given a larger sum, and in fact the defendant charged them with a larger sum, it was held that no action was maintainable; for it was either a false representation of the intention of another, or a mere *gratis dictum* of the defendants, on which it was the indiscretion of the plaintiff to rely. *Vernon* v. *Keys*, 12 East, 632, affirmed on error, in the Exchequer Chamber, 4 Taunt. 488.

(*z*) *Vernon* v. *Keys*, 12 East, 632. See the last note.

(*a*) Where there has been an *express* warranty, although the action be framed in *tort*, and a *scienter* averred, it need not be proved, *Williamson* v. *Allison*, 2 East, 446; for then the express *warranty* is the gist of the action, and not the deceit. See tit. ASSUMPSIT.—WARRANTY. And where there is a warranty the action is usually laid in *assumpsit*, in order that the declaration may embrace the money counts. The propriety of this practice was established in the case of *Stuart* v. *Wilkins*, Doug. 18. Where the action is framed in *tort*, the plaintiff, if he prove the *scienter*, will be entitled to recover, although the representation made may fall short of a warranty Where a vendor *knew* of defects in a ship at the time of sale, which it was impossible that the buyer should discover, and did not disclose them at the time of sale, Lord Kenyon held that he was liable to an action for the deceit, as on a warranty that the ship was free from all defects, although by the express terms of the contract the buyer was to take her with all faults. *Mellish* v. *Motteux*, Peake's C. 115. But in the subsequent case of *Baglehole* v. *Walters*, 3 Camp. 154, Lord Ellenborough stated that he could not subscribe to the doctrine of the former case; he said, "Where an article is sold with *all faults*, I think it quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser." There, however, the plaintiff failed in proving *any fraud*. See *Parkinson* v. *Lee*, 2 East, 314.

(*b*) *Supra*, note (*a*).

(*c*) B. N. P. 30; Salk. 210. *B.* sells goods to *A.* as his own, but knowing them to be the goods of *P.*, who retakes them, *A.* shall have an action on the case. 42 Ass. 8; 4 Co. 14. On the sale of a personal chattel the law will imply a warranty as to the right to sell, 3 T. R. 57; 2 Bl. Com. 451; 3 Com. 166; Peake's C. 94. But a warranty as to the right to real property will not be implied, 2 B & P. 13; 3 B. & P. 166; Dougl. 654; 6 T. R. 606. A warranty as to the soundness, goodness, or value of a horse, or other personal chattel, is never implied. 2 East, 314; 2 Com. 451; 3 Com. 165; 2 Roll. R. 5.

(*d*) Ibid.

(*e*) B. N. P. 81; 1 Danv. 176.

a pedigree delivered to him when he bought the horse, and shown to the purchaser (*f*); or sell a picture as the production of an ancient master (*g*), or as having formed part of a particular cabinet of paintings, and such representations be made according to the honest belief of the owner at the time, no action is maintainable, although the representation be incorrect; but it is otherwise if the vendor *knew* at the time that he was representing a falsehood. Proof of fraud.

In an action for giving a false representation of the credit and circumstances of a third person, to the detriment of the plaintiff, it is not necessary to show that the defendant expected to derive any benefit from the deceit, or that he colluded with the other (*h*). The ground of the action is the intention to deceive and injure the plaintiff (*i*), and of this, as on all other questions of *mala fides*, the jury are to judge (*k*). Though the defendant inform the plaintiff that a party may safely be credited, and that he spoke from his own *knowledge*, and not from hearsay, he will not be liable to damages although the representation be false, and the plaintiff in consequence receive an injury, if the representation was in fact made by the defendant *bonâ fide*, and under the belief that it was true (*l*). It is not sufficient to show that the defendant intended to deceive when he made the representation, without proof that he intended to defraud *the plaintiff* (*m*). The mere suppression of the fact that the party concerning whom the representation is made, had recently been discharged under the Insolvent Act, is not conclusive evidence of fraud (*n*). Character.

It is enacted by the statute 9 G. 4, c. 14, s. 6, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person (*o*), to the intent or purpose that such other person may obtain credit, money or goods upon *such representation or assurance* (*p*), unless such representation or assurance be made in writing, signed by the party to be charged therewith.

The party whose solvency is misrepresented is a competent witness (*q*). Similar misrepresentations made by the defendant to other persons are, it has been held, admissible in evidence to prove a fraudulent connection between the defendant and the customer (*r*).

(*f*) *Dunlop* v. *Waugh*, Peake's C. 123.

(*g*) *Jendwine* v. *Slade*, 3 Esp. C. 572.

(*h*) *Pasley* v. *Freeman*, 3 T. R. 51: Falsehood *and* fraud are essential; falsehood without fraud is not sufficient. *Ashlin* v. *White*, Holt's C. 387.

(*i*) *Tapp* v. *Lee*, 3 B. & P. 367; 3 T. R. 51.

(*k*) *Eyre* v. *Dunsford*, 1 East, 318. The defendants having credit lodged with them in favour of *T.* to a certain amount, but upon an express stipulation that goods should previously be lodged with them to treble the amount, informed the plaintiff, who applied to them for information as to *T.*'s responsibility, that they might safely execute *T.*'s order for goods upon credit, and stated the fact that such credit had been lodged with them, but wholly omitted the previous condition; and it was held that this was a *suppressio veri*, which warranted the jury in finding fraud.

(*l*) *Haycraf* v. *Creasy*, 2 East, 92.

(*m*) *Scott* v. *Lara*, Peake's C. 226; and *infra*, 375.

(*n*) *Gainsford* v. *Blackford*, 6 Price, 36. The representation was, that *L. H.* then owed him, the defendant, 50*l.*; that he the defendant was ready to give *L. H.* credit for any thing he wanted. See *Wood* v. *Wain*, 1 Esp. C. 442.

(*o*) In *Lyde* v. *Barnard*, 1 M. & W. 101, the Judges of the Court of Exchequer were divided in opinion whether the clause applied to a case where the defendant had falsely represented the interest of *A. B.* in certain funds charged only with three incumbrances, whereby the plaintiff was induced to give him credit.

(*p*) The words in italics are omitted in the printed copy of the statute.

(*q*) *Smith* v. *Harris*, 2 Starkie's C. 47. *Richardson* v. *Smith*, 1 Camp. 277, for the witness in an action for the goods cannot avail himself of the verdict.

(*r*) *Beal* v. *Thatcher*, 3 Esp. C. 194.

Proof of deception.

The gist of the action is, that the plaintiff was *imposed* upon by the *fraud* of the defendant. If therefore it appear that the plaintiff was aware of the falsity of the representation, or made the contract, to use a common phrase, with his eyes open to the defect, he is remediless, for he was not *deceived*. Nay, further, if he had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, or even if he placed a blind and wilful confidence in a representation which was not calculated to impose upon a man of ordinary prudence and circumspection, it seems that an action of deceit cannot be supported. For although the plaintiff in these cases may, in point of fact, have been deceived, yet it was a consequence of his own folly that he was so defrauded, and *vigilantibus non dormientibus jura subveniunt*.

Where a false representation was made on the sale of goods, but the plaintiff had full opportunity to inspect them, and *a written contract* was entered into, the terms of which had no reference to the representation, it was held that the plaintiff was not entitled to recover (*s*).

If the vendor of a horse affirm that he is sound wind and limb, when it is apparent that he has but one eye (*t*), or warrant an house to be in perfect repair, which wants a roof (*u*), the buyer must abide by the consequence of his own laches.

In the sale of goods.

The possession of goods by a vendor, induces a reasonable presumption of ownership and title (*x*). But it is laid down, that if the seller was out of possession at the time of the sale, no action will lie against him, though they be not his own, without an express warranty, for there was room to question his title (*y*).

If the vendor of a house affirm that the rent of the house was more than it really was, whereby the vendee was induced to give more for it than it was worth, an action, it is said, will lie; for the value of the rent is within the private knowledge of the landlord (*z*); but if the seller merely affirm that the thing sold is worth so much, or that one would have given so much for it, although the affirmation be false, yet if the buyer might inform himself as to value, no action lies. And this principle, it is said, applies to all cases where the purchaser may easily ascertain the true value (*a*). But where the value of the article is not perfectly obvious upon mere inspection, but requires a particular degree of skill for the ascertainment, or depends upon collateral circumstances, the action may be maintained.

Although the goods have been sold by a written contract, yet the plaintiff is at liberty to give parol evidence of antecedent misrepresentations, for the

(*s*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*t*) Unless, as is quaintly remarked in the year-books, the purchaser be also blind.

(*u*) *Bayley* v. *Merrel*, Cro. Jac. 387; and per Grose, J.; 3 T. R. 55. *Dyer* v. *Hargrave*, 10 Ves. 507. Where the defect is so obvious and visible, it is presumed that the parties did not intend the warranty to apply to it.

(*x*) B. N. P. 30. *Medina* v. *Stoughton*, Salk. 210; 1 Ray. 593. *Dobell* v. *Stevens*, 3 Roll. 623.

(*y*) Salk. 210; B. N. P. 31.

(*z*) *Risney* v. *Selby*, Salk. 211; Ray. 1118; Sid. 146; B. N. P. 31. So where the vendor of a public-house, pending his treaty, made false representations concerning the amount of the business done, and the rent received for a part of the premises. *Dobell* v. *Stevens*, 3 B. & C. 625.

(*a*) B. N. P. 31; 1 Sid. 146. Where the plaintiff brought an action against the defendant, alleging that the defendant, having skill in jewels, sold him a stone which he affirmed to be a Bezoar-stone, and sold it as such, judgment was arrested, because the declaration did not allege that the defendant knew that it was not Bezoar-stone, or warranted it. See also *Pickering* v. *Dowson*, 4 Taunt. 779.

purpose of proving fraud; as that the seller, by fraud, prevented him from discovering a defect, which he, the seller, knew to exist (*b*). It has been held that in an action for fraudulently misrepresenting the profits of a business as amounting to a specific sum, a variance from that amount in the representation proved will be fatal (*c*). Deception in the sale of goods, &c.

If a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, the action lies, although it turn out that the deceit was not in the merchant, but in his factor; for he is responsible, *civiliter*, although not *criminaliter*, for the deceit of his factor (*d*); and it is more reasonable that he who trusted the factor should suffer than that a stranger should.

It must be proved that the damage in fact resulted from the fraudulent act of the defendant. Where the plaintiff's agent applied to *A.* for the character of an intended vendee, and *A.* made a fraudulent representation on the subject, and afterwards the defendant, who was the brother of *A.*, to whom the agent also applied, but did not say at whose request, confirmed his account, and the agent communicated *A.*'s representation to the plaintiff, but did not communicate the defendant's representation; it was held that the action was not maintainable, for the damage did not result from the defendant's representation, but from *A.*'s (*e*). So no action will lie for any misrepresentation where the plaintiff or his agent knew that the party whose circumstances were misrepresented was insolvent (*f*). Proof of damage.

If *A.* falsely represent to *B.* the circumstances of *C.*, in consequence of which *B.* sells to *C.* goods upon credit from time to time, *A.* is liable to *B.* although *C.* pays for the goods first supplied, on the purchasing of which the representation is made (*g*). He continues, it is said, to be liable within a reasonable time, and to a reasonable amount (*h*); in other words, the liability depends so much on the peculiar circumstances of each case, that the law cannot define generally the limits either as to time or as to amount. Where *B.* had sold goods to *C.* on the representation of *A.*, and then told *C.* that he would sell him no more without further references, it was held that *A.*'s liability did not extend beyond the time of such declaration (*i*). For this is strong, if not conclusive, evidence to show that the plaintiff was no longer deceived by *A.*'s misrepresentation.

It is no defence to an action of this nature, that the plaintiff agreed to take the article with *all faults*. Evidence in defence.

Where the vendor of a ship represented her to have been built in 1816, and in fact she had been built a year earlier, it was held that the plaintiff

(*b*) *Pickering* v. *Dowson*, 4 Taunt. 779; and P. C. in *Kain* v. *Old*, 2 B. & C. 634. And see *Dobell* v. *Stevens*, 3 B. & C. 625.

(*c*) *Gilbert* v. *Stanislaus*, 3 Price, 54. Even although the sum was laid under a *videlicet*. The declaration stated that the defendant, a publican, represented that in his public-house the returns averaged 300 *l.* a month; held to be proved by evidence that he said that he was doing 300 *l.* a month in his house. *Bowring* v. *Stevens*, 2 C. & P. 337.

(*d*) Hern v. *Nicholls*, Salk. 289; B. N. P. 31.

(*e*) *Scott* v. *Lara*, Peake's C. 226. Neither did the defendant intend to impose upon the *plaintiff*.

(*f*) *Cowen* v. *Simpson*, 1 Esp. C. 290.

(*g*) *Hutchinson* v. *Bell*, 1 Taunt. 558. But there *B.* stated to *A.* that he proposed to open an account with *C.* as a *general customer*. In the case of *De Graves* v. *Smith*, 2 Camp. 533, *cor.* Ellenborough, C. J., where the interrogation was general, and the false information given without reference to any proposed mode of dealing, it was held that the defendant was responsible for the first parcel of goods only, although the party became insolvent within a few months, and after the delivery of a second parcel on credit.

(*h*) *Ibid.*

(*i*) See above, note (*g*).

Evidence in defence.

was entitled to recover, although he was to take her on those conditions (*k*).

So if a watch be warranted which turns out to be worthless, the plaintiff is entitled to recover, notwithstanding a stipulation that if he disliked the watch the vendee would exchange it (*l*). So where *A.* fraudulently misrepresented the circumstances of *B.* to *C.*, it was held that he was liable, although he had promised to pay *C.* if *B.* did not (*m*).

Evidence of the actual value of the premises or chattel sold is admissible in reduction of damages, though not in bar of the action (*n*). Where the action was for a misrepresentation of a publican's profits, and in fact he named his brewer, and stated that a pass-book was kept of the beer and spirits, but the plaintiff made no inquiry of the brewer nor asked for the pass-book; it was held that the omissions did not bar the action, but were proper for the consideration of the jury, on the question whether any fraud had been practised (*o*). It is no defence that the plaintiff on a bill filed paid the price of goods deceitfully sold (*p*).

DEED.

1. As to the Production of the deed, and proof under the plea of *non est factum.*
2. — Evidence by the defendant under the same plea.
3. — Evidence under special pleas.
4. — Admissibility and effect of a deed in evidence.

Non est factum.

THE plea of *non est factum* (*q*) puts in issue the execution of the deed, and its continuance as a deed at the time of the plea. Where the plaintiff has not the possession of the deed, he may aver that it has been lost or destroyed, or that it is in the possession of the adversary (*r*); but the deed, if pleaded with a profert, must be produced, or the plaintiff will be nonsuited (*s*). Where the deed has been improperly pleaded with a profert on *non est factum*, he should move to amend the record; but an application at *Nisi Prius* for that purpose comes too late (*t*). If a deed be alleged to be lost through time and accident, but be found before the trial, it may be given in evidence (*u*).

Proof of execution.

Proof of the execution consists in evidence of the sealing and delivery of the deed by the testimony of the attesting witness (*x*), in the manner already stated (*y*). The deed may be admissible in evidence although when produced at the trial it appear that the seal has been torn off. As, where it

(*k*) *Fletcher* v. *Bowsher*, 2 Starkie's C. 561, *cor.* Abbott, L. C. J.

(*l*) *Wallace* v. *Jarman*, 2 Starkie's C. 162, *cor.* Ellenborough, L. C. J.

(*m*) *Hamer* v. *Alexander*, 2 N. R. 241.

(*n*) *Pearson* v. *Wheeler*, 1 R. & M. 303.

(*o*) *Bowring* v. *Stevens*, 2 C. & P. 337.

(*p*) *Jendwine* v. *Slade*, 2 Esp. C. 573.

(*q*) It seems that if issue be taken on the improper plea of *nil debet* to a declaration on a bond, the execution of the deed stands admitted. On such an issue taken in an action by executors on a bond to the testator, evidence was admitted of an admission of the amount of the debt by the defendant, and the plaintiffs recovered without proof of the bond. York Summer Assizes, 1827, *cor.* Bayley, J. Where the defendant, *W. F. B.*, executed the bond in the name of *W. B.*, and appeared at the time to be known by the latter name, and the declaration was against *W. F. B.*, sued by the name of *W. B.*; upon the plea *non est factum*, held, that the bond was not void, and that the objection, if valid, could not be available under that plea. *Williams* v. *Bryant*, 7 Dowl. 502.

(*r*) *Reed* v. *Brookman*, 3 T. R. 151; *Totty* v. *Nesbitt*, Ibid. in note. *Bolton* v. *Bishop of Carlisle*, 2 H. B. 259.

(*s*) *Smith* v. *Woodward*, 4 East, 585.

(*t*) *Paine* v. *Bustin*, 1 Starkie's C. 74.

(*u*) *Hawley* v. *Peacock*, 2 Camp. 557.

(*x*) Bac. Ab. Ev. 647.

(*y*) Vide Vol. I. Ind. tit. DEED.

Proof of execution.

was sealed when pleaded, and the seal was afterwards torn off; for, as has been already observed, the issue is upon its continuance as a deed at the time of pleading (*z*). And after the plea with a profert, it is in the custody of the law, and if the seal be broken off in court the law will not allow the innocent party to be prejudiced (*a*). So it may be shown that the seal has been torn off by accident after the execution of the deed (*b*); and before the time of pleading (*c*); or that it has been cancelled through the practice of the obligor (*d*).

If the deed be altered by the party (the obligee) himself, although but in an immaterial point, he thereby avoids the deed (*e*); for the law takes every man's act most strongly against himself. An alteration by a stranger, in an immaterial point, will not avoid the deed; but it is said to be otherwise if a stranger alter it in a material point, for the witnesses cannot prove it to be the deed of the party where there is any material difference (*f*). And an alteration in any covenant will avoid the whole deed, for the deed cannot be the same unless every covenant be the same (*g*).

If an interlineation appear in a deed, and there be no evidence to show how it was done, it will be presumed to have been done before the execution (*h*).

Where a deed operated differently as to different parties, and after execution by some, and before the execution by others, was altered in parts, which did not affect the former, but only the latter, it was held to be binding on all (*i*).

Where the lessor of the plaintiff in ejectment claimed under a deed proved to have been mutilated after execution, it was held that the deed was void, but that the avoidance did not devest the estate, which had passed under the deed (*k*).

Proof of delivery.

The proof of the execution of a deed has already been considered (*l*). No particular form of delivery is essential. Mere delivery without words is sufficient (*m*); as if the obligor throw it down on a table, with *intent* that

(*z*) Besides this, the deed, after it has been pleaded with a profert, is in the custody of the law. Cro. Eliz. 120; 5 Co. 119, b.; 2 Bulst. 247; Dy. 59, pl. 12, 13; Doc. Pl. 262; Roll. R. 39, 40; 2 Roll. Ab. 29.

(*a*) *Smith* v. *Woodward*, 4 East, 585. If the seal be broken off in court, the deed shall be enrolled for the benefit of the parties; for where anything is impaired whilst in the custody of the law, it is restored by the benignity of the law as far as possible. 1 Inst. 676.

(*b*) And this is a question for the jury. In Palm. 403, it was holden that a deed leading the uses of a recovery was good evidence of such uses, although the seals were torn off, it being proved to have been done so by a young boy. B. N. P. 268. It is there suggested that such evidence would not be sufficient under the plea of *non est factum*, although it might where the deed was used as evidence collaterally.

(*c*) Pal. 403; 1 Mod. 211.

(*d*) 1 Vent. 297.

(*e*) B. N. P. 267; 10 Co. 92; 11 Co. 27, a.

(*f*) B. N. P. 267; 11 Co. 27. *Qu.* therefore, whether the deed is avoided by the act of a stranger, where the contents of the original deed can be satisfactorily proved. As the act of a stranger in tearing off the seals does not vitiate the deed, it is difficult to say why his alteration of it should avoid it; the reason above assigned for considering it to be *wholly void* assumes that which may or may not be true, according to circumstances. See Com. Dig. tit. Fait, (1); Roll. 41 Cro. Eliz. 626; Mo. 10.

(*g*) 11 Co. 28, b.; B. N. P. 267.

(*h*) Vin. Ab. vol. 12, p. 58. But see below, 377 (*a*).

(*i*) *Doe* d. *Lewis* v. *Bingham*, 4 B. & A. 672.

(*k*) *Doe* v. *Hirst*, 3 Starkie's C. 60.

(*l*) *Supra*, Vol. I. Ind. tit. DEED. A party may be bound by a covenant in an indenture of lease, although he does not seal it, if he agree to the lease (Co. Litt. 231, a.; Com. Dig. tit. Fait, A. 2). As where *A.* demises to *B.* and *C.*, who covenant with *A.*, and *B.* seals the counterpart, and *C.* agrees to the lease, but does not seal it.

(*m*) Co. Litt. 36, a.; 2 Roll. 24, l. 28. 45.

Delivery.

the party shall take it, and he takes it accordingly (*n*); or deliver it *as his deed* into the hands of a stranger (*o*). But it is otherwise if he deliver it to a stranger as an *escrow*, to be his deed upon performance of *conditions* (*p*); and it cannot be delivered to the obligee as an *escrow* (*q*). A delivery by a stranger with the assent of the maker is sufficient (*r*).

A delivery may also be by words, without an actual delivery; as where the deed lies on the table, and the obligor says to the obligee, "take it up as my deed (*s*).

If the obligor once deliver it as his deed, with intent that it shall be so, he cannot by any subsequent words explain his intent to be otherwise (*t*).

One who executes a deed for another, under a power of attorney, must execute it in the name of the principal; but no particular form of words is essential (*u*).

The due execution of a deed may be presumed from circumstances (*v*).

Variance.

In general, where an action is brought against one of several covenantors or obligors, the defendant cannot take advantage of it, except by plea in abatement (*x*).

If the plaintiff declare on a bond made by two, it is no variance under the plea of *non est factum* that the bond was made by three (*y*). But if one of several covenantees or obligees bring an action without averring that the rest are dead, the defendant may take advantage of it at the trial, as a variance under the plea of *non est factum* (*z*).

If the deed appear to be razed or interlined, it is a question for the jury whether it was the individual contract delivered by the party (*a*).

A variance between the real name of the defendant from that which is given him in the deed, and by which he is sued, is immaterial (*b*).

(*n*) Ow. 95. But it is no delivery, unless the intent be found. Ibid. and 1 Lev. 140.

(*o*) 2 Roll. 24, l. 42. Although it was not to be delivered till after the performance of a condition. 2 Roll. 25, l. 30; 1 Lev. 152.

(*p*) Co. Litt. 36, a.; 2 Roll. 25, l. 25.

(*q*) 2 Cro. 85, 6.

(*r*) Perkins's Fait. 137; and Com. Dig. Fait. A. 3.

(*s*) Co. Litt. 36, a.

(*t*) Com. Dig. Fait. A. 3. But *qu.* whether the delivery is absolute where the deed is delivered to the obligee as an *escrow* to be his deed on performance of a condition. Ibid; and see Vol. I. Ind. tit. DEED.

(*u*) *Wilks* v. *Back*, 2 East, 142.

(*v*) Where, on the execution of a composition-deed with creditors, a dispute arising as to the exact amount of the debt of one, the deed was executed with a blank as to that sum, and the amount was inserted the following day, upon the vouchers being produced, but the attesting witness was not present, and the deed was not proved to have been re-executed or re-delivered, but there was evidence of its being subsequently recognised and acted upon by the defendant; held that the Judge properly referred it to the jury to say whether they would not presume an execution after such insertion, or that it was not to be considered as delivered as a perfect deed until the sum was so inserted: held also (per Holroyd, J., on the trial), that the attorney who prepared the deed on the retainer, and on behalf of the trustees, was a competent witness in an issue directed by the Court to try its validity, notwithstanding one of the trusts was for the payment, in the first instance, of the costs attending the preparing it, and he was also a defendant in another action, the result of which depended on the validity of the deed; the Court not questioning the decision of that learned Judge, and being satisfied that the justice of the case had been obtained by the verdict. *Hudson* v. *Revett*, 5 Bing. 368.

(*x*) See the cases, 1 Will. Saund. 154, n. 1. *Whelpdale's Case*, Rep. 119; *Gilbert* v. *Bath*, 1 Str. 503.

(*y*) *South* v. *Tanner*, 2 Taunt. 254.

(*z*) 1 Will. Saund. 154, and the cases there cited.

(*a*) B. N. P. 267; 10 Co. 92. Formerly the Judges decided upon the profert, or view of the deed, whether it was void by reason of erasure or interlineation; but when deeds grew to be voluminous, they found it inconvenient to decide upon demurrer, and referred it to a jury. B. N. P. 267.

(*b*) A party ought to be sued by the name given him in the bond, &c. A declaration against him by his right name, stating that in another name he executed the bond, has been held to be bad. *Gould* v. *Barnes*, 3 Taunt. 504. See above, 376, note (*q*).

If the deed read vary from that described in the declaration, in legal effect, the variance will be fatal (*c*). As, if it describe the consideration for the defendant's covenant improperly (*d*); or allege that as absolute which is merely qualified and conditional (*e*). Variance.

Where the declaration, in setting out one of the several covenants in a lease, on which breaches were assigned, described it to be the Cellar Beer Field, by mistake for the Aller Beer Field, the variance was held to be fatal, as amounting to a misdescription of the deed declared on (*f*).

The defendant prayed *oyer* of the condition of a bond, which was for the payment of 100 *l.* by instalments, till the said sum be paid; the defendant then pleaded *non est factum*; and it appeared that the word *hundred*, where it should have occurred the second time in the condition of the bond, had been omitted, but had afterwards been inserted without the defendant's knowledge; it was held, that although the alteration did not avoid the instrument, yet, that it caused such a variance between the condition set out on the record on *oyer* and the condition of the bond produced, that the plaintiff could not recover (*g*).

2. The defendant may give in evidence any matter which shows either 1st, that the deed was originally void, or, 2dly, that it was avoided by matter subsequent before the plea; for the plea is in the present tense, and if it has been avoided, it was not the defendant's deed at the time of pleading (*h*). Evidence for the defendant.

1st. That it was originally void. As where a bail-bond is taken after the return of the writ (*i*). That it is a forgery; that he was made to sign it when he was so drunk that he did not know what he did (*k*); that he was a lunatic (*l*); that it was obtained by fraud, and without any real assent of the mind, having been falsely read over to him, being a blind man, or unable to read (*m*); that she was a feme covert (*n*); that the deed was delivered as an *escrow*, upon a condition not yet performed (*o*); that it was delivered to a stranger for the use of the plaintiff, who refused it, for the refusal deraigns the bond (*p*); that it was made to a feme covert, and that the husband disagreed, and refused to accept it (*q*); that the deed was cancelled before the plea; that a material erasure was made in the deed, or that the seal was torn off before the plea (*r*); but this, it seems, is but presumptive evidence of such an act on the part of the obligee as will cancel the deed, for the latter may show that the seal was torn off by accident (*s*); or that the alteration was made by a stranger in a point not material, and without his Proof by defendant.

(*c*) See *Swallow* v. *Beaumont*, *supra*, 343; *Sands* v. *Ledger*, 2 Ld. Raym. 792; *Howell* v. *Richards*, 11 East, 633; *Browning* v. *Wright*, 2 B. & P. 19.

(*d*) *Swallow* v. *Beaumont*, *supra*, 247.

(*e*) See *Brown* v. *Ruill*, 2 B. & B. 395. *Tempany* v. *Burnand*, 4 Camp. 20. See also 1 Camp. 195; 14 East, 568; 7 Taunt. 305; 1 B. & A. 57; and Vol. I. tit. VARIANCE.

(*f*) *Pitt* v. *Green*, 9 East, 188.

(*g*) *Waugh* v. *Bussell*, 1 Marsh. 214.

(*h*) Gilb. L. Ev. 173, 2d edit.

(*i*) *Supra*, tit. BAIL-BOND.

(*k*) *Cole* v. *Robins*, B. N. P. 172. See tit. DRUNKENNESS.

(*l*) B. N. P. 172. *Yates* v. *Boen*, Str. 1104.

(*m*) B. N. P. 172.

(*n*) Ibid.; 2 Wils. 352; Burr. 1805; Lord Ray. 363.

(*o*) B. N. P. 172; 2 Roll. Ab. 683; 5 Co. 119.

(*p*) 5 Co. 119, b.

(*q*) Ibid.

(*r*) Formerly, the Court decided on view of the deed, upon profert made, whether it was void or not from rasure (10 Co. 92); and they held that a raised or interlined deed was void, because they could not sufficiently collect the intention of the obligor. 10 Co. 92; Bac. Ab. Ev. F. 649. See above, 378, note (*a*), and 377, note (*h*).

(*s*) B. N. P. 172.

Proof by defendant.

privity (*t*). But an alteration by the obligee himself, even in an immaterial point, will, it is said, avoid the deed (*u*). An alteration in any one covenant will avoid the whole deed, for the deed is not the same, unless all the covenants be the same (*x*).

Where the deed is a joint one (*y*), or both joint and several (*z*), the defendant who is sued may shew that the seal of one of the obligors has been torn off, for the manner of the obligation becomes different, and a presumption arises that the obligee has been satisfied. But it is otherwise where the obligation is entirely several (*a*).

Where *A.*, with a blank left after his name, is bound to *B*, and afterwards the name of *C.* is added as a joint obligor, the bond is not avoided, for the addition does not alter the contract of *A.*, who was bound to pay the money independently of any addition (*b*).

Where a bond was made to *C.*, with blanks left for the christian name and addition, which were filled up afterward with the assent of the parties, it was held that the bond was void (*c*). And in general, if blanks be left at the time of execution, and be afterwards filled up, the deed will be avoided, for it is no longer the same contract that was sealed and delivered (*d*); but an immaterial addition will not avoid the deed (*e*). The defendant may also shew that the deed after execution was altered, and without any new stamp (*f*)

The defendant cannot, under this plea, give any matter in evidence which avoids the deed either at common law or by statute, unless it impeach the execution or continuance of the deed (*g*); and therefore cannot give in evidence that the deed is void for usury (*h*); or that the bond was delivered to the plaintiff himself upon a condition not performed (*i*); or to a stranger, but not as an *escrow* (*k*). So, in all cases where the deed is merely voidable, but not void, the matter must be specially pleaded, and is not evidence under this plea (*l*); as for infancy (*m*), duress, or where it was obtained by threats (*n*); nor can he read the condition of the bond to show that it is void, as being in restraint of marriage, or for any other illegality (*o*).

Where the plea is *non est factum* generally, the proof lies upon the plaintiff; but where the plea shows that the deed is void for special matter, the issue is on the defendant (*p*).

Special plea in avoidance.

3. The usual pleas in avoidance of a deed are, that it was obtained by duress,

(*t*) B.N.P. 171. But see 11 Co. 27, and Str. 1160; where it is laid down, that an alteration by a stranger in a material point will avoid the deed, because the witnesses cannot then say that it is the deed of the party. Vide *supra*, 377.

(*u*) *Pigott's Case*, 11 Co. 27; B. N. P. 267; vide *supra*, 377.

(*x*) 11 Co. 27, 28, b.; B. N. P. 267.

(*y*) Noy, 172; B. N. P. 268; 11 Co. 28; 2 Show. 28, 29; 2 Roll. Rep. 39, 40; 5 Co. 23, a.; Cro. Eliz. 546; Doc. Pl. 260. 262, 263; Poph. 161; 2 Roll. R. 30.

(*z*) March. 125; 2 Show. 29; Bac. Ab. Ev. 652; B. N. P. 268.

(*a*) Ibid.

(*b*) 2 Lev. 35; 2 Keb. 872. 881; Moor. 547. 619; Cro. Eliz. 627; B. N. P. 281.

(*c*) Roll. R. 39, 40.

(*d*) Ibid.; 2 Roll. Ab. 20; B. N. P. 281.

(*e*) Vent. 185.

(*f*) 1 Ford, 84. See tit. STAMP.

(*g*) *Cotton* v. *Goodright*, Bl. 1008; 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18; 2 Starkie's C. 35.

(*h*) 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18.

(*i*) 9 Co. 137, a.

(*k*) Dyer, 167, b.

(*l*) Com. Dig. Pleader, 2 W. 18.

(*m*) B. N. P. 172; Ca. K. B. 609. Per Lord Mansfield, Burr. 1805; Lord Raym. 315. But where infancy actually avoids the deed, it is evidence on the plea of *non est factum*. Per Eyre, J., 2 H.B. 515.

(*n*) 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18.

(*o*) Bl. 1008.

(*p*) Mod. Ca. 218: Com. Dig. Pleader, 2 W. 18.

which will be supported by proof that he was forced to give the bond by a wrongful imprisonment (*q*); by threats, and then proof of a menace of life, member, mayhem, or imprisonment, is sufficient, it is said, to avoid a deed (*r*); but a threat of battery, or of injury to the party's house or goods, is, it is said, insufficient, because the party may recover damages for the injury (*s*); this, however, is clearly a very inadequate reason for the distinction, and may be frequently false in fact. Under the plea of duress, it is a question for the jury whether the act of the party was voluntary, or was the result of terror and apprehension. Special plea in avoidance.

So the defendant, in avoidance of the deed, may plead coverture (*t*), infancy (*u*), or that the deed was void under the statute of usury, or against gaming, or for other illegal matter (*x*), fraud or covin, and in some instances mistake (*y*).

Other pleas in answer are, of a tender; *solvit ad*, or *post diem* (*z*); or a release (*a*), which must be produced and proved as a deed; performance of the condition; a defeazance, which must be proved as a deed, if denied by the replication (*b*); eviction (*c*); expulsion (*d*).

4. It is a general rule, that parties to a deed and those who are privy in estate, can found no claim upon the deed without showing it to the Court (*e*); and where the contract creates the obligation, it can neither be pleaded nor given in evidence unless it be under seal, but it is otherwise where the interest vests, although the deed has no continuance (*f*). Proof by, when necessary.

Where an estate is claimed by act of law, the party may make his claim without showing the deeds; as where the party is tenant in dower, or by elegit, or guardian in chivalry; for where the law creates an estate, but does not give custody of the deeds, it must allow the estate to be defended without them (*g*). But a tenant by the curtesy cannot claim an estate lying in grant, without deed, because he has the custody of the deeds in right of his wife (*h*).

Where the plea is, that *J. S.* was enfeoffed by deed, it seems that a parol feoffment cannot be proved; for if the jury were to find the issue for the defendant, the plaintiff would be for ever after estopped, although there was no such deed (*i*). So a demise may be proved by parol, for it may be by livery; but if it be alleged to have been by deed, it must be proved by deed (*k*). The deliverer will be *estopped* by the livery, unless he produce the indenture to show that it was merely conditional.

A deed of feoffment is evidence to prove livery, where the party has had possession (*l*), but if possession has not gone along with the deed, livery must be proved under a plea of feoffment (*m*). Upon a plea that *J. S.*

(*q*) 2 Ins. 482; Com. Dig. Pleader, 2 W. 19. But this is no plea, if the deed be acknowledged by the defendant to be enrolled of record. 2 Roll. 862.
(*r*) 2 Ins. 483; Cl. Ass. 72; Com. Dig. Pleader, 2 W. 20.
(*s*) 2 Ins. 483.
(*t*) See tit. HUSBAND & WIFE.
(*u*) See tit. INFANT.
(*x*) See tit. TENDER.
(*y*) See tit. PAROL EVIDENCE. In some instances the mere *suppressio veri* will avoid a deed. See *Gordon* v. *Gordon*, 3 Swanst. 400.
(*z*) See tit. PAYMENT.
(*a*) See tit. RELEASE.
(*b*) Com. Dig. Pleader, 2 W. 35; Mo. 573.
(*c*) Vide *supra*, tit. COVENANT.
(*d*) Ibid.
(*e*) Co. Litt. 267; 10 Co. 92.
(*f*) Roll. R. 39, 40; 2 Buls. 246.
(*g*) 10 Co. 93, 94.
(*h*) 10 Co. 94; Co. Litt. 226, a.
(*i*) 2 Roll. Ab. 682.
(*k*) Ibid.
(*l*) Roll. R. 192. 227; Tri. per Pais, 209; Cro. Jac. 423; Bac. Ab. Ev. F. 648.
(*m*) Bl. Comm. 67.

enfeoffed the defendant without saying *per indenturam*, the indenture is evidence of the feoffment (*n*). A deed of feoffment may be given in evidence as a release; for where the party is already in possession, the deed alone will be a sufficient contract to transfer a right (*o*). Where a thing lies in livery, a deed is evidence, although the seal be torn off, for the deed is only the evidence of transferring the possession, which being once transferred by livery does not return (*p*); but it is otherwise where the thing to which title is claimed (as a watercourse) lies in grant, for a man cannot claim a thing lying in solemn agreement but by solemn agreement (*q*).

The production of an original lease for a long term of years, coupled with a possession for seventy years, was held to be presumptive evidence of the execution of all mesne assignments (*r*). A deed takes effect from the delivery. A condition to pay for goods, then and afterwards to be delivered, does not bind as to goods delivered between the date and execution (*s*).

DEPOSITIONS.

THE admissibility and effect of depositions in civil cases have already been considered (*t*); it remains to notice those which are made according to the statutes in criminal proceedings.

Depositions under the statute 7 Geo. 4, c. 65.

The stat. 7 Geo. 4, c. 65, s. 2, enacts that "two justices, before they admit to bail, and the justice or justices, before he or they shall commit to prison any person arrested for felony or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know and declare anything material touching any such felony or suspicion of felony, to appear at the next court, &c. at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court (*u*).

Sect. 3. provides for such examination and depositions in cases of misdemeanor.

(*n*) 2 Roll. Ab. 682.

(*o*) Tri. per Pais, 209; Bac. Ab. Ev. F. 649.

(*p*) Pal. 403; Mod. 11; Vent. 14; 2 Keb. 556; 2 Lev. 220; 2 Show. 28. The livery being indorsed. Roll. Ab. 29. The cancelling of a deed does not revest the property conveyed. *Bolton* v. *Bishop of Carlisle*, 2 H. B. 263. *Roe* d. *Lord Berkely* v. *Archbishop of York*, 6 East, 86, per Holroyd, J., in *Doe* d. *Lewis* v. *Bingham*, 4 B. & A. 677; and per Bayley and Holroyd, Judges, in *Doe* v. *Hirst*, 3 Starkie's C. 60. A lease, on a dispute between a lessor and lessee, was ordered by a Court of Equity to be deposited with the attorney of the lessor, and in an action by the lessee against the tenant in possession, was produced, having the names of the parties torn off; it was held that it was still evidence of the lessee's title, and that the facts did not show a surrender in law, or by deed or note in writing. *Doe* v. *Thomas*, 9 B. & C. 288.

(*q*) 3 Buls. 79; Roll. R. 188.

(*r*) 2 Bl. R. 1228.

(*s*) Com. Dig. Fait, G.; 2 Cro. 264.

(*t*) *Supra*, Vol. I. Ind. same title.

(*u*) If the prisoner be taken before a magistrate of a different county from that in which the offence was committed, the informations, &c. should be transmitted to the latter county, and will, it is said, be evidence, although the magistrate had no original cognizance of the offence. Cro. Car. 213; 2 Hale, 285; Dalton's Just. c. 111, p. 299.

The object of the Legislature in framing the statutes, for which the above provisions have been substituted (*x*), was to enable the Court to see whether a prisoner had been properly admitted to bail, and whether the witnesses were consistent or contradictory in the evidence which they gave, without manifesting any intention to alter the law of evidence (*y*). But such depositions, in being warranted by the former and present statutes, became evidence in particular cases, upon general principles of evidence; that objection having been removed by the statutes which would otherwise have operated to their exclusion, namely, that they were extra-judicial.

Previous proof.

To warrant such evidence, it is essential to prove by the justice, coroner, or his clerk, &c. that the depositions contain the substance of the information on oath (*z*). It is not necessary to prove that the depositions were signed by the witnesses (*a*).

Death of the witness.

It must also be previously proved that the witness is dead (*b*); or that he has been kept away by the practices of the prisoner (*c*); or, as *has been said* (*d*), that he is unable to travel. It seems. however, to be very doubtful whether the mere casual and temporary inability of the witness to attend in a criminal case, be a sufficient ground for admitting his deposition, which affords evidence of a nature much less satisfactory than the testimony of a witness examined *vivâ voce* in court, and which might be procured at another time if the trial were to be postponed. It is true that the prisoner has had the power to cross-examine the witness, but this was at a time and under circumstances very disadvantageous to the prisoner. There are indeed many old cases in which great abuse has been practised in the reading of depositions against prisoners, although the deponents might have been produced; but these instances occurred in bad times, when little regard was paid to the rules of evidence, or indeed to any other laws (*e*). In *Lord Morley's Case* (*f*) it was held that it was not sufficient to show that endeavours had been used to find the witness, and that he could not be found. It must also be proved that the depositions were taken conformably with the statute, since any other would be extrajudicial; that they were taken on oath (*g*); that they were taken in the presence of the prisoner; for where the informations are taken before a magistrate, the words of the statutes strongly imply that the prisoner is supposed to be *present*, for the justice is to take the examination of the prisoner, and the informations of those who bring the

In the presence of the prisoner.

(*x*) 1 & 2 Phil. & M. c. 113; 2 & 3 Phil. & M. c. 10.

(*y*) Per Grose, J., *Lambe's Case*, Leach's C. C. L. 3d edit. 625; 3 T. R. 710. 722.

(*z*) 2 Hale's P. C. 284. It seems that they may be proved by any one who was present, and able to swear to the due taking. Where, on a capital charge, the magistrate himself, not having any clerk, took down the depositions, it was held that, although not absolutely necessary, it was desirable that he should be present to prove the correctness; but having returned that the prisoner was sworn, the Judge rejected evidence to prove that he was not so in fact. *Reg.* v. *Pikesley*, 9 C. & P. 124.

(*a*) *R.* v. *Fleming and Windham*, 2 Leach, 96.

(*b*) *Westbeer's Case*, Leach, 14. And see *Bromwich's Case*, 1 Lev. 180; 1 Salk. 281; B. N. P. 42.

(*c*) *Harrison's Case*, 4 St. Tr. 492; Fost. 337; Keb. 55.

(*d*) 2 Hale, 52; Phill. on Ev. 371. But this has been held, even in a civil case, to be insufficient.

(*e*) See Mr. J. Foster's observations, Fost. Dis. p. 234; and see the cases of *Sir W. Raleigh, Udal, the Earl of Essex, the Duke of Norfolk, Lord Strafford*, &c. in the State Trials.

(*f*) Kel. 55.

(*g*) 2 Hale, 284. Note, the former statutes did not in terms require that the informations should be taken on oath, but this is necessarily incident to the duty of the magistrate or coroner. Dalton, Just. c. 111; B. N. P. 242.

In the presence of the prisoner.

prisoner; and if they were to be taken in the prisoner's absence he would lose the benefit of cross-examination, and consequently the evidence, in principle, would not be admissible: the effect of the statutes seems to be not to alter any rule of evidence, but only to make a particular proceeding regular which otherwise would have been irregular, and so to leave it subject to the ordinary rules of evidence (*h*). The same inference is to be drawn from the terms of the late statute.

In *Woodcock's Case* (*i*), the magistrate visited *Silvia Woodcock* (who had received a mortal blow) at the poor-house, and took her deposition there in the absence of the prisoner, and C. B. Eyre was of opinion that the deposition was not admissible, since it had not been taken, as the statute directs, in a case where the prisoner was brought before the magistrate in custody; the prisoner therefore had no opportunity of contradicting the facts it contained.

In *Dingler's Case* (*k*), the deposition had been taken by the magistrate at the infirmary where the wounded person lay, and the Court acceded to the objection that the prisoner was not present, or on his defence. Where part of the examination in a case of murder was taken in the absence of the prisoner, but that which had been so taken was read over to him, and the rest of the deposition taken in the ordinary way, and the deponent was resworn in the presence of the prisoner, who was asked whether he chose to put any questions, it was held that the deposition was admissible, the witness being dead at the time of the trial; and a great majority of the Judges were of opinion that the evidence had been properly received (*l*).

It has been said, that depositions taken by the coroner are evidence, although the prisoner was not present, because the coroner is a public officer appointed to inquire of such matters (*m*), and therefore it is to be presumed that such depositions were fairly and impartially taken. Yet, it seems that the admissibility of these depositions stands altogether upon the statutes (*n*), and therefore it is difficult to conceive why a greater degree of credit should be given to depositions before the coroner than to those before justices, both being invested with equal authority.

The objection is not a want of authority in the case of the magistrate, for the statutes invest him with authority, but upon the principle that the accused has lost the benefit of a cross-examination, a defect which cannot be remedied by any care or attention on the part of the coroner, for he is not

(*h*) According to the case of *The King* v. *Eriswell*, 3 T. R. 707. Buller, J., was of opinion that depositions taken in the *absence* of the prisoner might, after the death of the witness, be read; and refers to *Radbourne's Case*, where it had been so held by all the Judges; but in that case (Leach, C. C. L. 3d edit. 512), the deposition was taken in the *presence* of the prisoner, and of course the question did not arise. It seems to have been the opinion of Lord Kenyon, in the case of *The King* v. *Eriswell*, that depositions so taken were not admissible; and he refers to *Paine's Case* (as reported 5 Mod. 163), and terms the objection there taken to admitting the deposition in evidence, namely, the loss of cross-examination, a *weighty objection*.

(*i*) Leach's C. C. L. 3 edit. 563.

(*k*) Ibid. 638, *cor.* Rose, Recorder, and Gould, J.

(*l*) *R.* v. *Smith*, *cor.* Richards, C. B., and afterwards by the Judges, 2 Starkie's C. 208; Russ. & Ry. C. C. L. 339. In the previous case of *R.* v. *Forbes*, Holt's C. 599, Chambre, J., held that the prisoner ought to be present whilst the witness actually delivers the whole of his testimony.

(*m*) B. N. P. 242, cites 1 Lev. 180; 2 Jon. 53.

(*n*) Per Lord Kenyon, 3 T. R. 707. *Lambe's Case*, Leach's C. C. L. 3d edit. 625.

privy to the facts to which the cross-examination might be directed, and which may be known to the prisoner alone.

In *Bromwich's Case* (*o*), (one of the authorities referred to in Buller's Nisi Prius, in support of this distinction), it does not appear whether the prisoner was or was not before the coroner at the time when the evidence was given, and it does not appear that either in that case, or in *Lord Morley's Case* (*p*), the question was raised.

In the case of *Thatcher* v. *Waller* (*q*), the other authority cited in support of the position in Buller, the only question was, whether the deposition of a witness taken before the coroner could be read, the witness being abroad, and it was held that it might; and it is stated, that the Court (with the exception of the Chief Justice) were of opinion that if the deposition had been taken before a magistrate it could not have been read; and the only reason assigned for the distinction is, that the coroner was an officer of *greater authority*. In neither, therefore, of these cases was the question considered upon plain and broad principles.

In the case of *The King* v. *Eriswell* (*r*), Mr. J. Buller states it to have been long settled, that a deposition taken before a coroner in the absence of the accused is good evidence (*s*); but that learned Judge did not, it seems, intend to make a distinction between depositions taken before coroners and those taken before justices, for he stated that the latter would be admissible in evidence, although taken in the absence of the party charged; and also stated that it had been so determined in *Radbourn's Case* by all the Judges. It is however remarkable, that in *Radbourn's Case* (*t*) the information was taken in the *presence* of the prisoner. It is also to be observed, that in the same case of *The King* v. *Eriswell*, Lord Kenyon, although he assumed that depositions before coroners and informations before magistrates were excepted cases, placed their admissibility upon the same footing, viz. the statutes of Philip & Mary, and made no distinction whatsoever between the two cases. He added, indeed, that the examination before a coroner is an inquest of office, a transaction of notoriety to which every one has a right of access (*u*); but he immediately afterwards laid great stress upon the case of *The King* v. *Paine* (*x*) as one which had been decided by the Courts of King's Bench and Common Pleas on great consideration; and cited, what he termed a weighty reason, given by the Chief Justice according to the report in 5 Mod. 163, for rejecting such evidence; viz. "the defendant not being *present* when they were taken before the mayor, and so had lost the benefit of a cross-examination." His Lordship also observed, that the case as reported in 5th Modern, had been adopted in 2 Hawk. c. 46, s. 24, which he approved of. It cannot therefore be inferred that Lord Kenyon fully acceded to the admissibility of such evidence, although in the course of his argument, assuming them to be exceptions, he denied the consequences attempted to be deduced from them. The only plausible ground upon which such a distinction can be supported, seems to be this, that a proceeding before the coroner is a matter so notorious, that every one may be presumed to have notice of it, and consequently to have had an opportunity of

(*o*) 1 Lev. 180.
(*p*) 7 Sr. Tr. 422.
(*q*) 2 Jon. 53.
(*r*) 3 T. R. 707.
(*s*) And he cited 1 Lev. 180; Kel. 55; also Salk. 555.
(*t*) Leach, 3d edit. 512.
(*u*) See 4 Comm. 274; 1 Hale, 60. *R.* v. *Scorey*, Leach, 50.
(*x*) 1 Salk. 281; 5 Mod. 163.

cross-examining the witness. This however is a reason far from satisfactory. Upon the whole, the distinction is not warranted by the Legislature; and as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be supported.

When admissible to impeach the testimony of a witness.

A deposition judicially and regularly taken may be read to contradict the testimony of a witness at the trial; for it is to be recollected, that one reason for requiring such informations to be taken, is in order to try the consistency of the witnesses (*y*).

In *Oldroyd's Case* (*z*), it was held that where a witness for the prosecution gave evidence in favour of the prisoner, in contradiction of the deposition taken before the coroner, it was competent to the Judge to direct the deposition to be read, in order to impeach the witness's testimony. Here the deposition was read by direction of the Judge, but Lord Ellenborough, C. J., and Mansfield, C. J., were of opinion that it would be competent to the prosecutor to do the same,

When admissible to impeach the credit of a witness.

It was admitted in *Lord Stafford's Case* (*a*), that the depositions of a witness taken before a justice of the peace, might by the prisoner's desire be read at the trial, in order to discredit the witness, by showing a variance between his evidence at the trial and his deposition (*b*).

In cases of misdemeanor.

Such depositions formerly were not admissible, except in case of felony; and therefore, upon an information for a libel, a deposition taken by a magistrate in the defendant's absence could not be read (*c*): but now depositions are taken in cases of misdemeanor, as well as of felony (*d*). They cannot be read on an indictment for petit treason, where the party is still living, although the witness has been kept out of the way by the defendant's procurement (*e*), since the 5th & 6th Edw. 6, c. 11, requires that two lawful accusers shall be brought *in person* before the accused, and prove him guilty, &c. But upon an indictment for petit treason and murder, it seems that such depositions are evidence to prove the charge of murder (*f*).

Where depositions have been taken and lost, a witness may be cross-examined from copies (*g*).

Examinations before justices.

Analogous to these depositions are the examinations which are judicially

(*y*) Vide *supra*, 383. It seems to be a general rule, that where a witness at one trial varies from his evidence at another in relation to the same matter, such variance may be given in evidence to discredit his testimony. Haw. b. 2, c. 46, s. 23.

(*z*) Russ. & Ry. C. C. L. 88. Note, that the counsel for the prosecution did not mean to call the witness, who was mother to the prisoner, but the learned Judge, in compliance with the ordinary rule, her name being on the back of the indictment, directed that she should be called. The learned Judge, in summing up to the jury, stated that the evidence of the witness was not to be relied on, and left the case to them entirely on the other evidence. All the Judges afterwards held that there was sufficient evidence to go to the jury, and no sufficient circumstances to raise a doubt as to the propriety of the conviction. They agreed, that where some of the evidence is inadmissible, yet, that if the case appear to be clear without that evidence, execution ought not to be stayed. *Tinckler's Case*, East's P. C. 354; but that this rule would not have been applicable in the principal case, had the deposition been inadmissible. As to the competency of a party to impeach his own witness, see tit. WITNESS.

(*a*) 3 St. Tr. 152.

(*b*) 2 Haw. c. 46, s. 22. But it seems that the deposition must be proved to be the genuine one of the witness. In *Lord Stafford's Case, Oates*, the witness, proved that the paper produced contained his deposition. 3 St. Tr. 153.

(*c*) *R.* v. *Paine*, 1 Salk. 281; 5 Mod. 163.

(*d*) By the late stat. 7 Geo. 4, c. 64.

(*e*) Post. 236. 337.

(*f*) Post. 106. *Radbourn's Case*, Leach, 512.

(*g*) *R.* v. *Shellard*, 9 C. & P. 277. Where it is said also that the witness ought to be asked only whether he has always said the same thing, except before the magistrates.

made under the direction of Acts of Parliament, which it seems to be now settled are not evidence where they are taken *ex parte* against one who had not the benefit of cross-examination. Therefore an *ex parte* examination of a pauper, although taken upon oath, is not admissible evidence against the appellant parish. For although the stat. 13 & 14 Car. 2, c. 12, s. 1, gives magistrates authority to remove upon complaint made, and incidentally to examine upon oath, yet the proceeding is *ex parte*, and the parties to be affected have no opportunity to cross-examine (*h*). In the case of *The King* v. *Ravenstone* (*i*) it was held that the examination of a woman pregnant of a bastard was admissible evidence, after her death, against the person whom she charged as the putative father, although the proceeding before the magistrate was *ex parte*, and the party charged was not present; the authority of this case may well be doubted (*k*). Examination before justices.

DETINUE.

In *detinue* the plaintiff must prove, 1st, his property in the goods; and 2dly, the *detainer* by the defendant.

1. Property in the goods. This may be either absolute or special (*l*). But a present right of possession is essential (*m*); a mere reversionary interest is not sufficient. And the right must exist at the time of bringing the action. If *A.* deposit the tit e deeds of his estate with *B.*, and before action convey the estate, he cannot recover, for the title deeds go with the estate (*n*).

2dly. The detainer by the defendant. Under the plea of *non detinet*, it is sufficient for the plaintiff to prove that the goods came wrongfully into the defendant's possession, though the declaration allege a possession by finding (*o*).

If a man detain the goods of a feme covert which came into his hands before the marriage, the husband alone may bring *detinue*, for the *detention* is the gist of the action (*p*); proof of possession is unnecessary (*q*); and if *A.* deliver goods to *B.* to deliver them to *C.*, the latter may bring *detinue* against *B.*, for the property is vested in him by the delivery to *B.* for his use (*r*).

(*h*) *R.* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Nuneham Courtenay*, 1 East, 373. *R.* v. *Eriswell*, 3 T. R. 721.

(*i*) 5 T. R. 373. See also *R.* v. *Clayton*, 3 East, 58; *supra*, 201, n. (*g*), and the observations upon it.

(*k*) The Court assumed that depositions under the stat. of Phil. & Mary, taken in the *absence* of the prisoner, would be evidence against him. Vide *infra*, tit. EXAMINATION.

(*l*) B. N. P. 50. The proof as to property seems to be the same as in an action of trover. Ibid. But greater certainty is necessary in the description of the property in the declaration.

(*m*) *Gordon* v. *Harper*, 7 T. R. 9. *Pain* v. *Whitaker*, 1 R. & M. 100.

(*n*) *Phillips* v. *Robinson*, 4 Bingh. 106. If *A.*, tenant in fee-simple, enfeoff *B.* without warranty, *B.* shall have all charters and evidences, for *B.* is to defend the land at his peril; but if *A.* enfeoff *B.* with warranty, *B.* shall not have any charters or evidences which comprehend the warranty without express grant. If *A.* enfeoff *B.* with warranty to him, his heirs, and assigns, and *B.* by deed enfeoff *C.* without warranty, who enfeoffeth *D.* with warranty, *C.* shall have the first and second charter. *Lord Buckhurst's Case*, 1 Co. 1.

(*o*) *Mills* v. *Graham*, 1 N. R. 140; and *semble*, where the detention is wrongful, the declaration may always be supported on an allegation of finding, as in trover; per Sir J. Mansfield, C. J. *Ibid.* In cases of special bailments it may be fit to declare specially; but even there it seems to be unnecessary. *Ibid.* And see Co. Litt. 286, b.; tit. 2, N. B. 138 (E). *Kettle* v. *Bromsall*, Willes, 118; Mod. Ent. vol. 2, p. 422.

(*p*) B. N. P. 50. *Secus* in *detinue* of charters of the wife's inheritance. 1 Rol. 347.

(*q*) Ibid.; and 1 Roll. Ab. 606.

(*r*) 1 Roll. Ab. 606.

If *A.* deliver goods to *B.* who loses them, and *D.* finds them, and delivers them to *J. S.* who has a right to them, *A.* cannot maintain *detinue* against *D.*, for he is not privy to the delivery by *A.* (*s*).

If a statute prohibit goods under pain of forfeiture, one part to the King, and another to him who will inform, seize, or sue for the same, any person may bring *detinue* for the goods, for the bringing the action vests a property in him (*t*). An heir may maintain *detinue* for an heir-loom (*u*).

The plaintiff must prove an actual possession of the goods by the defendant (*x*); hence *detinue* does not lie against the executor of a bailee who has destroyed the chattel (*y*). And if there be several executors, and one only has the possession, the action must be brought against him alone (*z*).

If goods be delivered to husband and wife, the *detinue* must be against the husband only (*a*); but if goods come to a feme covert before marriage, the action must be brought against the husband and wife (*b*). In *detinue* for a bond, a variance as to the sum will be material (*c*). The detention of goods seized by excise officers, after payment of the penalty on a conviction by justices, is not unlawful if no *demand* has been made (*d*).

Under the plea of *non detinet*, the defendant may give in evidence any matter which shows that he does not detain the plaintiff's goods (*e*); as for instance, a gift by the plaintiff; but he cannot give in evidence that the goods were delivered by way of pledge, as he may in trover (*f*).

And by the rule of H. T. 4 W. 4, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence but such denial shall be admissible under that plea.

The jury must find the value of every particular thing demanded; for the judgment is to recover the thing itself, or the value of it, and if the jury find damages and costs, and no value, the defect cannot, it is said, be supplied by a writ of inquiry (*g*).

DEVISE, PROOF OF TITLE BY. *See* EJECTMENT.

DIRECTORY.

STATUTE when directory as to Time. *See* TIME.
As to Mode of Sale (*h*), *see* INDEX.

(*s*) 2 Danv. 511; B. N. P. 51.

(*t*) Salk. 223; B. N. P. 51. It has been said, that *detinue* does not lie where the property has been taken by trespass (Sel. N. P. tit. Detinue, 6 Hen. 7, 9, a.; Bro. Ab. Detinue, pl. 53), because, as is said, the property is devested by the trespass, *tam. qu.*

(*u*) Bro. Ab. Detinue, pl. 30.

(*x*) 2 Roll. Ab. 703. *Wilkins* v. *Despard*, 5 T. R. 112.

(*y*) B. N. P. 50.

(*z*) Bro. Ab. Detinue, pl. 19.

(*a*) Roll. R. 128; B. N. P. 51.

(*b*) Co. Litt. 351; B. N. P. 51; *i. e. semble*, for the detention before the marriage.

(*c*) 2 Roll. Ab. 703; B. N. P. 51.

(*d*) *Hutchings* v. *Morris*, 6 B. & C. 464.

(*e*) Co. Litt. 283; B. N. P. 51.

(*f*) B. N. P. 51. Under the plea of *non detinet* of a note, the defendant cannot show a justifiable detention. *Richards* v. *Frankum*, 6 M & W. 420; and 8 Dowl. 346. And on the note being produced at the trial, there appearing to be a memorandum at the back, assigning it to *G.*, a third party, and directing the maker to pay the assignee the amount and all interest in respect thereof, it was held, that as amounting to a mere indorsement, it did not require a stamp; but that on the issues, "not the property of the plaintiff, and that the defendant held it as the servant of *G.*" the verdict must be found for the defendant. *Ibid.* S. C. 9 C. & P. 221.

(*g*) *Ibid.*; 10 Co. 119. But they may find the aggregate value of that which consists of a number of particulars; as a flock of sheep, &c. *Ibid.*

(*h*) *Doe* v. *Evans*, 1 C. & M. 450. As to writs, *Miller* v. *Bowden*, 1 Cr. & J. 563.

DISTRESS (*i*).

An action of *trespass* is a proper form in all cases where the distress is either wholly illegal (*k*) or irregular, unless it be otherwise provided by a statute.*

Where a distress has been irregularly made for rent, or for poor's rates, the action is in case or trespass, according to the nature of the irregularity complained of (*l*). But the plaintiff may waive the trespass and bring case (*m*).

In an action on the case for an illegal or irregular distress, the particular *grævamen* is specified in the declaration, which governs the nature of the proof.

And see *Davidson* v. *Gill*, 1 East, 72. *Clarke* v. *Palmer*, 4 M. & Ry. 141. A statute is never directory when in the negative.

(*i*) As to justifications under a distress for rent, see REPLEVIN.—TRESPASS. A Canal Act authorizing the company to distrain goods in boats for non-payment of toll, does not warrant a distress except on the canal. *Fraser* v. *Swansea*, 1 Ad. & Ell. 354. As to distresses for small rents, see the stat. 57 G. 3, c. 93; 7 & 8 G. 4, c. 17. Distress warrants by justices of the peace, 27 G. 2, c. 20. As to notice of action, see NOTICE.—TIME. Goods were seized (under a warrant of distress, for church-rates, admitted to be irregular) on the 27th October, but not sold until the 1st and 2d November, and the action was brought on the 30th January; it was held, that as the seizure was only conditional, if the amount were not paid, and the subsequent sale was the real grievance, the action was in time; and where the demand of perusal and copy of the warrant required it to be within three days, although by 24 Geo. 2, c. 44, no action can be brought until after refusal of such copy, and in six days after demand, held, that the right of action was not affected thereby. *Collins* v. *Rose*, 5 M. & W. 194.

(*k*) If the landlord turn the plaintiff's family out of possession, and continue in possession after the rent is paid, he is a trespasser. *Etherton* v. *Popplewell*, 1 East, 139. As to what may be taken in execution under a distringas, see 3 B. & P. 256; 4 East, 467. Implements of trade are distrainable where there is no other subject of distress. *Simpson* v. *Hartop*, Willes, 512. Utensils in use are not distrainable. *Secus*, if not in use and no other distress on the premises. *Fenton* v. *Logan*, 9 Bing. 676. *Wood* v. *Clarke*, 1 Cr. & J. 484. See Appendix. Beasts distrained damage feasant must be fed whilst impounded. Cruelty to Animals Act. The collector of land-tax cannot break open a house, without the presence of a constable, to make a distress, the provision overruling the whole of sect. 17 of 38 Geo. 3, c. 5. *Foss* v. *Raine*, 4 M. & W. 419; 7 Dowl. 53; and 8 C. & P. 699.

(*l*) *Ib.* By stat. 17 Geo. 2, c. 38, s. 8, "Where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers, or in the rate of assessment, or in the warrant of distress thereupon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs; unless tender of amends be made before action brought."—By stat. 11 Geo. 2, c. 19, s. 19, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio**, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at the election of the plaintiff; and if he recover, he shall have full costs." But by sec. 20 of the same stat. it is provided, "that no tenant or lessee shall recover in such action, if tender of amends has been made before action brought."

(*m*) Distress made after tender of the rent, the plaintiff may waive the trespass and bring case. *Branscombe* v. *Bridges*, 1 B. & C. 145; 3 Starkie's C. 171.

* An irregularity in the distress does not avoid the sale. *Lyon* v. *Weldon*, 2 Bing. 334.

Causes of action.

The most usual causes of action are for distraining where no rent was due (*n*); or for more than was due (*o*); or for an excessive distress (*p*); or for distraining beasts of the plough, and sheep, where there is other sufficient distress (*q*); or driving a distress above three miles out of the hundred (*r*); impounding goods distrained off the premises, and not giving due notice (*s*); refusing to restore the goods distrained for rent, after tender of the rent and costs (*t*); selling the distress within five days after notice (*u*); not removing

(*n*) By 2 Will. & Mary, sess. 1, c. 5, s. 5, the owner may, in action of trespass or *case*, recover double the value of the goods, and full costs.

(*o*) This is either at common law or under the stat. of Marl. 52 Hen. 3, c. 4.

(*p*) Trespass does not lie for taking an excessive distress for rent (*Lynn* v. *Moody*, Fitzg. 85; 2 Str. 851. *Hutchins* v. *Chambers*, 1 Burr. 590), unless gold and silver be taken to excess, for they are of known value. Ibid; and per Lord Kenyon, *Crowther* v. *Ramsbottom*, 7 T. R. 658. The proper remedy for taking an extensive distress is case upon the Statute of Marlbridge, 52 H. 3, c. 4. *Hutchins* v. *Whitaker*, 2 Ld. Kenyon, 204. Trover will not lie. *Whitworth* v. *Smith*, 1 M. & R. 193. *Bachelor* v. *Vyse*, 4 M. & S. 552.

(*q*) *Unqore est purveu que null homme de religion n'autre soit distreinte per bestes, que gaignent sa terre, ne per ses brebis, taunt come lem trove autre destresce et autres chateux suffisaunt.* 51 H. 3, st. 4. But such a distress is not illegal if at the time of making it there was reasonable ground for supposing, from the appraisement of competent persons, that without taking beasts of the plough there would not have been sufficient. *Jenner* v. *Yolland*, 6 Price, 3. The law does not compel the previous sale of such other goods. *Ibid*; and see 2 Willes R. 167. An action is not maintainable for distraining beasts of the plough where there is no other sufficient subject of distress on the premises. *Piggott* v. *Birtle*, 1 M. & W. 441. Implements of trade are distrainable where there is no other subject of distress. *Simpson* v. *Hartop*, Willes, 512. Utensils in use are not distrainable. *Secus*, if they be not in use and there be no other distress on the premises. *Fenton* v. *Logan*, 9 Bing. 676. *Wood* v. *Clarke*, 1 Cr. & J. 484. Crops taken in execution under the statute, and left a considerable time upon the premises in order to be reaped, are not distrainable for rent becoming due after they were taken in execution; *see* Vol. I. 514; and where props are so taken, sold, and left on the premises, and arrears of rent have been paid, under the statute of Anne, the landlord cannot distrain for subsequent rent on the ground that the purchaser has not entered into the agreement prescribed by the stat. 56 Geo. 3, c. 50, s. 3. Nor can it be presumed from the absence of such an agreement that the straw was sold to be carried off contrary to the 1st section. *Wright* v. *Davies*, 1 Ad. & Ell. 641. As to the general position that growing crops seized under a *fi. fa.* are not liable to the landlord's distress, see *Peacock* v. *Purvis*, 2 B. & B. 362; 5 B. Moore, 79. *Eaton* v. *Southby*, Willes, 131, and the dictum of Thompson, B. in *Gwilliam* v. *Burke*, 1 Price, 277, *contrà*. Distrainers of cattle damage feasant are bound to provide a proper pound, and are liable for injury caused by the state of it; where the replication alleged that the pound was *then* wet, and wholly unfit, and whereby, &c., it was held, that the issue raised expressly its state at the time of impounding, and not whether generally sufficient. *Wilder* v. *Speer*, 3 N. & P. 536.

(*r*) 1 & 2 Phil. & Mary, c. 12, which entitles the party aggrieved to 5*l.* and treble damages.

(*s*) 2 Will. & Mary, c. 5, s. 2; 11 Geo. 2, c. 19, s. 10.

(*t*) A tender of the rent upon the land before the distress makes the distress tortious; a tender after the distress, and before the impounding, makes the subsequent detainer, but not the taking, wrongful; a tender after the taking and impounding does not make either the one or the other wrongful; but in the case of a distress for rent, a sale after tender of the rent and costs, is illegal, under the equity of the stat. 2 Will. & Mary, c. 5. An action on the case will not lie for detaining the plaintiff's cattle, which have been distrained damage feasant, in the pound after tender of amends made subsequent to the impounding. *Anscomb* v. *Shore*, 1 Camp. 285; 1 Taunt. 261; nor where the tender is made after the distress, but before the impounding; for the proper action is replevin or trespass. *Lindon* v. *Hooper*, Cowp. 414; and see 6 T. R. 299; *Sheriff* v. *James*, 1 Bing. 341.

(*u*) See the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2. Where the landlord sold an unripe crop of corn within the five days, the plaintiff cannot recover on a declaration for the seizure, per *quod* he would not replevy, for such a sale is wholly void, and the tenant might at any time before the corn was ripe have tendered the rent due, and if after that the landlord had taken the corn, he would have been a trespasser. *Owen* v. *Legh*, 3 B. & A. 470. The five days appointed by the statute are inclusive of the day of sale. *Wallace* v. *King*, 1 H. B. 13. The act of appraisement at the end of five days does not take away

the goods distrained within a reasonable time after the lapse of five days (*x*); for not selling for the best price (*y*); for not leaving the overplus arising from the sale of a distress with the sheriff (*z*) or constable.

The omission of the bailiff to deliver a copy of his charges, under the stat. 57 G. 3, c. 93, s. 6, does not render the landlord liable (*a*).

The law does not prescribe any priority in the sale of goods; no action lies for selling beasts of the plough before other goods, where the distress is legal (*b*).

Proof by the sheriff.

A count in trover is usually added to the special count; and therefore, mere proof of the defendant's seizure and sale of the plaintiff's goods will usually be sufficient to throw upon the defendant the necessity of justifying the act (*c*).

The more correct course seems to be, that the plaintiff should enter at once upon the whole of his case. If he alleges a distress for rent, and complains of an irregularity committed in the course of that distress, he should prove the defendant's handwriting to the notice of distress, if such a notice has been served; this will usually be evidence of the tenancy, the *quantum* of rent, and the sum in arrear, if it be correct as to such particulars; if it be not correct, and the fact should be material, the defendant may prove the amount of the rent by evidence of the original contract, or by evidence of receipts given by the defendant, or of payments to him.

Excessive distress.

In an action for an excessive distress (*d*) the plaintiff should prove the tenancy (*e*), the rent due as alleged, and the distress. The tenancy may be

the right to replevy. *Jacob* v. *King*, 5 Taunt. 451. An arrangement between the landlord and tenant that the goods distrained shall remain on the premises after the five days, is not *per se* evidence of collusion between the landlord and tenant. *Harrison* v. *Barry*, 7 Price, 690.

(*x*) Although there are precedents of declarations in case for not removing a distress from the premises after the expiration of five days (see Chitty on Pleadings), yet it seems to be clear that the remedy is in trespass, and not case. As the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, and the stat. 11 Geo. 2, c. 19, s. 10, authorize an appraisement and sale of the goods upon the premises after the expiration of the five days, it follows that the landlord is to be allowed a reasonable time for doing this, the statutes having fixed no particular time, and it being impossible, where each case must depend so much on its own circumstances, for the Legislature to prescribe any. What shall be a reasonable time, under the circumstances of the particular case, is a question for the jury. In the late case of *Pitt* v. *Adams*, Abbott, L. C J., left it so to the jury, and the Court of K. B. afterwards held the direction to be right. If the party remain in possession beyond a reasonable time, he is a trespasser. *Ibid.* After the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, which gives the power of sale after the expiration of five days, and previous to the stat. 11 Geo. 2, c. 19, s. 10, which authorized a sale on the premises, the landlord was considered to be a trespasser if he did not remove the distress at the end of five days. *Griffin* v. *Scott*, Str. 717. See also *Winterborne* v. *Morgan*, 11 East, 395. *Wallace* v. *King*, 1 H. B. 13. *Etherton* v. *Popplewell*, 1 East, 139. But the defendant in trespass may disprove the trespass by evidence of consent on the part of the tenant. See *Harrison* v. *Bray*, 7 Price, 610.

(*y*) According to the stat. 2 Will. & Mary, c. 5, s. 2, *infra*, note (*p*). But the price at which the goods were appraised will be presumed to be the best, until the contrary appear; 4 Mod. 390; Com. Dig. Distress, D. 8.

(*z*) According to the stat. 2 Will. & Mary, c. 5, s. 2, where the action is against overseers for the surplus under a distress for poor's rates, under the stat. 27 Geo. 2, c. 20, a demand must be proved to have been made previous to the commencement of the action. *Simpson* v. *Routh*, 2 B. & C. 682.

(*a*) *Hart* v. *Leach*, 1 M. & W. 560.

(*b*) *Jenner* v. *Yolland*, 6 Price, 5.

(*c*) But trover will not lie for an irregularity in the sale where the defendant was entitled to distrain, although he sells before the expiration of the five days. *Wallace* v. *King*, 1 H. B. 13.

(*d*) Under the stat. 52 H. 3, c. 4, "*et qui distriationes fecerint irrationabiles et indebitas graviter amercientur propter excessum districtionum ipsarum.*

(*e*) A local description of the premises must be proved as laid. *Harris* v. *Cooke*, 2 Moore, 587. See Vol. I. tit. VARIANCE.

proved as already stated, or by the production and proof of the lease. A variance between the *quantum* of rent alleged, and that appearing to be due, will not be material (*f*).

The taking of the distress by the defendant may be proved by the testimony of the person employed to distrain, if he can prove his authority from the defendant; or such authority may be proved by giving secondary evidence of the warrant to distrain, after giving notice to produce the warrant. Proof of the seizure of the distress is sufficient, without showing that the goods were sold or removed; and although no person be left in possession of the goods (*g*). So if the plaintiff pay the expenses of the levy under protest before any seizure is made or inventory taken (*h*).

It is not necessary to prove express malice; it should, however, appear that the excess was considerable (*i*). Neither is it necessary to prove the precise amount of rent alleged to be due (*k*).

The proper test of value is the amount which the goods would have sold for at a broker's sale (*l*).

The action does not lie against the keeper of a pound merely for receiving a distress, though the original taking was tortious, unless he exceed his duty and assent to the trespass (*m*).

Proof by the defendant.

In an action on the case the defendant may, under the general issue, give any evidence in justification of his act (*n*). If the distress were for rent he should prove the tenancy, either by means of the contract, or evidence of the payment of rent by the plaintiff, or some other admission by him of the tenancy (*o*); the authority to the broker or other agent to distrain, for the particular cause; notice of distress according to the statute (*p*), by means

(*f*) *Sells* v. *Hoare*, Bing. 401.

(*g*) *Swan* v. *Earl of Falmouth*, 8 B. & C. 456.

(*h*) *Hutchins* v. *Scott*, 2 M. & W. 809.

(*i*) *Field* v. *Mitchell*, 6 Esp. C. 71. As if a man distrain oxen for a small sum, where a sheep or pig might have been distrained. *Secus*, where the distress cannot be made on an article of inferior value. *Ibid.* According to an ancient case, a cart and horse may be distrained for a small demand, because, as is said, *they are not severable*. *Clarke* v. *Tucker*, 2 Vent. 183 *Proudlove* v. *Twemlow*, 1 Cr. & M. 326. A landlord is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the amount due. Per Bayley, J., *Willoughby* v. *Backhouse*, 2 B. & C. 823. To maintain the action there must be a disproportion to excess. Per Lord Ellenborough, *Field* v. *Mitchell*, 6 Esp. C. 71. A landlord is liable for excess in seizing growing crops, the probable produce of which is capable of estimation at the time of seizure, but the measure of damages is the inconvenience and expense sustained by the tenant in being deprived of their management, or which he is put to in providing sureties on replevying. *Piggott* v. *Birtle*, 1 M. & W. 441.

(*k*) *Sells* v. *Hoare*, 1 Bing. 401.

(*l*) *Wells* v. *Moody*, 7 C. & P. 59; and therefore a witness ought not to be asked what might have been obtained for the goods from an incoming tenant. *Ibid.* Per Parke, B.

(*m*) *Badkin* v. *Powell*, Cowp. 476.

(*n*) Under the stat. 11 Geo. 2, c. 19, s. 21, a previous recovery in replevin is a bar. *Phillips* v. *Berryman*, 3 Doug. 386.

(*o*) And for this purpose notice should be given to him to produce the lease or agreement under which he holds, the receipts for rent, &c.

(*p*) By the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, it is enacted, "That where any goods or chattels shall be distrained for any rent reserved, and due upon any contract, and the tenant or owner of the goods shall not within five days* next after such distress, and notice thereof†, with the cause of such taking, left at the chief mansion-house, or other most notorious place on the premises‡ charged with the

* See note (*x*), *supra*, 391.

† As to the form of notice, see *Moss* v. *Gallimore*, Doug. 180. It need not state at what time the rent became due. *Ibid.*

‡ But notice delivered to the party himself is sufficient (*Walter* v. *Rumbal*, Lord Ray. 53), for it is the most effectual way of giving notice.

of an examined copy, after proof of notice to produce the original; a regul a appraisement by two sworn appraisers (*q*) at the expiration of five days after the notice (*r*); the sale of the goods for the best price that could be got (*s*); the amount of the costs (*t*); the leaving the overplus, after payment of the rent and costs, with the sheriff or constable. Proof by the defendant.

He cannot justify a joint distress for parcels distinctly let, though in the same lease (*u*); nor can he split his distress, and first distrain for part, and afterwards for the residue (*x*). A distress warrant for seven rates, one of which has been quashed, is void as to all (*y*). An arrangement after an illegal distress as to the sale does not devest the plaintiff's right of action (*z*); neither does payment or tender of rent, in order to obtain re-deliverance of the goods, bar an action for irregularity. An agreement to take interest on rent does not take away the right of distress (*a*).

In an action for an excessive distress, the defendant may show that more rent was due than is stated in the notice (*b*). Previously to the late statute, the broker who made the distress was held to be an incompetent witness for the defendant, to disprove an irregularity (*c*).

In an action under the stat. 11 Geo. 2, c. 19 (*d*), for a fraudulent and Proof in an action for a fraudulent removal, &c.

rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish or place, where the distress is taken, cause the distress to be appraised by two sworn appraisers *, whom such sheriff, &c. shall swear to appraise them truly; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent, and the charges of the distress and appraisement, leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner's use." It seems that at all events reasonable care and diligence ought to be used to obtain the *best* price. Where a sheriff sells under a *venditioni exponas*, the meaning of the writ is, sell for the best price you can obtain; and the sheriff ought not to part with the goods for a price manifestly inadequate to their value. See *Keightly* v. *Birch*, 3 Camp. 521. *Barnard* v. *Leigh*, 1 Starkie's C. 43. But where a sheriff cannot sell but under too great a sacrifice, under a writ of *fi. fa.*, he ought to make a special return. *Ib.* The party is not bound by the notice of distress given at the time of the distress; he may distrain for one thing and justify for another. *Crowther* v. *Ramsbottom*, 7 T. R. 658.

(*q*) See the stat. *supra*, note (*p*). An appraisement by a party who makes the distress is irregular. *Westwood* v. *Cowne*, 1 Starkie's C. 172. In case for wrongfully refusing to permit the plaintiff to appraise goods distrained, a plea that the goods were taken for arrears of rent, is an issuable plea, as going to the merits. *Sealey* v. *Harris*, 7 Dowl. 197.

(*r*) The five days are reckoned inclusive of the day of sale. *Wallace* v. *King*, 1 H. B. 13.

(*s*) *Supra*, note (*p*).

(*t*) The stat. 57 Geo. 3, c. 93, which regulates the costs of distresses for rents not exceeding 20 *l.* directs (sec. 5) that evidence of the justice's signature shall be proof of the judgment.

(*u*) *Rogers* v. *Birkmire*, Str. 1040; Cas. T. H. 245.

(*x*) *Wallis* v. *Saville*, Lutw. 1532. *Secus* if he seize *for the whole*, but mistaking the value of the goods, seize too little. *Hutchins* v. *Chambers*, 1 Burr. 589.

(*y*) *Hurdy* v. *Wink*, 2 Moore, 417.

(*z*) *Willoughby* v. *Backhouse*, 2 B. & C. 821.

(*a*) *Skerry* v. *Preston*, 2 Chitty's R. 245.

(*b*) *Gwinnett* v. *Phillips*, 3 T. R. 645. *Crowther* v. *Ramsbottom*, 7 T. R. 658.

(*c*) *Field* v. *Mitchell*, 6 Esp. C. 73.

(*d*) By 11 Geo. 2, c. 19, s. 1, "In case any tenant or lessee of lands or tenements, upon the demise whereof any rent is payable, shall fraudulently or clandestinely carry off his goods, to prevent the landlord from distraining, it shall be lawful for every landlord, or any person by him empowered, within thirty days next ensuing

* It is irregular for the party distraining to act as broker, 2 Bing. 334. *Westwood* v. *Cowne*, 1 Starkie's C. 172. *Andrews* v. *Russell*, B. & P. 81. The measure of damages, in an action for selling without an appraisement, is the value of the goods, and special damage sustained, *minus* the amount of rent due. *Buggins* v. *Good*, 2 Tyrr. 447. *Nott* v. *Curtis*, cited Ib. 449.

Fraudulent removal.

clandestine removal of goods, to prevent a distress, the plaintiff must prove, 1st, that the rent was in arrear (*e*); 2dly, the fact of the removal of the goods, and their value. It is sufficient to show that the removal was with the privity of the tenant; 3dly, that the removal was fraudulent or clandestine, and made (*f*) with intent to prevent the landlord or lessor from distraining for the rent so due. It has been said, that it is necessary to prove that the removal was *secret and clandestine*, as well as that it was *fraudulent* (*g*); but this may well be doubted, the words of the statute being in the disjunctive. The statute, it seems, contemplates a removal by the tenant for his own benefit, and does not extend to a delivery to a creditor who presses for payment of a debt (*h*). Nor to the removal of the goods of a stranger (*i*). The fraudulent intention, which is a question of fact for the jury, is usually evidenced by the season and circumstances of the removal; as from its having been effected in the night-time, or at an unseasonable hour, with suddenness and precipitation after a threat of distraining, or with knowledge that a distress was intended.

Intention.

In an action against one for aiding and assisting a tenant in a fraudulent removal, it is essential to prove knowledge of the fraudulent intent (*k*).

In an action of trespass against the landlord, who has followed goods thus removed, he cannot give the fraudulent removal in evidence under the general issue (*l*); he must, on issue taken on the special justification, be prepared with the proofs already stated, and also show that he distrained the goods within thirty days after the removal (*m*).

DISTURBANCE.

Proof by the plaintiff.

In an action on the case for the disturbance of the plaintiff in the enjoyment of incorporeal rights, such as of common (*n*), way (*n*), watercourse (*n*), office, seat at church, or other possession, the plaintiff must prove, under the plea of the general issue, not guilty; 1st, his right, as alleged in the

such carrying off, to seize such goods wherever the same shall be found, as a distress for the rent, and the same to sell or dispose of, as if the said goods had been distrained upon such premises." Sec. 2: "Provided that no landlord shall seize goods sold *bonâ fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud." Sec. 3: "If any such tenant shall fraudulently remove his goods, and any person shall knowingly assist such tenant in fraudulently conveying away his goods, or in concealing the same, all persons so offending shall forfeit to the landlord from whose estate such goods were carried off, double the value of the goods, to be recovered by action of debt in any of His Majesty's courts at Westminster, or in the courts of session in the counties palatine, or in the courts of grand sessions in Wales." The landlord may elect which remedy he will pursue, in case of fraudulently removing goods to prevent a distress, by action or by complaint to two magistrates, although the goods do not exceed the value of 50*l*. *Bromley* v. *Holden*, 1 M. & M. 175.

(*e*) Unless rent be actually in arrear, the case is not within the stat. 2 Will. Saund. 284, a, n. (2). *Watson* v. *Main*, 3 Esp. C. 15.

(*f*) *Lister* v. *Brown*, 3 D. & R. 501; 1 C. & P. 121.

(*g*) *Watson* v. *Main*, 3 Esp. C. 15, *cor.* Eyre, C. J. The point was doubted in *Furneaux* v. *Fotherby*, 4 Camp. 136; but in the case of *Opperman* v. *Smith*, 4 D. & R. 33, subsequently decided, it was held, that an open removal, if fraudulent, of which the jury were to judge, would justify the landlord in following and distraining the goods. A withdrawing of cattle to a place where they were not likely to be found, is a concealment, although they were turned into an open field. *Stanley* v. *Wharton*, 8 Price, 301. An *action* lies, although the value does not exceed 50*l*. *Ib.*

(*h*) *Bach* v. *Meats*, 5 M. & S. 200.

(*i*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*k*) *Brooke* v. *Noakes*, 8 B. & C. 539.

(*l*) 2 Will. Saund. 284, a.; 3 Esp. C. 15 *Furneaux* v. *Fotherby*, 4 Camp. 136. As to the justification by the landlord in an action of trespass, see TRESPASS.

(*m*) According to the stat. 11 Geo. 2, c. 19, s. 1, 2.

(*n*) See these titles respectively.

declaration; 2dly, the defendant's interruption of that right; and 3dly, the damage sustained.

Proof of the plaintiff's right.

1st. The usual allegation in the declaration against a wrong-doer, is *habere debet*, without alleging a grant or prescription (*o*); and although he should allege a prescription, yet as it is but inducement, a variance from the prescription in evidence would not be material, provided the plaintiff proved himself to be really entitled to the right claimed (*p*); but the plaintiff must prove *his right as claimed;* as, if he claim a right as appurtenant to particular lands, by proof that it has been used by the occupiers of that land; and it would be insufficient to prove that the right was enjoyed as appurtenant to other lands, or by the tenants of the manor (*q*).

The title to a right of this nature is proved, either, 1st, by direct, or 2dly, more usually by presumptive evidence; by direct evidence, as by proof of a grant of a right of way, as appurtenant to a house or land, or of a right to a pew, as appurtenant to a house, by proof of a faculty (*r*).

Presumptive evidence.

2dly, Prescriptive rights can seldom be proved except by presumptions resulting from constant usage and enjoyment, where the right is of a private nature; and from such evidence, and also from reputation and traditionary declarations, where it is of a public nature (*s*).

An uninterrupted enjoyment of land for twenty years, in the claimant's own right, is *primâ facie* evidence of title to the land itself (*t*); and an enjoyment of a privilege or easement in the lands of another, affords also a presumption of a legal title by grant or prescription (*u*); this, however, is merely presumptive evidence of the right, which is liable to be rebutted by circumstances (*x*); and on the other hand, the presumption of legal title may be inferred from a shorter period of possession (*y*).

In an action for the disturbance of the plaintiff in his enjoyment of a pew in a church, proof of *possession* is sufficient against a wrong-doer, without

(*o*) Com. Dig. Action on the Case, B. 1.

(*p*) As against a strapger for a wrongful disturbance of a right, the mode by which he acquired the right is, it seems, no more material to be stated, than it would be if the plaintiff in an action of trover should aver that he was lawfully possessed of goods bought at a fair. *Secus* in trespass or replevin, where, if a plaintiff allege a particular estate, he would be bound to prove it on issue taken. *Sir Francis Leake's Case*, Dyer, 365. *Goram* v. *Sweeting*, 2 Will. Saund. 206, note (22); 2 Cro. 630; Com. Dig. Action on the Case, B. 1.; 1 Will. Saund. 346. *Ricketts* v. *Salway*, 2 B. & A. 360.

(*q*) *Wilson* v. *Page*, 4 Esp. C. 71. But where the plaintiff declared upon a right of common, in respect of a messuage and 150 acres of land, with the appurtenances, it was held that the declaration was divisible, and that proof of common right in respect of the *land* was sufficient to entitle the plaintiff to a verdict *pro tanto*. *Ricketts* v. *Salway*, 2 B. & A. 360. The allegation of a right of common for all the plaintiff's cattle, *levant* and *couchant*, &c. may be supported, although the common be not sufficient to feed all the cattle for a length of time. *Willis* v. *Ward*, 2 Chitty, 297. So it was held that an allegation that the plaintiff was entitled to common of pasture for all cattle, *levant* and *couchant*, upon the land, was supported by evidence that the plaintiff was a part owner with defendant and others of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out cattle in proportion to the extent of their respective lands within the common field; and although such cattle were not maintained upon such land in winter, and although the custom was to turn out according to the extent, and not the produce, of the land in respect of which the right was claimed; and that the right was well laid to extend over the whole common, without excepting his own land. *Cheesman* v. *Hardham*, 1 B. & A. 706.

(*r*) See *Stocks* v. *Booth*, 1 T. R. 428.

(*s*) Vid. Vol. I. and *infra*, tit. PRESCRIPTION.

(*t*) See tit. EJECTMENT,

(*u*) See the cases, 2 Will. Saund. 175, a.; and also tit. PRESCRIPTION.—PRESUMPTION.

(*x*) See tit. PRESUMPTION.—LENGTH OF TIME.

(*y*) Ibid.; and see *Bealey* v. *Shaw*, 6 East, 208.

proof of repairs done by the plaintiff (*z*); but as against the ordinary, who by the common law has the disposal of all the seats in the church, a special title or consideration must be alleged and proved; as by proof of the building and repairing of the seat (*a*). The defendant may adduce evidence to rebut the presumption of right arising from such continued enjoyment, by evidence tending to explain it, and to show that the enjoyment was founded not on right, but on leave and permission (*b*); or to destroy the prescription by proving the origin of the enjoyment, or showing that it has been interrupted, or that the prescription has been extinguished (*c*).

Proof of the disturbance.

2dly. The disturbance may be alleged generally, and the particular manner of the disturbance be given in evidence (*d*).

Of damage.

3dly. Proof of damage done, to the smallest amount, will be sufficient to support the action, although the plaintiff cannot prove damages to any specific and determinate amount; for if that were required where the plaintiff's right has been infringed, the wrong-doer might gain a title by length of possession (*e*); as, if a stranger turn cattle on the land where the plaintiff has a right of common (*f*): for it is a damage to the plaintiff that he cannot enjoy the right of common in so ample and beneficial a manner as, but for the defendant's act, he might have done (*g*). So, if the defendant take from the common any manure dropped there by the cattle (*h*).

DRUNKENNESS.

A DEFENDANT may avoid even a deed on *non est factum* pleaded, by evidence that he was made to sign it when he was so drunk that he did not know what he did (*i*), in which case it is entirely void. So *à fortiori* may he avoid an alleged agreement, not under seal, by such evidence (*k*). It has indeed been said that a Court of Equity will not relieve in such a case, unless the inability were occasioned by the management and contrivance of him who gained the deed (*l*). But at common law no such distinction seems to obtain: the law regards the contracts of one who for the time is bereaved of reason, though by his own folly, as void, and does not punish his moral delinquency by subjecting him to obligations to which assent is essential, when he was incapable of assent (*m*).

(*z*) *Kenrick* v. *Taylor*, 1 Wils. 326. The pew was there claimed by prescription, as appurtenant to a messuage. *Burton* v. *Bateman*, 1 Sid. 203. See tit. PEW.—PRESCRIPTION.

(*a*) Ibid.; and 3 Lev. 73; 2 Lev. 241; Salk. 551; 1 Buls. 150; Godb. 200.

(*b*) See tit. PRESUMPTION.—LENGTH OF TIME. *Bradbury* v. *Grinsell*, 2 Will. Saund. 175, d. *Daniel* v. *North*, 11 East, 372. *Campbell* v. *Wilson*, 2 East, 294.

(*c*) See tit. PRESCRIPTION.

(*d*) 2 Cro. 606; Bridg. 4; Com. Dig. Action on Case, B. 1.

(*e*) See the observations of Buller and Grose, J^s^, *Hobson* v. *Todd*, 4 T. R. 71.

(*f*) *Hobson* v. *Todd*, 4 T. R. 71.

(*g*) *Ibid.*

(*h*) *Pindar* v. *Wadsworth*, 2 East, 154. In case for a surcharge it is not necessary for the plaintiff to show that he put on any cattle of his own at the time of the surcharge, but only that he could not enjoy so beneficially. *Wells* v. *Watling*, 2 W. Bl. 1233.

(*i*) B. N. P. 172, cites *Cole* v. *Robins*, Hil. 2, Ann. per Holt, C. J., and per Ld. Ellenborough in *Pitt* v. *Smith*, 3 Camp. 33. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise. Per Lord Hardwicke, in *Cory* v. *Cory*, 1 Ves. 19, drunkenness is not sufficient to set aside an agreement to settle family disputes, unless an unfair advantage be taken.

(*k*) *Pitt* v. *Smith*, 3 Camp. 33. *Fenton* v. *Holloway*, 1 Starkie's C. 126.

(*l*) *Johnson* v. *Medlicott*, 3 P. W. 130; 1 V. & B. 30.

(*m*) See the observations of Bayley, J., in *Baxter* v. *Earl of Portsmouth*, 7 D. & R. 614. It would be singular that the law should merely inflict a fine of 5*s.* on a man for getting drunk, but afterwards mulct him to the amount of 1,000*l.* by holding him to performance of a contract made

It is an established rule of criminal law, that voluntary drunkenness is no excuse for any injury or offence to the public or to individuals, either criminally or civilly; but that the circumstance, where a crime has been committed, is regarded rather as an aggravation than an extenuation of guilt (*n*).

DURESS.

According to Bracton, to constitute a duress in law it must not be *suspicio cujuslibet vani et meticulosi hominis sed talis quæ possit cadere in virum constantem talis enim debet esse metus qui in se contineat vitæ periculum aut corporis cruciatum* (*o*). Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces: 1st, for fear of loss of life; 2dly, of member; 3dly, of mayhem; 4thly, of imprisonment (*p*).

In the case of duress by imprisonment proof should be given that it is an unlawful imprisonment, for where the imprisonment is in due course of law the maxim applies, *executio juris non habet injuriam* (*q*); and therefore, where a defendant after judgment against him without any legal cause of action, procured the plaintiff to be arrested on legal process, and threatened that he should lie and perish in gaol unless he executed a release, upon which the plaintiff sealed one, and was discharged, it was held that the release could not be avoided by duress (*r*). But even in the case of a lawful imprisonment, the use of illegal force, constraint, or the practising unnecessary privations or hardships, will constitute duress (*s*). But where one caused another to be arrested on a charge of felony, under a warrant from a justice of the peace, and discharged him upon his sealing a bond for 10*l.*, it was held that the deed might be avoided, the proceedings being a mere pretext to cover the deceit (*t*). Where the duress is by threats they must be of such a nature as are sufficient to overcome a man of moderate firm-

when he was drunk. Sir E. Coke, 2 Inst. 747. a., says, that one who by his own vicious act for a time deprived himself of reason and memory, though a kind of *non compos*, shall gain no benefit or privilege thereby. And this is, no doubt, true, that a voluntary drunkard can never avail himself of his incapacity as an excuse, either civilly or criminally, for not doing that which he otherwise ought to have done; and it is also true, that a drunkard, *voluntarius dæmon*, as he is styled by Sir E. Coke, is liable both civilly and criminally in respect of every offence which he commits, whether it be against an individual or against the public. But if a party be made drunk by the stratagem of another, or by fraud, he is not responsible. Per Park, J., in *R.* v. *Pearson*, 2 Lewin's C. 145. See also the observations of the same learned Judge in *Marshall's Case*, 1 Lewin's C. 76; and of Holroyd, J., in *Burrough's Case*, Ib. 75; and *Rennie's Case*, Ib. 76. In *Pearson's Case*, Park, J., is also stated to have said, that drunkenness may be taken into consideration to explain the probability of a party's intention, in the case of violence committed on sudden provocation. *See* Appendix.

(*n*) *Supra*, note (*m*).

(*o*) Brac. l. 2, c. 5.

(*p*) 2 Inst. 483; 2 Roll. Ab. 124; Bac. Ab. Ev. Duress. A threat to beat, or burn the house of the party, or to spoil his goods, it is said, is no duress, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages (2 Inst. 481; 1 Comm. 131); but no suitable atonement can be made for loss of life or limb. Ibid. *Qu.* and vide *supra*, tit. Deed.

(*q*) Bac. Ab. Ev. Duress, 402. 3 Lev. 239.

(*r*) *Cf.* Bridgman, C. J., Guildhall Lev. 69.

(*s*) The effect of duress by imprisonment, in the avoidance of a deed or feoffment, is very analogous to the case of infancy. The act of the prisoner or of the infant is not *void* but *voidable* only, by entry or action, and can be avoided by privies in blood only; but a feoffment in either case made by letter of attorney is *void*. A bond executed by an impressed man for securing his return in case of non-payment of the money, is illegal and void. *Pole* v. *Harrobin*, 9 East, 416.

(*t*) Allen, 92. So ruled by Rolle, upon the trial of an issue on the duress. See Bac. Ab. Ev. tit. Duress, 405. See tit. Deed.

ness (*u*). Duress to avoid a deed must be pleaded specially (*x*). And the question of duress *per minas* in case of treason (*y*), and, as it seems, in other cases, is a question of fact for the jury, subject, however, to the rules of law, where the law defines.

Upon an indictment for extorting money by duress, it must be shown that such means were used as common prudence and firmness cannot guard against (*z*).

EJECTMENT.

I. Proof of the title to enter.
II. Of the Plaintiff's title in general.
III. Of the title of an administrator or executor.
Assignee of bankrupt (*a*).
Conusee of statute-merchant, &c.
Devisee, or tenant by.
Elegit.
Guardian.
Heir at Law.
Husband, &c.
Landlord.
Mortgagee.
Rector.
Tenant in common, joint tenant, &c.
IV. Variance.
V. Defendant's possession.
VI. Competency of Witnesses.
VII. Trespass for mesne profits.
VIII. Effect of judgment in evidence.

The declaration in ejectment comprises four allegations,—the title of the

(*u*) Br. l. 2, c. 5. *R.* v. *Southerton*, 6 East, 140; Com. Dig. Pleader, 2 W. 19.

(*x*) And the special manner must be set forth. 5 Co. 119; 2 Inst. 483. In *assumpsit* or debt on simple contract, duress is evidence under the general issue. Ib.

(*y*) Forster, 14; 3 B. & P. 73. The threat in such case must affect the life, and not merely the property.

(*z*) In *R.* v. *Southerton*, 6 East, 144, where the question was, whether it be an offence at common law to threaten another that he will procure a public officer to prosecute him unless he give him money, Lawrence, J., observed, it has been decided in many cases that even where money has been fraudulently obtained, yet it is not indictable; as in *R.* v. *Jones*, 1 Salk. 379, where the defendant obtained money of another by pretending that he was sent by a third person for it. One of the Judges in that case said, that one man cannot be indicted because another has been a fool. The case of *The Queen* v. *Hannon*, 6 Mod. 311, is to the same purpose. It is otherwise where money is obtained by such means as common prudence and firmness cannot guard against. The same distinction was adopted by the old law with respect to such as were deterred by threats from making entries into lands which they claimed. The threats must be such as will deter *virum fortem et constantem* from entering on the land, in order to render it sufficient for him to go as near to it as he possibly may, for the purpose of asserting his claim. But there must be a fear of personal violence. Co. Litt. 253, b. And it is there said "that it seemeth that fear of imprisonment is also sufficient, for such a fear sufficeth to avoid a bond or a deed." And that shows the ground of the decision in *The Queen* v. *Woodward & others*. That was not a case of mere threat, but the man was in actual duress at the time, and was threatened to be taken to Newgate; and one cannot say that that might not be such a threat as a man of ordinary firmness could not resist. But here, when the defendant threatened to prosecute the party for the penalties, a man of ordinary firmness might well have said to him, that he was not guilty of the offence charged, and therefore he might prosecute him at his peril if he pleased.

(*a*) These proofs have already been considered; see tit. Bankrupt.

lessor of the plaintiff; a lease by him to the plaintiff; an entry by the latter; and an ouster by the defendant. By the consent-rule the proof is usually confined to the title of the lessor.

Title to enter.

The lease, entry, and ouster being admitted, no proof of the plaintiff's entry under the supposed lease is requisite, although proof of an actual entry by the lessor is sometimes rendered necessary, as constituting his title to possession. So, except in some particular instances, the ouster by the defendant is also admitted (*b*). The plaintiff's proof usually consists, therefore, in proving *the lessor's title to enter and possess* (for the nature of the action is merely possessory) the identical lands in dispute (*c*).

Proof of a legal title to the lands is not always sufficient, for notwithstanding a legal title the party may not have a right to enter and possess. But in general, except where the right of entry is taken away by the statute of limitations (*d*), or of fines (*e*), and in some instances, where the right of entry is devested at common law (*f*), it is sufficient to prove, simply, the legal title to the lands.

Proof of, within twenty years.

The statute 3 & 4 Will. 4, c. 27, s. 2, enacts, that no person shall make an entry (*g*), or distress, or bring an action to recover any land or rent but within 20 years next after the time at which the right to make such entry shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which such title shall have first accrued (*h*) according to the statute. Where, therefore, the title has actually accrued within twenty years next before the commencement of the action, it is usually sufficient to prove the legal title. Where the title has accrued at a greater distance of time than twenty years, the plaintiff must prove that he laboured under one of the disabilities (*i*) within the statute.

Under the stat. 21 J. 1, c. 16, the plaintiff might show that he had *virtually* been in possession, although another had been in the actual possession; as by proof that the party in actual possession was his tenant under a lease, although no rent had been paid (*k*), and even although a forfeiture had been committed by the tenant (*l*), by non-payment of rent, for he was not bound to enter till the determination of the lease.

(*b*) *Infra*, 429.

(*c*) As to the latter point, see Possession by the Defendant, *infra*, 431. The plaintiff is not bound to produce the consent-rule as part of his case. *Doe* v. *Raby*, 2 B. & Ad. 948. Contra *Doe* v. *Lamble*, M. & M. 237. It may be necessary to produce it where the plaintiff applies his evidence to premises which the defendant asserts he does not defend, for it may then be necessary to show what he does defend for. Per Ld. Tenterden, 2 B. & Ad. 949.

(*d*) 21 Jac. 1, c. 16, and now by the st. 3 & 4 W. 4, c. 27.

(*e*) 4 Hen. 7, c. 24; and *infra*, tit. FINE.

(*f*) *Infra*, 403.

(*g*) It seems that this statute like the stat. 21 J. 1, c. 16, takes away the right of entry after 20 years have accrued subsequently to possession under a legal title, or such receipt of rent, or acknowledgment, as is provided for by the statute. Where a jointress for life married again and joined her second husband in levying a fine, and he survived her, and held the land for 20 years, it was held that the reversioner was bound although the fine was void. *Doe* v. *Gregory*, 2 Ad. & Ell. 14.

(*h*) This statute has superseded the former limitation of 20 years prescribed by the stat. 21 J. 1, and made numerous provisions for defining in particular cases the time when the right shall be deemed to have accrued. As this statute extends to distresses and other actions besides ejectment, its provisions are considered under the title LIMITATIONS and APPENDIX.

(*i*) See the stat. 3 & 4 W. 4, c. 27, ss. 15 to 18 inclusive.

(*k*) Runn. 457.

(*l*) 7 East, 299; where the devisee entered within 20 years after the expiration of the lease, but not until after 20 years from the death of the testatrix. See also *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh, 68. It lies on the lessor of the plaintiff to

Proof of title within twenty years.

The mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title, for it was no disseisin but at the option of the latter, even although the stranger made a lease to the tenant by indenture, reserving rent, unless he made an actual entry (*m*).

Where the lord of a manor brought ejectment against a cottager, twenty years possession was a good title where the cottage had been built in defiance of, or without the consent of the lord, but this was liable to be rebutted by proof that it was built by the permission of the lord, or by any subsequent acknowledgment of his title; and in such cases it has been said, that it was rather to be presumed, in the absence of any evidence to the contrary, that the lord of the manor had assented (*n*). The question, whether the possession was adverse or permissive in such cases, was for the consideration of the jury.

The 2d and 3d clauses of the stat. 3 & 4 Will. 4, c. 27, have superseded the doctrine of non-adverse possession, except in cases within the 15th clause; the question being, whether twenty years have elapsed since the right accrued, without regard to the nature of the possession (*o*).

The plaintiff might also show that he was joint tenant, or tenant in common with the party in actual possession; for the possession of one joint tenant or tenant in common is the possession of the other, unless there has been an actual ouster (*p*).

On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as heir to her, her possession would before the late statute have been construed to be by curtesy and by license,

show possession, &c. under a legal title within the last 20 years. See B. N. P. 102. Where a pauper had, 30 years ago, inclosed a piece of waste in an adjoining parish, and cultivated it until 1827, when he sold and conveyed it to a purchaser; he had shortly before erected a hut thereon, and resided in it a year and a half; the parishioners and commoners had, upon several perambulations, prostrated part of the fence, and rode through the inclosure, but the pauper was never present, and he had never paid any acknowledgment to the lord or other person during his occupation; held that it was to be deemed an adverse possession for 20 years, and that a settlement by estate was gained in the parish. *R.* v. *Woburn*, 10 B & C. 846.

(*m*) B. N. P. 104; 1 Roll. Ab. 659. And see *Smith* v. *Parkhurst*, Andr. 315. But it is said (B. N. P. 104), that if the tenant declare that he is in possession for the stranger, it may be evidence to go to a jury, especially if he has any colour of title. *Damer* v. *Fortescue*, B. N. P. 104.

(*n*) B. N. P. 104. *Infra*, tit. MANOR. Where the defendant had inclosed a small piece of waste adjoining to the highway, and occupied it for 30 years, but afterwards the owner of the adjoining land demanded sixpence for rent, which the defendant paid on three several occasions; the evidence was held to be conclusive to show that the original occupation was permissive. *Doe* v. *Wilkinson*, 3 B. & C. 413; and see *Doe* v. *Clarke*, 8 B. & C. 717.

(*o*) *Nepean* v. *Doe* d. *Knight*, on error, 2 M. & W. 894. *A.* mortgages in fee to *B.* subject to cesser upon payment on a day named (more than 20 years before the stat.); within 20 years *A.* admitted that the money was unpaid. *B.*'s heir brought ejectment (within 5 years after the passing of the Act). The jury found that the money was unpaid; and it was held that the possession not being adverse at the passing of the Act, the action was not barred under sect. 2, although the lessor was not shown to have been in possession or received rents or interest. *Doe* v. *Williams*, 5 Ad. & Ell. 291; and see *Doe* v. *Thompson*, ib. 532. A feme sole seised in fee having married, she and her husband quitted possession, and both died at times neither of which was shown to be within 40 years after ceasing to occupy. The wife's heir brought ejectment within 20 years after the husband's death and within five years after the passing of the statute. It was held that the heir was barred under the 17th section, although it did not appear how the defendant had come into possession, or that any fine had been levied by the wife. *Doe* v. *Bramston*, 3 Ad. & Ell. 63.

(*p*) Salk. 421; Peake's L. E. 333. As to what shall amount to an actual ouster, see Ld. Raym. 312. 829; 5 Burr. 2604. But now see the late stat. 3 & 4 Will. 4, c. 27, s. 12. *Infra*, tit. LIMITATIONS.

to preserve the possession of the brother; but the presumption would have ceased if it had appeared that the brother had been in the actual possession, and that he had been ousted by the sister (*q*). Possession within 20 years.

But now by the stat. 3 & 4 Will. 4, c. 27, s. 13, it is enacted, that where a younger brother, or other relation of the person entitled as heir to the possession, or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of, or by the person entitled as heir.

The mere perception of profits by a joint tenant or tenant in common would not constitute an ouster, but when long continued was evidence of an actual ouster (*r*). Neither will a refusal to pay rent, coupled with a denial of the title, amount to an actual ouster (*s*).

It has been held that declarations made by a person in the actual possession of premises, that she was entitled to them for life, and that after her death they would go to the heir of her deceased husband, were, after her death, admissible in evidence to rebut the inference of an adverse possession (*t*).

In order to prove possession, in an ejectment for mines, it is not sufficient to show that the lessor of the plaintiff was the lord of the manor; an actual possession must be proved (*u*). Nor will a verdict for the plaintiff in trover for lead dug out of a mine prove possession of the mine, for the action may have been brought by the heir-at-law, who had property in the mine, but had no possession (*x*).

Where the husband was tenant by the curtesy of a copyhold estate which descended to the wife, who had never been admitted, and was also admitted after the death of the wife to hold, pursuant to a settlement of the estate of the wife, by which it was limited to the survivor in fee, it was held that his possession was not adverse to the heir-at-law of the wife (*y*), and that the heir might maintain ejectment within twenty years of the husband's death.

Where *A.*, a copyholder for life, with remainder to *B.*, surrendered his own estate for life, and thereby let in *B.* and took a new copy for the successive lives of himself, *B.* and *C.*; and on *A.*'s death after twenty years had run against *B.*, *B.* got into possession, it was held that he might defend upon his legal title coupled with possession, against *C.* who had no title, whatever the effect of *A.*'s possession was (*z*).

2dly. Where the ejectment is brought within the twenty years, the confession by the defendant, of a lease, entry, and ouster, includes all the essential formalities, and it is unnecessary to prove an *actual* entry (*a*). Before the late statute, where the ejectment was brought by one under no disability, after the expiration of twenty years he might have availed himself of an *actual* entry within the twenty years (*b*), by himself, or by some person by his command, or with his assent (*c*), on part of the lands, in the name of the whole (*d*). Actual entry.

(*q*) *Page* v. *Selfby*, per Weston, J. Sussex, 1680, B. N. P. 102. In that case it would amount to a disseisin. Vide *infra*.

(*r*) *Doe* v. *Prosser*, Cowp. 217; 2 Bl. 690.

(*s*) *Doe* v. *Prosser*, Cowp. 217. But now see the late stat. s. 12.

(*t*) *Doe* d. *Humon* v. *Pettit*, 3 B. & A. *Vide* Vol. I. and Ind. tit. HEARSAY.

(*u*) *Lord Cullen* v. *Rich*, 14 Geo. 2; Runn. 292; B. N. P. 102; *Rich* v. *Johnson*, Str. 1142.

(*x*) *Ibid.*; Runn. 292.

(*y*) *Doe* v. *Brightwen*, 10 East, 583.

(*z*) *Doe* v. *Reade*, 8 East, 353.

(*a*) 1 Doug. 484. And now see the provisions of the late stat. as to ENTRIES.

(*b*) 1 Will. Saund. 319, c.; 7 T. R. 433; 9 East, 17.

(*c*) 9 Rep. 106; Popham, 108.

(*d*) 1 Will. Saund. 319, c.; 6 Mod. 44. If the entry be made for the purpose of avoid-

Actual entry.

A ratification by the claimant, of the entry of another on his behalf before the time of the demise, was sufficient (*e*). It seems that the subsequent bringing of the action was sufficient evidence of assent (*f*), for *omnis ratihabitio retro trahitur & mandato priori æquiparatur*. The lessor of the plaintiff was also bound to prove, under the stat. 4 Anne, c. 16, that he commenced his action within one year next after such entry (*g*).

It is now expressly provided by the stat. 3 & 4 W. 4, c. 27. 10, that no person shall be deemed to have been in possession of any land within the meaning of the Act, merely by reason of having made an entry thereon.

Where the declaration in ejectment was delivered within the twenty years, and the plaintiff was nonsuited, and afterwards brought another action after the expiration of the twenty years, it was held that the confession of the lease in the former action was not evidence of an entry to bar the statute (*h*).

So, in some instances, where a fine has been levied with proclamations (*i*), unless the plaintiff can show that he is within one of the exceptions in the statute (*k*), he must prove an actual entry by himself, or an authorized agent, for the purpose of avoiding the fine (*l*). The claim must be made on the land. Where the proof was, that the claim was made at the gate of the house, it was held to be insufficient, but where it was shown that there was a court before the house which belonged to it, and that though the claim was made at the gate it was upon the land, it was held to be sufficient (*m*).

An actual entry need not be proved where the fine has been levied at common law without proclamations (*n*); nor where it has been levied by a bare tenant for years (*o*); nor where the son of a tenant by sufferance holds

ing a fine, a declaration should be made to that effect on entry.

(*e*) See *Podger's Case*, 9 Co. 106.

(*f*) Str. 1128; B. N. P. 103; *infra*, note (*s*).

(*g*) As to the mode of proof, see TIME. Before the stat. 4 Ann. c. 16, the stat. of 21 Jac. 1, c. 16, was avoidable by continued entries made successively within the space of twenty years from each other. Co. Litt. 15; 3 Bl. Comm. 175; Salk. 285. *Ford* v. *Gray*, 6 Mod. 44.

(*h*) Runn. 62.

(*i*) For the cases in which an actual entry is necessary to avoid a fine levied with proclamations, see B. N. P. 99; Runn. 45; 2 Doug. 484; 2 Str. 1086; 3 Burr. 1895; 9 Rep. 106; Poph. 108; 2 Str. 1128; 1 Will. Saund. 319; 4 Hen. 7, c. 24. It seems that an actual entry is never necessary, except for the purpose of avoiding a fine. *Doe* d. *Davenport* v. *Duncannon*, Lofft, 360. *Goodright* d. *Hone* v. *Cator*, Doug. 477. Where a younger son, living with his father previous to his death, continued in possession, and afterwards levied a fine with proclamations; held, that the heir might maintain ejectment without actual entry, the original possession being permissive, and the continuance after the death of the father not founded on a new wrongful entry when the freehold was vacant, so as to constitute a disseisin or sufficient interest to give operation to the fine. *Doe* v. *Davis*, 12 Pri. 756. And see *Doe* v. *Perkins*, 3 M. & S. 271. Fines and recoveries are now abolished by the stat. 3 & 4 Will. 4, c. 74.

(*k*) 4 Hen. 7, c. 24.

(*l*) Vide *supra*, note (*i*).

(*m*) Skinn. 412; B. N. P. 103.

(*n*) 2 Wils. 45.

(*o*) *Rowe* v. *Power*, 2 N. R. 1. *Podger's Case*, 9 Co. 106. It is a general rule, that no fine or warranty shall bar any estate in possession, reversion or remainder, which is not divided or put to a right before or at the time of the fine, or by the operation of the fine itself; for a party not put out of possession has all that claim or possession could give. Entry is not necessary, though one tenant in common of a reversion levy a fine of the whole. *Roe* d. *Truscott* v. *Elliot*, 1 B. & A. 85. And though a tenant in common levy a fine of the whole estate in possession, and take the rents and profits for nearly five years, yet it is no evidence on which the jury ought to be directed to find an actual ouster. *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568. So if ejectment be brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 H. 7, c. 24. *Doe* d. *Duckett* v. *Watts*, 9 East, 17. So where the lessee of tenant for life continued in possession after the death of the tenant for life, without paying rent, and after his death his son

over (*p*); nor where the defendants had no possession of the estate when the fine was levied (*q*). And the receipt of rents previous to the time of levying a fine, is not evidence of possession without proof of title (*r*).

An entry by a stranger without authority is sufficient to take advantage of a condition, provided it be assented to before the day of the demise (*s*).

Proof of disability.

3dly. If there has been no possession or actual entry within twenty years next after the time when the title accrued, the lessor of the plaintiff must show in excuse of the want of entry, that he laboured under one of the disabilities specified in the stat. 21 Jac. 1, c. 16, *i. e.* infancy, coverture, insanity, imprisonment, the being beyond seas (*t*). And also, that he entered or made distress within ten years next after the time when the party shall have ceased to be under such disability (*u*). But it is a rule, that when the statute has once begun to run no subsequent disability will affect its progress (*x*).

Proof that the right is devested.

A right of possession and a right of entry are convertible terms (*y*). Hence, if the right of entry be taken away the plaintiff cannot recover in ejectment. If *A.* disseise *B.* by wrongfully ousting him from his possession of land, *B.* may regain the possession by mere entry, and therefore may maintain ejectment. But where the disseisor died seised, the common law presumed a rightful seisin in favour of the heir, and the disseisee's right of entry was taken away or tolled. The common law annexed exceptions to this rule, where the claimant laboured under a legal disability during the life of the ancestor, as of infancy, coverture, insanity, imprisonment, or being beyond the realm. And by the stat. 32 Hen. 8, c. 33, if the disseisor die within five years after the disseisin done, such disseisin shall not take away the right of the disseisee, although he has made no claim (*z*).

Evidence of a disseisin.

What is sufficient evidence of a disseisin is a question subject to some doubt. It seems originally to have meant an actual ouster or dispossession of the owner (in which all the definitions concur) by force, or in spite of the owner (*a*), for every dispossession was not a disseisin (*b*). The ambiguity seems to have arisen from an extension of the term disseisin, for the sake of the easy remedy by assize, and its meaning was restricted or extended alternately for the benefit of the owner. To entitle him to the remedy by assize against a mere wrongful possessor, almost every obstruction of the owner's right was construed into a disseisin. And again, in favour of the true owner, where he had been actually dispossessed, and to protect him against a claim founded on a wrong, the meaning of the term was restricted

levied a fine with proclamations, it was held that the son of the remainder-man might maintain ejectment without actual entry. *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271; and see *Doe* d. *Davis* v. *Davis*, 1 C. & P. 130. In order to constitute a disseisin the original entry must have been wrongful. See *Doe* v. *Perkins*, 3 M. & S. 271.

(*p*) *Doe* v. *Perkins*, 3 M. & S. 279.

(*q*) Andr. 326.

(*r*) *Smith* v. *Parkhurst*, Andr. 326.

(*s*) *Fitchett* v. *Adams*, Str. 1128. *Curtis* v. *Wolverton*, Cro. J. 56. As to whether an actual entry in such case be necessary, vide *Ib.* A verbal assent is sufficient; *Ib.* And see Watkins on Descent, s. 73.

(*t*) The same exceptions are contained in the Statute of Fines, 4 Hen. 7, c. 24.

(*u*) 3 & 4 Will. 4, c. 27, s. 16. By s. 17, no action shall be brought after the expiration of 40 years from the time at which the right first accrued.

(*x*) *Doe* d. *Duroure* v. *Jones*, 4 T. R. 300.

(*y*) 1 Burr. 89. A right of entry cannot be reserved to a stranger to the estate. *Doe* v. *Lawrence*, 4 Taunt. 23.

(*z*) The feoffee of the disseisor formerly acquired the right of possession by one year's non-claim; but the disseisee's right was capable of being kept alive by continued claims. Co. Litt. 256, a.

(*a*) See Litt. sec. 279; Co. Litt. 153. b.

(*b*) Co. Litt. 153, b.

Disseisin.

to an ouster in *spite* of the owner, or not *congeable* (*c*). This seems to have been the foundation of the doctrine of disseisin *at election* (*d*).

To the action of ejectment a mere dispossession is usually immaterial, since the title of the lessor is the only question, an ouster being admitted; and therefore, where the defendant contends that the entry has been barred by an actual disseisin, and descent cast, feoffment, &c., it seems to be necessary that he should prove a disseisin in the ancient and strict sense of a *personal trespass* (*e*), an actual expulsion (*f*) and putting out of the owner, and usurpation of the freehold tenure, and not merely such a disseisin as the owner might have considered to be such at his election, for the sake of the remedy by assize.

A lease for years made by a tenant at will (*g*); an entry into lands by one who pays rent, and claims to hold as tenant at will (*h*); the receipt by the tenant in tail of the rents of lands leased by his father to his younger brother for lives under a power (*i*), do not operate as disseisins, except at the election of the owner for the sake of his remedy; and if he has made no such election, do not take away any right of entry.

The doctrine that a descent cast tolled the entry, did not apply to the case of a devisee, nor to any case where the party had no other remedy than by entry, for if so he would be left without remedy (*k*); nor to customary or copyhold estates, where the freehold was in the lord (*l*); and therefore the devisee of a copyhold was not barred by a descent cast on the defendant by his father, who had been admitted as heir-at-law of the testatrix (*m*).

A vendee of land let into possession on an agreement to purchase has no adverse possession (*n*) against the vendor, unless he refuse to give up possession or pay interest (*o*). Possession claimed under a lease for lives which has expired, and a new one having been granted, is not adverse (*p*).

Title in general.

II. It is an inflexible rule, that the lessor of the plaintiff must entitle himself to recover by the strength of his own legal title, and that he can derive no support, either from any equitable title or from weakness of his adversary. Thus it has been held, that an unsatisfied term for securing an annuity might be set up against the heir-at-law, although he merely claimed the premises as subject to the charge (*q*).

(*c*) Litt. sec. 279.

(*d*) See *Blunden* v. *Baugh*, Cro. Car. 303; Pal. 201; Cro. Jac. 659. *Kynaston* v. *Parry*, Salop Ass. 25 March 1742; and Ld. Mansfield's observations in *Atkyns* v. *Horde*, 1 Burr. 89.

(*e*) Co. Litt. 153, b.

(*f*) Per Ld. Holt, Salk. 246; and per Ld. Ellenborough, 7 East, 312. And see *William* v. *Thomas*, 12 East, 141.

(*g*) *Pously* v. *Blackman*, Palm. 201. And therefore a subsequent devise by the original lessor was held to be good, because he had not elected to admit himself to be disseised.

(*h*) Cited Cro. Car. 303. And therefore the entry of the heir of the person so entering does not bar the entry of the heir of the owner.

(*i*) *Kynaston* v. *Parry*, Salop Ass. March 1742. And therefore a recovery suffered by the tenant in tail did not operate as a bar.

(*k*) Co. Litt. 240, b. and *Doe* v. *Danvers*, 7 East, 321. But *qu.* whether the devisee has not a remedy by writ *ex gravi querela*, And see the note by Hargrave & Butler. And see *Roe* v. *Read*, 8 T. R. 118. *Doe* v. *Wroot*, 5 East, 138. The assignee of a copyhold by a common-law conveyance cannot bring ejectment even against the widow of the assignor. *Doe* v. *Webber*, 3 Bing. N. C. 922.

(*l*) *Doe* v. *Danvers*, 7 East, 299.

(*m*) *Ibid.*; and now see the stat. 3 & 4 W. 4, c. 27; *infra*, tit. LIMITATIONS.

(*n*) *Doe* v. *Edgar*, 2 Bing. N. C. 498.

(*o*) *Ibid.*

(*p*) *R.* v. *Axbridge*, 2 Ad. & Ell. 520.

(*q*) *Doe* v. *Staple*, 2 T. R. 684. But notwithstanding the general rule that the legal title must prevail in ejectment, yet a party may be estopped from contesting the title of the adversary. A man cannot recover contrary to his own covenant for quiet enjoyment. *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 597. *Right* d. *Green* v. *Procter*, 4 Burr. 2208. A tenant cannot

The title must be proved to exist at the time of the demise; and if it be proved to have existed, then it will be sufficient, although the right be devested before the trial (*r*).

Evidence of title consists either, 1st, in showing possession and acts of ownership from which a legal title may be presumed; or, 2dly, in proving a particular title, as heir-at-law, devisee, executor, &c.

Presumptive, from possession.

In the first place, long uninterrupted possession of an estate by a man and his ancestors is the strongest presumptive evidence of an estate in fee. Where lands have descended for many generations from father to son, such possession may be the only evidence, and it is the best presumptive evidence of title.

In the next place, in analogy to the stat. 21 Jac. 1, c. 16, a clear undisturbed possession of twenty years is evidence of an estate in fee, if no other title appear; and upon such evidence a plaintiff may recover in ejectment (*s*).

The presumption of title resulting from such possession of twenty years is liable to be rebutted by evidence that the possession was not adverse to the party legally entitled (*t*), or that the latter laboured under some disability when his right accrued, which continued down to a period within the twenty years (*u*).

Proof of a lease for a long period, coupled with possession, is evidence of a title to the remainder of the term, although the party cannot prove the mesne assignments from the original lessee (*v*).

And evidence of possession for a period short of twenty years affords presumptive evidence of title sufficient to prevail against a mere wrong-doer who shows no title (*x*).

In cases where there has been no continued occupation of the premises, the possession and title may be evidenced by any acts of ownership which the circumstances of the case afford, such as cutting down trees (*y*), digging for turves, and getting stones.

set up the title of a third person against his lessor. *Doe* d. *Bristowe* v. *Pegge*, 1 T. R. 750, n. *infra*. Nor can a mortgagor defeat his mortgagee's title by setting up a title in a third person. *Doe* v. *Pegge*, 1 T. R. 760. And see *Doe* d. *Nepean* v. *Budden*, *supra*, 22, note (*q*).

(*r*) For although the plaintiff would not be entitled to sue out an *habere facias possessionem*, he would still be entitled to the intermediate mesne profits, to be recovered through the medium of an ejectment. *Doe* v. *Black*, 3 Camp. 447. B. N. P. 105. Co. Litt. 285, a.

(*s*) Per Ld. Mansfield, *Denn* v. *Barnard*, 1 Cowp. 597; and per Holt, C. J. *Stokes* v. *Berry*, Salk. 421. And see *Cholmondely* v. *Clinton*, 2 Jar. & W. 156. *Taylor* v. *Horde*, 1 Burr. 119. And see the provisions of the stat. 3 & 4 Will. 4, c. 27, s. 34, which expressly extinguishes title of one against whom possession has run. So if the plaintiff prove possession for 20 years, and the defendant prove possession for less than 20, an ejectment is maintainable on 20 years' adverse possession, although it was in continuation of possession by a sister who entered by abatement into land to which her elder brother was entitled as heir (whose issue was still living), and who died more than 20 years' before the ejectment suit. *Doe* v. *Lawley*, 3 N. & M. 331. The plaintiff relied on a 23 years' possession prior to the later possession by the defendant for 10 years; held, that the defendant proving no title in himself or any other, the prior presumptive title ought to prevail. *Doe* d. *Harding* v. *Cooke*, 7 Bing. 346, and 5 M. & P. 181.

(*t*) *Supra*, 401.

(*u*) *Ibid.*

(*v*) *Earl* v. *Baxter*, Bl. 1228.

(*x*) *Doe* v. *Dyeball*, 1 M. & M. 346, *cor.* Ld. Tenterden; and see tit. POSSESSION. In *Allen* v. *Rivington*, 2 Saund. 111, it was held that the plaintiff was entitled to recover on a special verdict, which showed that the plaintiff was in possession but that the defendant had no title. And possession is clearly sufficient to enable the possessor to maintain trespass, but not, as it seems, to maintain ejectment, where the evidence *negatives* his title. See *Doe* v. *Barber*, 2 T. R. 749. *Doe* v. *Billyard*, 3 Mo. & Ry. 112.

(*y*) *Stanley* v. *White*, 14 East, 332. As

Proof of occupation for a period less than twenty years, will be evidence of title against a mere wrong-doer (*z*). But possession, to confer a right against one having title, must be adverse (*a*).

It is to be presumed *primâ facie*, that waste lands adjacent to a road belong to the owner of the adjoining freehold; this presumption is of course liable to be rebutted by evidence of acts of ownership by the lord (*b*).

As the plaintiff must recover by virtue of his legal title, he will fail if it appear that a term of years has been created which is still outstanding in another, there being no count in the declaration on a demise by the trustee. It will not be sufficient, however, for the defendant to produce and prove a lease for 1,000 years, unless he also prove a possession under it by the trustee within the last twenty years, for otherwise a surrender of the term will be presumed (*c*). So proof of the execution of a mortgage-deed by the lessor of the plaintiff will be insufficient, unless it be also proved that the money was not paid at the day; but if the defendant prove the payment of interest subsequent to the day, and within twenty years, the plaintiff will be nonsuited (*d*).

Presumptive evidence of a surrender.

An indorsement on a lease, of the receipt of principal and interest, and releasing the term, amounts to a surrender of the term (*e*).

When the trusts of a term have been completely fulfilled, a surrender will be presumed; thus, where trustees were directed to convey to a devisee when he attained the age of twenty-one, it was held that the jury might properly presume a conveyance at any time afterwards, and long before the expiration of twenty years (*f*). But if the surrender of the outstanding term cannot be presumed, or if the existence of such a term be proved, and the jury do not find a surrender, the plaintiff (there being no count on a demise by the trustee) cannot recover (*g*). But it seems that the surrender of a term attendant on the inheritance, either by operation of law or by special declaration, after the extinction of the purposes for which it was created, is not to be presumed (*h*); nor from mere satisfaction, and

to presumptive evidence of title, see TRESPASS.—POSSESSION.—LIBERUM TENEMENTUM.—PRESCRIPTION.

(*z*) Where a party had the key of the premises delivered to him by the lessor of plaintiff, and went in and enjoyed peaceable possession for nearly a year; held, that it was sufficient proof of title as against a party taking forcible possession. *Doe* d. *Hughes* v. *Dyeball*, 3 C. & P. 610.

(*a*) *R.* v. *Okeford Fitzpaine*, 1 B. & Ad. 254. Where the party in possession of a cottage built on the side of a road above 50 years, upon possession being within 20 years, demanded by *B.*, the owner of the land adjoining on both sides of the road, had gone out, and on retaking possession by leave of such owner, had been told that "if he let him in again it would be during his pleasure," and he continued to occupy it without paying any rent for 15 years; held, that it was a question for the jury to say whether he remained in the cottage by adverse title or by permission of *B.*, and they having found that he occupied by permission, the Court refused to disturb the verdict. *Doe* v. *Clark*, 8 B. & C. 717.

(*b*) *Steele* v. *Prickett*, 2 Starkie's C. 463. Vide TRESPASS.—LIBERUM TENEMENTUM.

(*c*) B. N. P. 110.

(*d*) Ibid.

(*e*) Ibid.

(*f*) *England* v. *Slade*, 4 T. R. 682. *Doe* v. *Lloyd*, Peake's Ev. Appen. See further, on the subject of presumed surrenders, *Doe* v. *Wright*, 2 B. & A. 720. *Doe* v. *Hilder*, 2 B. & A. 791. *Aspinal* v. *Kempson*, Sugden's Vend. & Pur. 446. *Doe* v. *Plowman*, 5 B. & Ad. 573.

(*g*) *Goodtitle* v. *Jones*, 7 T. R. 47; and see *Doe* v. *Wroot*, 5 East, 132. That an equitable title cannot prevail against a legal title in ejectment, see the above case, and the cases cited, 5 East, 139. Cas. temp. Redesdale, 67.

(*h*) The owner of the inheritance becoming the *cestui que* trust of the term, there is no ground for such a presumption. *Doe* v. *Hilder*, 2 B. & A. 791. *Townsend* v. *Champernown*, 1 Y. & J. 544. *Evans* v. *Bicknell*, 6 Ves. 185; especially if the term has been expressly assigned to attend the inheritance. *Doe* v. *Plowman*, 2 B. & Ad. 573. Sugden's V. & P. 389, 391. And see *Doe* v. *Cooke*, 6 Bing. 179,

without such evidence of dealing with the term as warrants the presumption (*i*).

Enrolment. In ejectment, upon the assignment of a term to secure an annuity, an enrolment of the memorial is to be presumed, unless the contrary be shown (*k*).

Estoppel. In general a party is estopped from claiming premises in ejectment by his covenant that the defendant shall enjoy them (*l*).

A lessee (*m*) or licensee is (*n*) not allowed to dispute the title of the party who admitted him into possession. So a defendant may be estopped by an arbitrator's award (*o*).

Administrator. III. An administrator, to prove his title to a term, should produce the letters of administration under the seal of the ecclesiastical court, or the entry in the book of orders of the court for the granting of administration (*p*), which may be proved by means of an examined copy. So he may show his title by producing an exemplification of the letters of administration (*q*). The assignees of a bankrupt, in ejectment to recover the bankrupt's leasehold property, must prove their acceptance (*r*). An executor proves his title by the production of the probate; the term vests in the executor (*s*) upon the death of the testator, before the probate, and he may recover on a demise laid after the death of the testator, but before probate (*t*). The lease to the testator or intestate must also be proved. The defendant's answer to a bill in equity, stating that he believed that the testator was possessed of the leasehold premises in the bill mentioned, is *primâ facie* evidence that the testator had a chattel interest in the premises in the bill mentioned (*u*).

By executor.

By the st. 3 & 4 W. 4, c. 27, s. 6, for the purposes of the Act, an administrator claiming the estate or interest of the deceased, shall be deemed to

where Tindal, C. J. observes, no case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance but wanting some collateral matter necessary to make it complete in point of form. In *Doe* v. *Reed*, 5 B. & A. 237, Bayley, J. intimated that a jury ought not to be required to presume what they did not believe. In that case *A.* having devised to trustees for years, remainder to *B.*, who 18 years after the death of *A.* dealt with the estate as his freehold, granting leases for lives; it was held that a surrender ought not to be presumed.

(*i*) *Doe* v. *Williams*, 2 M. & W. 749.

(*k*) Per Lord Ellenborough, *Doe* v. *Mason*, 3 Camp. 7.

(*l*) *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 597. *Right* d. *Green* v. *Procter*, 4 Burr. 2203. *Infra*, 412, note (*a*).

(*m*) *Infra*, 424.

(*n*) See the observations of the Court in *R.* v. *Baytup*, 2 Ad. & Ell. 188. If the lessee or licensee be really entitled, his course is to give up possession and bring ejectment. *Ib.* Where *A.* without title entered on land and built a cottage, and afterwards took a lease by indenture from *B.*, and then for 20 *l.* gave up the possession to *C.*, it was held that *C.* was estopped from controverting *B.*'s title. *Doe* v. *Mills*, 2 Ad. & Ell. 17. But a party is not estopped from disputing the title of one through whom both he and his adversary claim. The plaintiff claiming under a lease from *A.* in 1818, the defendant may claim under a conveyance from *A.* in 1824, and show that in 1818 he had no power to make such a lease.

(*o*) *Doe* v. *Rosser*, 3 East, 15. *Hunter* v. *Rice*, 15 East, 100.

(*p*) 1 Lev. 25. 101; B. N. P. 138. 246; 8 East, 187.

(*q*) Ca. temp. Hard. 108; 8 East, 187.

(*r*) *Copeland* v. *Stevens*, 1 B. & A. 593. *Broom* v. *Robinson*, cited 7 East, 339. See tit. BANKRUPT.

(*s*) *R.* v. *Stone*, 6 T. R. 295. *R.* v. *Horseley*, 8 East, 410; B. N. P. 246.

(*t*) Com. Dig. Administ. B. 10; 2 Rol. 554, l. 15. 25; Salk. 303. But an administrator cannot commence an action before administration granted; 1 Salk. 303; Com. Dig. Administ. B. 19. It has been said that administration when granted relates to the death. Com. Dig. Administration, B. 10. But *Woolley* v. *Clark*, 5 B. & A. 745, is to the contrary; and see the provision of the st. 3 & 4 W. 4, c. 27, s. 6.

(*u*) *Doe* d. *Digby* v. *Steel*, 3 Camp. 115.

claim as if there had been no interval between the death, and the grant of letters of administration.

Conusee of statute-merchant.

2. The plaintiff who claims as the conusee of a statute-merchant (*v*) must produce the recognizance, or an examined copy of it (*x*); an examined copy of the writ of *capias si laicus*, and return (*y*), and also an examined copy of the writ and return of the extent and *liberari feci*.

An interest is vested in the conusee by the return to the extent, and the intention of the *liberate* is to give him actual possession; and by the return of *liberari feci* the conusee is estopped from saying that he has not had possession (*z*).

If the action be not against the conusor, but against one who had possession previous to the acknowledgment, the plaintiff must also prove the conusor's title; or if one claim under the conusor, that his interest is determined (*a*), and the identity of the parties.

Conusee of statute-staple.

The conusee of a statute-staple (*b*), or of a recognizance in the nature of a statute-staple (*c*), must prove the recognizance either by its production under the proper seals, or, as it seems, by an examined copy of its certification into the court of Chancery (*d*) by the clerk of recognizances, and by examined copies of the writ of *capias* and return, and also of extent and *liberate*. A copy of the record, containing the recital of the award of these writs, and of their returns, seems to be sufficient evidence to prove them (*e*).

In case of the loss of a recognizance taken under the stat. 23 H. 8, c. 6, it is provided by the st. 8 G. 1, c. 25, s. 2, that in order to enable the conusee to have process, a transcript from the roll should be certified by the clerk of recognizances into Chancery, in the same way as recognizances were directed by the former Act to be certified in the same manner as if the recognizance had not been lost. The same section also directs that in case of such loss or damage, a copy from the roll, under the hand of the clerk or his deputy, when duly proved, shall be as good evidence of the recognizance as if it had been produced under seal. Evidence of identity is also necessary; and if the proceedings be not against the conusor, the plaintiff must also give evidence of his title (*f*).

Devisee. Freehold.

3. The *devisee* of a freehold interest must prove, 1st, The seisin of the

(*v*) See the st. 11 Edw. 1, and 13 Edw. 1, st. 3.

(*x*) B. N. P. 104.; Salk. 563. The recognizance is sent by the mayor, at the request of the conusor, into Chancery. See the stat. 13 Edw. 1, st. 3.

(*y*) This writ issues out of Chancery, but is made returnable in the K. B. or C. B. by the provisions of the stat. 13 Edw. 1, st. 3; but by the stat. 5 Hen. 4, c. 12, after a writ once awarded and returned into the Common Pleas, the Justice may award process without any further showing of the recognizance.

(*z*) Per Holt, C. J., *Hammond* v. *Wood*, 2 Salk. 563. The statutes 23 Hen. 8, c. 6, and 27 Eliz. c. 6, s. 7 & 8, require a copy of every statute-merchant and staple to be delivered to the clerk of recognizances within four months after acknowledgment, or it will be void against subsequent purchasers. The latter stat. s. 9, requires the clerk to make the enrolment within six months after the acknowledgment, indorsing the day and year of entry on the statute; and by the stat. 29 Car. 2, c. 3, the day and year of the enrolment of recognizances is to be set down in the margin of the roll, and no recognizance shall bind a *bonâ fide* purchaser of lands for a valuable consideration but from that time.

(*a*) *Doe* v. *Wharton*, 8 T. R. 2.

(*b*) See the stat. 27 Ed. 3, s. 2, c. 9.

(*c*) See the provisions of the stat. 23 Hen. 8, c. 6.

(*d*) By the provisions of the several Acts referred to, upon the request of the conusee the recognizance is to be certified into the court of Chancery; and it seems that the recognizance itself should be sent into Chancery, properly certified by the clerk of recognizances. See the stat. 23 Hen. 8, c. 6, s. 5, and 8 Geo. 1, c. 25, s. 2; which provide for the certifying in case of the loss of the original recognizance.

(*e*) See 2 M. & S. 565; and *infra*, tit. ELEGIT.

(*f*) *Supra*, note (*a*).

devisor; and 2dly, the execution of the will; 3dly, the death of the devisor. Devisee.
He need not prove his own possession, since the law casts the seisin on Freehold.
the devisee; and although the heir enter before him, his entry is not barred (*g*).

1st. Seisin of the devisor. Proof of his possession is *primâ facie* evidence of a seisin in fee (*h*).

2dly. The execufion of the will, see tit. WILL (*i*), and identity of the devisee (*j*).

3dly. The death of the devisor, see tit. DEATH.—PEDIGREE.

Proof of title, as devisee of a copyhold, has already been considered (*k*). Copyhold.

The devisee of a leasehold must prove, 1st, the lease to the devisor; 2dly, Leasehold.
the will by the probate (*l*), and the identity of the devisee; and 3dly, assent of the executor (*m*).

1st. An admission by the defendant of the testator's interest will supersede the necessity f proving the lease (*n*).

2dly. The will must be proved in order to show the devise of the chattel real; and this must be done by means of the probate, the only evidence of such a title to personal property recognized by courts of law (*o*).

3dly. Inasmuch as the legal title to the personal estate vests in the executor, even where it has been specifically bequeathed by the will, and does not vest in the legatee until the executor has assented to it, proof of such assent must be given. It is sufficient to prove that it was given either before or after probate (*p*). The legal interest vests in the legatee irrevocably by the executor's assent (*q*). No particular form is necessary. A general assent is sufficient (*r*). So is a letter, by which the defendant promises to give pos-

(*g*) Co. Litt. 240; and vide *supra*, p. 404.

(*h*) See tit. HEIR. To make a good devise there must be a seisin by the devisor at the time of making the will. *Bunter* v. *Coke*, Salk. 237; Co. Cust. 364; Rast. 747. The statute empowers those having land to devise, &c. But now see the statute 7 W. 4 & 1 Vict. c. 26.

(*i*) Whether a devisee in trust takes a *legal* title, is of course a question of mere law, and sometimes one of difficulty. Amongst the general rules on the subject, the following may be mentioned: The legal estate is vested in trustees where anything is to be done by them which makes it necessary that they should have the legal estate for the purpose. See Powell on Devises, by Jarman; the note to *Jefferson* v. *Morton*, 2 Williams; 1 Saund. 11. As where they are required to sell; *Keene* v. *Dearden*, 8 East, 148. To pay the testator's debts; *Ib.* To pay taxes; *Ib.* Keep the premises in repair; *Ib.*; and *White* v. *Barber*, 1 Bing. N. C. 573. But although a trust to receive the rents and profits, and pay them over, vests the legal estate, a trust to permit and suffer the *cestui que* trust to receive them, vests the property in the *cestui que* trust. *Doe* v. *Hamfray*, 6 Ad. & Ell. 207. *Broughton* v. *Langley*, 1 Lutw. 814. Powell on Devises, by Jarman. And in the case of a devise in trust to pay, or permit and suffer the *cestui que* trust to receive, the latter of the two inconsistent directions being contained in a will, is to prevail. *Doe* v. *Biggs*, 2 Taunt. 109. Where the estate is devised for particular purposes, it vests so long as is necessary for those purposes, and no longer. *Doe* v. *Nicholls*, 1 B. & C. 342.

(*j*) *Doe* d. *Hanson* v. *Smith*, 1 Camp. 196.

(*k*) See tit. COPYHOLD.

(*l*) *Antea*, Vol. I. Ind. tit. PROBATE and tit. EXECUTOR; and see *Stone* v. *Forsyth*, Doug. 681.

(*m*) 1 Inst. 111, a. *Young* v. *Holmes*, Stra. 70.

(*n*) *Doe* d. *Digby* v. *Steel*, 3 Camp. C. 115.

(*o*) *Infra*, tit. EXECUTOR.

(*p*) *Doe* v. *Guy*, 3 East, 120. 123.

(*q*) 4 Rep. 28. *Paramour* v. *Yardley*, Plowd. 539. *Young* v. *Holmes*, 1 Str. 70. And per Ld. Ellenborough, *Doe* v. *Guy*, 3 East, 123. In case of a deficiency of assets, a court of equity would interfere, and cause the legatee to refund a proportional part.

(*r*) See *Duppa* v. *Mayo*, 1 Saund. 278; and the observation of Lawrence, J., 3 East, 124.

session at a particular time (*s*). It seems that an assent is not to be *implied* from the sufficiency of assets (*t*); but an express assent will vest a term in the legatee from the death of the testator (*u*). An action of ejectment does not lie for dower which has not been assigned (*x*).

Tenant by elegit.

4. The tenant by *elegit* should produce an examined copy of the judgment-roll, reciting the judgment, the award of the *elegit*, and the return (*y*). It has indeed been formerly held, that an examined copy of the *elegit* itself, or of the inquisition and return, ought to be proved (*z*), but this seems to be unnecessary, since the judgment-roll is incontrovertible evidence of every matter which it recites (*a*). It must appear from the return that the sheriff has set out a moiety by metes and bounds, or the return will be bad (*b*); the objection may be taken on the trial (*c*). If more than a moiety appear to have been extended, the plaintiff cannot recover (*d*); but the sheriff is not bound to set out one-half of each particular tenement (*e*). If another than the debtor be in possession of the lands, the plaintiff must prove, in addition, the title of the debtor himself to the lands (*f*). As an ejectment will not lie unless the lessor has a right of entry, it seems that the tenant may take possession without an ejectment (*g*). Where a tenant has come into possession by lease, after the judgment, but before the issuing of the writ of *elegit*, notice to quit is unnecessary (*h*).

By a guardian.

5. A guardian in socage has an interest in the lands of the infant until the latter attain to the age of fourteen years, which will enable him to maintain an action of ejectment to recover them (*i*). To make out his title he must prove, 1st. That the infant is the heir to socage lands; which is to be proved, as in the case of title by an heir, by evidence of the seisin of the ancestor, of his death, and of the pedigree (*j*). 2dly. His own character as guardian; that is, that he is next of blood to the heir, to whom the inherit-

(*s*) *Doe* v. *Guy*, 3 East, 120.

(*t*) *Deeks* v. *Strutt*, 5 T. R. 690; and per Lawrence, J., 3 East, 124.

(*u*) *Saunders's Case*, 5 Rep. 12, b.; 3 East, 125.

(*x*) *Doe* v. *Nutt*, 2 C. & P. 430.

(*y*) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565.

(*z*) Salk. 563; Ld. Raym. 718; B. N. P. 104; Gilb. Ev. 9; 2 Will. Saund. 69, c.; Trials per P. 386, 5th edit.; Tidd's Pract. 1013, 5th edit.; Runn. Eject. 330.

(*a*) 2 M. & S. 565.

(*b*) *Fenny* v. *Durrant*, 1 B. & A. 40. *Pullen* v. *Birkbeck*, Carth. 453; Hutton, 16.

(*c*) *Fenny* v. *Durrant*, 1 B. & A. 40.

(*d*) *Putten* v. *Purbeck*, Salk. 563. *Denn* v. *Ld. Abingdon*, Doug. 456; B. N. P. 104.

(*e*) Doug. 472; 1 Salk. 563; 1 Sid. 91; Cro. Car. 319.

(*f*) It is sufficient to prove a *primâ facie* title in the debtor; this throws it on the tenant in possession to show a title anterior to the judgment. *Doe* v. *Owen*, 2 C. & J. 71. Premises were conveyed to such uses as a party should appoint, and in the meantime to the use of himself for life, and afterwards a judgment was obtained against him, upon which an *elegit* was issued, but prior to the execution of it he executed the power in favour of a mortgagee, and appointed the estate for a term of 500 years; held, that as suffering judgment was an act in *invitum* and not done by the party himself, it was not within the exception to the rule, that where a power is executed, the person taking under it takes under him who created the power and not under him who executes it, and the lien of the judgment creditor upon the land was therefore defeated by such appointment. *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459. And see *Clere's Case*, 6 Co. 18, and *Witham* v. *Bland*, 3 Swanst. 277, a.

(*g*) See the opinion of Gibbs, C. J., *Rogers* v. *Pitcher*, 6 Taunt. 207; 3 T. R. 295; 2 Tidd's Pr. tit. Elegit; Eq. Ca. Ab. 381.

(*h*) *Doe* v. *Hilder*, 2 B. & A. 782. In ejectment under a sale by the sheriff under a *fi. fa.*, it is unnecessary to prove the judgment, as in the case of an *elegit* or outlawry; Devon Lent Ass. 1811, *cor.* Power, J.; Vin. Ab. Evidence, T. b. 104. *Secus*, where the lessor sued out the execution. *Infra*, tit. SHERIFF, SALE BY. As to proof of the assignment, *vide* Ibid.

(*i*) Litt. sec. 123; Co. Litt. 88, 89; Bro. tit. Guarden, 70; Bac. Ab. tit. Guardian, 6; 2 Roll. Ab. 41.

(*j*) See TITLE BY HEIR.—PEDIGREE.

tance cannot descend (*k*); and by evidence that the infant was under the age of fourteen at the time of the demise, for from that time the title of the guardian ceases (*l*). A guardian who has been appointed by deed or will, by virtue of the stat. 12 C. 2, c. 24, s. 8, 9, must prove his appointment, either by the deed of the father, or his last will and testament, executed as the statute directs, in the preseence of two or more credible witnesses; the title of the infant, and his minority at the time of the demise.

By heir at law.

6. The title of the heir at law consists, 1st, In proof of the seisin of the ancestor from whom he claims, or if he claims from a remainder man, that he was the person in whom the remainder vested by purchase (*m*). 2dly, In proof that he is heir to that person (*n*).

1st. Seisin. Actual possession, or receipt of rent from a tenant of the premises, is *primâ facie* evidence of a seisin in fee (*o*). It is not necessary to prove an actual entry by the relation from whom the claimant derives his title. If a father die, leaving his estate let on a lease for years, the possession of the tenant will be a possession by his eldest son, so as to constitute a *possessio fratris* to the exclusion of the brother of the half blood (*p*). If on the other hand the estate on the death of the father was let on a freehold lease, there would be no *possessio fratris* unless the elder son lived to receive rent after the expiration of the lease (*q*). Where the father died, leaving two daughters by different mothers, and the mother of the youngest daughter entered generally as guardian in socage of her youngest daughter, it was held that this constituted a sufficient seisin of the eldest daughter to carry the descent of her moiety to her heirs (*r*). By the provisions of the late stat. 3 & 4 W. 4, c. 106, s. 2, every descent (*s*) shall be traced from the purchaser (*t*); and to the intent that the pedigree may never be carried further back than the circumstances of the case and nature of the title

(*k*) See 1 P. Wms. 260; Bac. Abr. Guardian, [A.]; 9 Mod. 142; Hargr. Co. Litt. 87, b. n. 6. *Qu.* as to such a relation under the new statute for regulating the law of descents.

(*l*) Bac. Ab. Guardian, [E.]; Hard. 69. *Doe* v. *Bell*, 5 T. R. 471.

(*m*) If a reversion or remainder be expectant on an estate for life or in tail, then he who claims the reversion as heir ought to make himself heir to him who made the gift or lease, if the reversion or remainder descend from him; or if a man purchase such remainder or reversion, he who claims as heir ought to make himself heir to the first purchaser. *Ratcliffe's Case*, 3 Rep. 42.

(*n*) For proof of title as heir-at-law to a copyhold, or by virtue of a custom, see tit. COPYHOLD.

(*o*) B. N. P. 103; Co. Litt. 243, a. The possession of a tenant for years, or of a guardian in socage, constitutes an actual seisin by the owner of the inheritance or infant. Ib. *Doe* v. *Newman*, 3 Wils. 516. The holding of courts and appointing gamekeepers is evidence to prove the existence of a manor, or to prove the *locus in quo* to be within the manor. *Doe* v. *Heakin*, 6 Ad. & Ell. 495; but evidence of shooting and appointing a gamekeeper is, it seems, no evidence of right to the soil. Per Bayley, J., *Tyrwhitt* v. *Wynne*, 2 B. & A. 560. See further tit. POSSESSION.—TRESPASS.—LIBERUM TENEMENTUM. As to declarations by tenants, see that title Vol. I., and *Peaceable* v. *Watson*, 4 Taunt. 16. *Carne* v. *Nicoll*, 1 Bing. N. C. 430. That which must be pleaded in a real action must be proved in ejectment, in order to make out a title by descent. *Shaw* v. *Lord*, 2 Bl. 1099. Proof of the possession of lands, and pernancy of rents, is *primâ facie* evidence of a seisin in fee. *Jayne* v. *Price*, 5 Taunt. 326. But proof of forty years subsequent possession by a daughter, whilst the son and heir lived near, and knew the fact, was held to be much stronger evidence that the father had but a particular estate.

(*p*) Co. Litt. 15, a.; Jenk. 242. *Doe* v. *Keene*, 7 T. R. 390.

(*q*) *Ibid.*

(*r*) *Doe* v. *Keene*, 7 T. R. 386.

(*s*) The Act (sec. 11) does not extend to any descent before June 1st, 1834.

(*t*) By sec. 1, purchaser means the person who last acquired the land otherwise than by descent. The words "person last entitled" extend to the last who had a right to the land, whether he did or did not obtain the possession or receipt of the rent and profit.

require, the person last entitled to the land shall, for the purposes of that Act, be considered to have been the purchaser, unless it be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it be proved that he inherited; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be presumed to have been the purchaser, unless it be proved that he inherited.

By sect. 4, where any one shall acquire land by purchase, under a limitation to the heir or heirs of the body of any of his ancestors in any assurance executed after the 31st of December 1833, or in any will of a testator dying after that day, the land shall descend, and the descent shall be traced as if his ancestor had been the purchaser.

By sect. 10, an heir may trace his descent through an attainted person who died before the descent took place, unless the land escheated in consequence of the attainder before the 1st of January 1834.

Proof of heirship.

2dly. That he is heir. The requisite proofs to establish this fact are considered under the title PEDIGREE.—If the defendant rely on a devise of the lands to him, and give *primâ facie* evidence of the due execution of the will, it is incumbent on the plaintiff either to disprove the execution of the will according to the statute, or to prove the want of assent of the supposed devisor to make a will, by proof of the practice of some fraud, or of his inability; or to dispute the operation of the will (*u*); or lastly, to prove its revocation. These proofs are considered under the title WILL. If the action be brought by the heir at law against a devisee under the will, the plaintiff will, in the usual course, be entitled to begin, and to the general reply, but if the devisee admit the plaintiff's *primâ facie* case as heir, and rely solely on the devise, he will be entitled to the opening and reply (*x*).

The heir at law may show that a devise has been waived, but such a waiver to be binding must be express and absolute. A repudiation of the devise by one who mistakenly claimed as heir is not sufficient (*y*). An heir at law may lay the demise on the day on which his ancestor died (*z*).

Husband and wife.

Upon a demise by husband and wife, in right of the wife, title must be proved in the wife (*a*). If the wife be joint-tenant of a term, the husband and wife should join in the ejectment with the other joint-tenant (*b*). A joint demise by the husband and wife is negatived by a receipt for rent given in the name of the husband alone (*c*).

By landlord.

7. If the ejectment be brought upon the determination of a lease, the plaintiff must prove, 1st, The demise. 2dly, Its determination.

Proof of the demise.

If the demise has been by deed or other written instrument, it should be produced, and proved in the usual way, and if it be in the defendant's possession, notice must be given to produce it (*d*). After notice to produce the original, which is not produced, the plaintiff may give a counterpart in evi-

(*u*) In order to disinherit the heir, there must either be express words or a necessary implication. 3 Wils. 488; Doug. 763; Cowp. 31. 302. 661.

(*x*) Vide *supra*, Vol. I.

(*y*) *Doe* d. *Smyth* v. *Smyth*, 6 B. & C. 112.

(*z*) *Doe* v. *Hersey*, 3 Wils. 274. A posthumous son taking lands by way of remainder, under the stat. 10 & 11 Will. 3, c. 16, may lay the demise on the day of his father's death. B. N. P. 105.

(*a*) The husband is only possessed of a term in her right; the term or legal interest continues in her. 7 H. 6, 2; 2 Roll. Ab. 341; Co. Litt. 351.

(*b*) Bac. Ab. tit. Baron and Feme, [C. 2].

(*c*) *Parry* v. *Hindle*, 2 Taunt. 180.

(*d*) *Supra*, Vol. I. tit. PROOF OF WRITTEN DOCUMENT. *Fenn* v. *Griffith*, 6 Bing. 533. *Doe* v. *Harvey*, 8 Bing. 439.

dence, or, if there be none, a copy (*e*). If there has been no written demise, the plaintiff may prove a demise by parol; proof of payment of rent by the defendant is *primâ facie* evidence of a tenancy from year to year (*f*). It is usual for this purpose to give notice to the tenant to produce the receipts, but the fact of payment may be proved by other evidence. Proof of the demise.

Evidence of the payment of an entire rent to the trustees of a charity, is evidence to support a joint demise, and it is not sufficient for the defendant to show that they were appointed at different times, in order to prove them to be tenants in common; in such a case express proof is requisite (*g*). Payment of small sums on three different occasions, as rent in respect of land enclosed from a waste thirty-three years, was held to be conclusive evidence of permissive occupation (*h*).

Where encroachments have been made by a tenant on waste lands adjoining to the demised premises, it seems that it is to be presumed that they were made in right of the demised premises, and that the lessor is entitled to show the determination of the lease (*i*).

A party holding over after the expiration of a lease, at an advanced rent, is presumed to hold upon the other terms of the former lease (*j*). So if he be let into possession under an agreement for a lease, and pays rent (*k*), or admits such rent to be due (*l*).

A tenancy may be presumed from circumstances: where the tenant of glebe lands continued in possession for eight months after the death of the

(*e*) *Burleigh* v. *Stubbs*, 5 T. R. 465; 7 East, 363. It seems that a counterpart is evidence in the first instance. *Roe* v. *Davis*, 7 East, 363.

(*f*) *Doe* v. *Samuel*, 5 Esp. C. 173. If the tenant for life leases, and dies, and the remainder-man receives rent from the tenant, a tenancy from year to year is created. *Sykes* v. *Burkitt*, cited 1 T. R. 161; and see tit. USE AND OCCUPATION.

(*g*) *Doe* v. *Grant*, 12 East, 221. In *Doe* d. *Brookes* v. *Fairclough*, 6 M. & S. 40, where lands had been devised to the rector and churchwardens of a parish, and their successors, for the use of the poor, and there were two demises, one by five churchwardens who were in office when the tenant entered, and another by a rector since appointed and the same churchwardens jointly, and notice was given to deliver up the premises to the rector and churchwardens for the time being, it was held that the lessors of the plaintiff were not entitled to recover on either demise, though the defendant had paid rent to one of the churchwardens (who gave a receipt as churchwarden for the use of the poor), and had promised to quit after receiving the notice; that is, 182 days before the end of the year. 5 Ad. & Ell. 351. But where the rent is payable on the usual feast days, notice on one feast day to quit on the next but one, being the end of the year, is sufficient. *Right* v. *Darby*, 1 T. R. 159. *Roe* v. *Doe*, 6 Bing, 574. *Doe* v. *Keightly*, 7 T. R. 63. *Howard* v. *Wemsley*, 6 Esp. C. 53. *Doe* v. *Green*, 4 Esp. C. 199.

(*h*) 3 B. & C. 413, where Holroyd, J. cited the following passage from Buller's N. P. 104: "A distinction has been taken and allowed by all the Judges on a case reserved by Pengelly, C. B., that if a cottage is built in defiance of a lord, and quiet possession has been had of it for 20 years, it is within the statute; but if it were built at first by the lord's permission, or any acknowledgment have since been made (though it were 100 years since), the statute will not run against the lord." "Here," adds Mr. J. Holroyd, "the payment of rent was an acknowledgment that the occupation was by permission." When, however, the sum paid is very small, and has not been regularly paid, it may be a question for the jury, whether the payment did not result from some oppression. P. C., K. B. Easter term, 1829.

(*i*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208. *Doe* d. *Challmer* v. *Davis*, 1 Esp. C. 461, *contra*. *Doe* d. *Colclough* v. *Miller*, Ibid. 460. Note, that in the first of these cases the landlord was seised in fee of the waste, which had been inclosed and enjoyed by his tenant for life for 30 years: it was left to the jury to say whether it was not inclosed with the consent of the lessor, in right of the demised premises.

(*j*) *Hutton* v. *Warren*, 3 M. & W. 475. So in the case of a lease void by the statute of frauds, if the tenant being let into possession pay rent, the holding will be from year to year, regulated by the terms of the void lease. *Doe* v. *Bell*, 5 T. R. 471.

(*k*) *Knight* v. *Bennett*, 3 Bing. 361; *Mann* v. *Lovejoy*, R. & M. 355; *Doe* v. *Stratton*, 4 Bing. 446.

(*l*) *Cox* v. *Bent*, 5 Bing. 185.

incumbent, it was held that the succeeding incumbent might be presumed to have assented to the continuance of the tenancy, and that a notice to quit was necessary (*m*).

Determination of the lease.

2dly. The determination of the lease. This may be proved, 1st, by the terms of the lease itself, where the term is certain; 2dly, by proof of notice where it is necessary (*n*); 3dly, by proof of some act of forfeiture.

Notice to quit.

1st. Where by the terms of the original lease the tenancy is to end on a precise day, no notice to quit is necessary, for both parties are apprized of the determination of the term (*o*).

Time of entry.

2dly. If the tenancy be from year to year (*p*), the plaintiff must prove that the defendant has had the usual *notice to quit* six months previous to the time of the year when the defendant entered (*q*). A receipt for rent due at a particular day is *primâ facie* evidence of a holding from that day (*r*).

(*m*) *Doe* v. *Somerville*, 6 B. & C. 126.

(*n*) A covenant to lease is not a lease, and is no defence to an action by the landlord. *Fenny* v. *Child*, 2 M. & S. 255. *P.*, the lessor of the plaintiff, being seised in fee of lands, having agreed for the sale thereof to *W.* on or before a certain day, *W.* before that day agreed to let them to the defendant, who with the permission of the vendor was let into possession as tenant to *W.*; the conveyance was, after the stated day, executed, whereby the lands were conveyed to *W.*, but for the use of *P.* the vendor for a term, subject to a proviso for redemption by *W.* on payment of the purchase-money, for default of which the ejectment was brought; held, that the entry and possession of the defendant being only that of *W.* by anticipation, no notice to quit was necessary. *Doe* d. *Parker* v. *Boulton*, 6 M. & S. 146. A party defends as landlord; the occupiers having suffered judgment by default, he cannot object that his tenants have not received notice to quit from the lessor of plaintiff. *Doe* v. *Creed*, 5 Bing. 327. The minister of a dissenting chapel is permitted by the trustees to occupy a dwelling-house; having no other estate in the premises than that of a mere tenant at will, it is put an end to by a demand of possession by the trustees, and they are entitled to recover the possession without notice. *Doe* v. *Jones*, 10 B. & C. 718; S. P. *Doe* d. *Nicholl* v. *M'Kaeg*, Ib. 721. The wrongful payment of rent to a person not entitled, does not operate as a disseisin of the landlord, or disclaimer of his title, so as to amount to a forfeiture of the lease. *Doe* d. *Dillon* v. *Parker*, 1 Gow's C. 18. But where the defendant in ejectment alleged that the person through whom the lessor of the plaintiff claimed a title in fee held only as tenant to the defendant, such an assertion of title operating as a disclaimer of the title of the landlord, amounts to a forfeiture of the lease or subsisting tenancy, and notice to quit need not be proved. *Doe* d. *Jefferies* v. *Whittick*, 1 Gow's C. 103.

(*o*) Per Lord Mansfield, *Right* v. *Darby*, 1 T. R. 162. *Messenger* v. *Armstrong*, 1 T. R. 54. *Cobb* v. *Stokes*, 8 East, 358. A clause in an agreement by the lessee to give up a portion of the demised land to the lessor upon certain terms, in case the lessor should want it for building, without any clause of re-entry, operates as a covenant, and not as a condition in defeasance of the estate, and the lessor cannot recover in ejectment. *Doe* d. *Wilson* v. *Phillips*, 2 Bing. 13. In some instances proof may from efflux of time be unnecessary; as where notice has been given to a weekly tenant to quit on Friday, or otherwise at the end of his tenancy next after one week from the date of the notice, and the ejectment is not brought until a time has elapsed which covers every day in that week. *Doe* v. *Scott*, 6 Bing. 362.

(*p*) A demise for a year, and afterwards from year to year, operates as a demise for two years. *Birch* v. *Wright*, 1 T. R. 280. A demise from year to year constitutes a tenancy for two years at least. *Denn* v. *Cartwright*, 4 East, 29. Under a demise for twelve months certain, and six months notice afterwards, the tenant is at liberty to quit at the end of twelve months, giving six months previous notice. *Thompson* v. *Maberly*, 2 Camp. 573. But a tenant who enters under an agreement for a lease for seven years, and who occupies for the whole of that time, is not entitled to a notice to quit at the end of the seven years, although a notice would have been necessary for the purpose of ejecting him within the seven years. *Doe* v. *Stratton*, 4 Bing. 446. An under-tenant holding over is not bound by the terms of a lease granted after his coming in to the tenant, with the terms of which he is unacquainted. *Torriano* v. *Young*, 6 C. & P. 8.

(*q*) *Kemp* v. *Derrett*, 3 Camp. 510. But that may be varied by showing a payment of rent for the portion of the quarter between entry and quarter-day. *Doe* v. *Johnson*, 6 Esp. C. 10. *Doe* v. *Stapleton*, 3 C. & P. 275. *Doe* v. *Selwyn*, Adams on Eject. 129. A variation in the rent during the tenancy does not affect the time of notice. *Doe* v. *Kendrick*, Adams on Ejectment, 129.

(*r*) *Doe* v. *Samuel*, 5 Esp. C. 173. And so ruled in *Doe* v. *Beaumont*, York Summer

Time of entry.

And where the tenant continues to hold the premises after the expiration of a lease, and assigns his interest, the assignee holds from the day on which the tenancy under the lease commenced (*s*). It was once held that the notice to quit was in itself *primâ facie* evidence that the tenancy commenced at the day specified in the notice for quitting (*t*). But on subsequent consideration of the point by the Judges, it was thought that this rule was not sufficiently supported by any principle; and it is now held, that the notice is not evidence of the time of entry, unless it be unobjected to at the time of service upon the defendant (*u*). Hence the notice is not evidence for that purpose unless it be served personally (*x*); nor then, unless the party can and does read it (*y*). And whether the defendant did or did not assent is a question for the jury. Where the defendant at the time of service gave an angry answer, complaining that he had been harshly treated, it was held that he was not thereby precluded from showing that the notice had been served too late (*z*). But where the tenant, on application by the lessor's attorney, as to the commencement of his tenancy, misinformed him, and notice was given in conformity with his answer, it was held that he was concluded by it, and that it made no difference whether the information so given resulted from accident or design, since he had induced the party to act upon it (*a*).

Proof of notice.

In general it must be proved that the notice to quit was served half a year before the expiration of the current year (*b*). A longer notice may be

Assizes, 1834, by Lord Lyndhurst, C. B. If no direct evidence can be given as to the time of entry, the custom of the country is *primâ facie* evidence of the time; if there be no such custom, the rent-day is to be considered as the day of entry. If there be two rent-days, the plaintiff's notice shall be presumed to be right till the defendant prove it to be wrong; and if the tenant enters about the usual day, the entry shall relate to such day. Per Buller, J., Lancaster Lent Assizes, 1790. Salkeld, by Evans, 413, note (*b*). And see *Doe* v. *Lambe*, Adams on Ej. 316, 3d ed.; *Timmins* v. *Rowlinson*, 3 Burr. 1609.

(*s*) *Doe* v. *Samuel*, 5 Esp. C. 173. So in the case of holding under a lease void by the statute of frauds. *Doe* v. *Bell*, 5 T. R. 472.

(*t*) *Doe* v. *Harris*, 1 T. R. 161.

(*u*) *Thomas* v. *Thomas*, 2 Camp. 647. *Doe* v. *Wombwell*, 2 Camp, 559. *Doe* v. *Forster*, 13 East, 406. *Doe* v. *Calvert*, 2 Camp. 388.

(*x*) *Doe* v. *Calvert*, 2 Camp. 388.

(*y*) *Thomas* v. *Thomas*, 2 Camp. 647, by the Court of K. B. So where the notice being general, and not mentioning any time of quitting, a declaration was served nearly a year afterwards, laying the demise half a year after the notice, the tenant on service making no objection as to the time, Ld. Ellenborough held that it was a question for the jury whether the tenant must not be taken to have admitted that the notice was good. *Doe* v. *Wombwell*, 2 Camp. 559.

(*z*) *Oakapple* v. *Copons*, 4 T. R. 361.

(*a*) *Doe* v. *Lambley*, 2 Esp. C. 635.

(*b*) *Right* v. *Darby*, 1 T. R. 159. If a house be taken by the month, a month's notice is sufficient. *Doe* v. *Hazell*, 1 Esp. C. 94. A weekly reservation of rent is evidence of a weekly holding. *Doe* d. *Peacock* v. *Raffan*, 6 Esp. C. 4. And see *Kemp* v. *Derrett*, 3 Camp. 510. Where the tenant entered in the middle of a quarter under an agreement to pay rent for the half quarter and quarterly, it seems that the tenancy commences from the preceding quarter-day. *Doe* v. *Selwyn*, Adams on Ejec. 129. But a quarterly reservation of rent does not dispense with a half-year's notice. *Shirley* v. *Newman*, 1 Esp. C. 226. Where the entry was in the middle of a quarter, and payment was made for the fraction between the time of entry and Christmas, and the rent was afterwards paid at Christmas and Midsummer, it was held to be a holding from Christmas. *Doe* v. *Johnson*, 6 Esp. C. 10. Notice on 28th September, to quit at the ensuing 25th March, is good; the customary half-year is sufficient. *Roe* v. *Doe*, 6 Bing. 574. The tenant came in at the half-quarter, and at quarter-day paid the half-quarter's rent, and from thence paid quarterly; a notice to quit at the last quarter-day of the current year is sufficient, notwithstanding a previous notice expiring at the half-quarter. *Doe* v. *Stapleton*, 3 C. & P. 275. And see *Doe* v. *Johnson*, 6 Esp. C. 10. Notice to quit to a weekly tenant "on *F.* provided his tenancy expired on *F.*, or otherwise at the end of his tenancy next after one week from the date of the notice," is sufficient. *Doe* v. *Scott*, 6 Bing. 362.

Proof of notice.

necessary, or a shorter one sufficient, if a custom to that effect be proved (*c*). There is no distinction between houses and lands as to the time of notice (*d*). Where a tenant enters upon different portions of the premises at different times, for the convenience of husbandry, and it does not appear from any express agreement from what point of time the tenancy was to commence, the rule of law is, that it shall be taken to commence from the time of entering upon that which is the principal and substantial subject of the demise (*e*); and it is a question of fact for the jury to ascertain what is the principal, and what the accessorial subject of demise (*f*).

In the case of *Doe* v. *Snowden* (*g*), the arable part of the farm was held from Candlemas, but the rent was made payable from Old Lady-day, and the tenancy was held to commence on the latter day (*h*). Where the tenant was to enter upon the arable lands at Candlemas, and all the other premises on the Lady-day following, and agreed to quit the same according to the terms of entry as aforesaid, and the rent was reserved half-yearly, at Michaelmas and Lady-day, the tenancy was held to commence from Lady-day, with a privilege for the in-coming tenant to enter on the arable land at Candlemas, for the purpose of ploughing (*i*). Under an agreement of demise of a dwelling-house, mills, and other buildings, for the purpose of carrying on a manufactory, together with meadow, pasture, and bleaching grounds; to commence, as to the meadow, from the 25th of December last, and as to the pasture, from the 25th of March next; and as to the housing, mills, and all the rest of the premises, from the 1st of May, reserving the first year's rent on the day of Pentecost, and the other half-year's at Martinmas, it was held, that the substantial subject of the demise being the house and buildings for the manufacture, which were to be entered upon the 1st of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the in-coming tenant had liberty of entering on the meadow, which was merely ancillary to the other and principal subject of the demise; and therefore, that a notice to quit, served on the 28th of September, was sufficient (*k*). Where the time of entry depends on the terms of a deed or other written instrument, no parol evidence can be admitted to vary the terms. Where the demise was of lands to be held from the Feast of St. Michael, which must be taken to mean from New Michaelmas (*l*), it was held that evidence could not be admitted to show that Old Michaelmas was meant (*m*). Under an agreement between the

(*c*) *Roe* v. *Wilkinson*, Co. Litt. by Butler, 270, b. *Roe* v. *Charnock*, Peake's Cas. 4.

(*d*) 1 T. R. 162.

(*e*) *Doe* v. *Spence*, 6 East, 120. *Doe* v. *Lea*, 11 East, 312. *Doe* v. *Howard*, 11 East, 498. See Co. Litt. 68; Allen, 4; 2 Ld. Raym. 1008; 2 Jones, 5; 2 Salk. 413, 4; 3 Burr. 1603.

(*f*) *Doe* v. *Howard*, 11 East, 498.

(*g*) 2 Bl. 1224, cited 2 East, 383.

(*h*) Ibid. This case is said to have been overruled by Lord Kenyon, at *Nisi Prius*, in the case of *Doe* ex dem. *Lord Grey de Wilton*, where the defendant entered upon the arable lands at Candlemas, and the buildings and pastures at May-day, the rent payable at Michaelmas and Lady-day, and the notice to quit was given six months before May-day, but not six months before Candlemas; and Lord Kenyon nonsuited the plaintiff. But it does not appear in that case whether six months notice previous to Lady-day had been given. See the observations of Grose, J., 2 East, 383.

(*i*) *Doe* v. *Spence*, 6 East, 120.

(*k*) *Doe* v. *Watkins*, 7 East, 551.

(*l*) *Doe* v. *Vince*, 2 Camp. 257.

(*m*) *Doe* v. *Spicer*, 11 East, 312. *Secus*, it is said, where the letting is by parol. *Doe* v. *Benson*, 4 B. & A. 588; *supra*, tit. CUSTOM. And where the demise is by deed, extrinsic evidence is inadmissible to show that by such words New Michaelmas was meant. *Doe* v. *Lea*, 11 East, 312. *Smith* v. *Walton*, 8 Bing. 235. But where the letting has been by *parol*, it has been held that evidence was admissible of the custom of the country to show that, by Lady-day, Old Lady day was

landlord and tenant that the other party may determine the tenancy by giving a quarter's notice, such notice must expire on or before the day of the year on which the tenancy commenced (*n*). According to the ordinary rule the words of a demise are to be taken *fortius contra proferentem*, and therefore when two periods of quitting are designated by the same words, the tenant shall have his option (*o*). Less than six months notice will not be sufficient, although it be accepted by the landlord, unless there be a surrender in writing or by operation of law (*p*). Proof of notice to quit.

The service of notice in writing is usually proved by the agent who served it, who produces a duplicate original (*q*), signed by the landlord; if there be no duplicate it seems that notice should be given to produce the original notice (*r*). If the notice has been attested, the attesting witness should be called (*s*). It is not however, essential that the notice should have been in writing (*t*), although served on the behalf of a corporation aggregate (*u*): it is sufficient in such case to prove that the notice was given by the steward of a corporation aggregate, without showing that he had a power of attorney for the purpose, the adoption of the notice, by the bringing the action, being sufficient proof of his authority (*x*); and it seems that an agent who has authority to let lands and receive rents has also authority to give a sufficient notice to quit (*y*); as in the instance of a receiver appointed by the Court of Chancery.

Where a lease contained a proviso for its determination by either landlord or tenant, their respective heirs and executors, on giving six months notice under his or their respective hands, a notice signed by two of the landlord's executors, on behalf of themselves and a third executor, was held to be insufficient, for the proviso required the signature of all three, and the notice was not sustainable on the general rule of law, that one joint-tenant may bind the rest by an act done for their benefit, since there was no evidence that the determination of the tenancy was for the benefit of all (*z*). And it was held, that the subsequent assent by the third executor did not make the notice good by relation, since the general principle did not apply to cases where the intermediate conduct of the parties would be affected by the ratification (*a*). Under a proviso in a lease, so that if either of the parties should be desirous to determine it, it should be lawful for either his executors or

meant. *Doe* v. *Benson*, 4 B. & A. 588. *Furley* v. *Wood*, Runn. Ej. 112. 1 Esp. C. 198. In the case of *Doe* v. *Benson* above cited, the demise appears to have been not only by parol in the technical sense without deed, but also without writing; Abbott, C. J., and Holroyd, J., lay stress on the solemnity of a demise by *deed*, but the latter adds, that the letting being by parol, the party is at liberty to explain the *words* used. So evidence is admissible to explain the intention of the parties in such cases. *Denn* v. *Hopkinson*, 3 D. & R. 507.

(*n*) *Doe* v. *Donovan*, 2 Camp. 78; 1 Taunt. 555.

(*o*) Per Heath, J., in *Doe* v. *Donovan*, 1 Taunt. 556, citing *Dann* v. *Spurrier*, 3 B. & P. 399.

(*p*) *Johnstone* v. *Huddlestone*, 4 B. & C. 922. See FRAUDS, ST. OF.

(*q*) *Hine* v. *Beaument*, 3 B. & B. 288.

(*r*) But see *Ackland* v. *Pearce*, 2 Camp. 261; *supra*, tit. BILLS OF EXCHANGE; *Grove* v. *Ware*, 2 Starkie's C. 174; *supra*, tit. ATTORNEY; *infra*, tit. NOTICE.

(*s*) *Doe* v. *Deanford*, 2 M. & S. 62.

(*t*) *Doe* v. *Crick*, 5 Esp. 106. *Secus* where by agreement a written notice is required, *Timmins* v. *Rowlinson*, 3 Burr. 1603, or by the provisions of a power. *Legg* v. *Benison*, Willes, 43.

(*u*) *Roe*, on the dem. of the *Dean and Chapter of Rochester* v. *Pierce*, 2 Camp. 96.

(*x*) *Ibid.* 2 Camp. 96, *cor.* Macdonald, C. B.

(*y*) *Doe* v. *Read*, 12 East, 57; and see 5 Burr. 2694. *Doe* v. *Wood*, and *Doe* v. *Blair*, MSS. *Doe* v. *Mizem*, per Pattison, J., 2 Mo. & R. 56. But a mere receiver of rents has no power to determine a tenancy. *Doe* v. *Walters*, 10 B. & C. 611, per Parke, J. The mere agent of an agent cannot give such notice. *Doe* v. *Robinson*, 3 Bing. N. C. 677.

(*z*) *Right* v. *Cuthell*, 5 East, 491.

(*a*) *Ibid.*

Proof of notice to quit.

administrators to do it, the devisee of the lessor is entitled to give such notice (*b*). If four joint-tenants jointly demise the land from year to year, such as give notice to quit may recover their several shares in ejectment upon their several demises (*c*). Where a lessee underlet a part, and gave up the remainder to the lessor, it was held that the latter could not determine the sub-lessee's tenancy by notice, since there was no privity between them (*d*). Proof of service at the dwelling-house of the tenant, although not upon the demised premises, is sufficient (*e*), and so is service on a servant on the premises (*f*), to warrant the presumption that the notice was received by the tenant. So where, on the tenant's having left the premises, notice is served on the party who takes possession after him, for it may be presumed that he came in as assignee (*g*). But after the death of the tenant, in an action against the widow, proof of leaving the notice at the dwelling-house without any proof of delivery to a servant, or that the defendant lived there, was held to be insufficient (*h*). Upon a joint demise to two, one of whom resides on the premises, service upon him is sufficient to enable the jury to presume that it reached the other (*i*). If the notice has been signed by an attesting witness, he must be called to prove it (*k*); and it is not sufficient in such a case to show that upon service of the notice the tenant read it over, and did not object to it (*l*). In the case of a corporation, notice should be addressed to the corporation, and served upon the proper officer (*m*).

It must appear on the face of the notice thus proved, that the tenant was sufficiently apprized by it of the landlord's intention to determine the tenancy at the expiration of the current year (*n*). A notice to quit at Lady-

(*b*) *Roe* v. *Hagly*, 12 East, 464.

(*c*) *Doe* d. *Wayman* v. *Chaplin*, 3 Taunt. 420. The several demises to the plaintiff in ejectment sever the joint-tenancy. Per Ld. Ellenborough, *Doe* v. *Read*, 12 East, 57. And where one gives notice in the name of all, it is a good notice for all. *Doe* v. *Summersett*, 1 B. & Ad. 135; and, as it seems, such a notice is sufficient to determine the tenancy, although all the co-tenants did not concur, *Ib.* 140, and see 2 Man. & R. 434 Notice given by a stranger professing to act as agent for several joint-tenants, is not available unless it be ratified before the notice begins to run. *Doe* v. *Walters*, 10 B. & C. 626. Contra. *Goodtitle* v. *Woodward*, 3 B. & A. 689. A landlord having let premises to a firm in which he is a co-partner, may eject on notice given. *Doe* v. *Francis*, 4 M. & W. 331.

(*d*) *Pleasant* v. *Benson*, 14 East, 234. If the lessee, on receiving notice to quit, gives notice to his sub-lessees to quit, and they refuse, ejectment may be maintained against him for so much as his sub-lessees refuse to give up. *Roe* v. *Wiggs*, 2 N. R. 330.

(*e*) See Lord Kenyon's observations in *Jones* v. *Griffiths*, 4 T. R. 464.

(*f*) *Jones* v. *Marsh*, 4 T. R. 464; Runn. 112; 4 T. R. 361. It is sufficient although the tenant, by reason of absence, was not informed of it till within half a year of its expiration. *Doe* v. *Dunbar*, M. & M. 10. But service on a relation of the sub-tenant on the premises is insufficient, although it be directed to the lessee. *Doe* v. *Levi*, Adams Ej. 115.

(*g*) *Doe* v. *Williams*, 6 B. & C. 41.

(*h*) *Doe* v. *Lucas*, 5 Esp. C. 153.

(*i*) *Doe* v. *Watkins*, 7 East, 551. So a parol notice to one has been deemed to be sufficient. 5 Esp. C. 196. *Doe* v. *Crick*, Co. Litt. 49, b.

(*k*) 2 M. & S. 62.

(*l*) *Doe* v. *Durnford*, 2 M. & S. 62.

(*m*) *Doe* v. *Woodman*, 8 East, 428.

(*n*) A notice it seems would be sufficient requiring the tenant to quit "as soon as by law he might." Per Ld. Abinger, in *Good* v. *Howells*, 4 M. & W. 199. A notice, however, will be insufficient if it be too general, as if it be to quit forthwith, or henceforth, or simply "to quit" generally. *Ib.* Or be in the alternative to quit or hold on a new agreement; and therefore, although a notice to quit, *or* I shall insist on double rent, is good as referring only to the penalty of the stat. 4 G. 2, c. 28, against holding over (although its terms were mistaken), was held to be good; yet if the notice had been to quit, "or else that you agree to pay double rent," it would have been insufficient. Per Ld. Mansfield, in *Doe* v. *Jackson*, Doug. 175. Objections of this nature, however, are reluctantly admitted by the courts. *Doe* v. *Archer*, 14 East, 245. And an obvious mistake will not avoid the notice. Where notice was given at Michaelmas 1795 to

day *generally*, is a sufficient notice for Old Lady-day (*o*). Notice to quit on the 25th of March, *or* 8th of April, is sufficient, if it be delivered six months before the former day, although it be doubtful which of these was the day of entry (*p*). Where the lease was by parol from *Lady-day*, and notice was given to quit at Old Lady-day, it was held that parol evidence was admissible of the custom of the country to show that by Lady-day the parties meant Old Lady-day (*q*). Proof of notice to quit.

Where the tenancy of land began on the 2d of February, and of the houses on the 1st of May, a notice was given on the 22d of October to quit both land and houses "at the expiration of half a year from this notice, or at such other time or times as your present year's holding of the premises or any part thereof respectively shall expire, after the expiration of half a year from this notice," was held to be sufficient to determine the tenancy of the houses on the 2d of April 1834, and of the lands the 2d of February 1835 (*r*).

But a notice to quit part of the demised premises (*s*).

Where *A.* was tenant of the premises, but left them several years ago, and *B.* then entered and occupied, but no rent had been paid since *A.*'s occupation; it was held that it was sufficient to serve notice to quit on *B.*, for an assignment to him might be presumed (*t*).

A mis-description of the premises in the notice will not be fatal, unless the party be misled by it. Where by mistake the Waterman's Arms was inserted for the Bricklayer's Arms, the variance was held to be unimportant (*u*). Although the notice be directed to the tenant by a wrong Christian name, yet if he keep it the mistake is waived (*x*). A notice requiring the tenant of lands demised to the rector and churchwardens of a parish in trust, signed by the rector and churchwardens, and requiring the tenant to deliver up the premises to the churchwardens for the time being (there being no such corporation), has been held to be bad (*y*). The plaintiff, instead of proving the notice to quit, may show that the tenant has denied his (the landlord's) title (*z*), and holds ad-

quit at Lady-day which will be in the year 1794, and the tenant was told, on service of the notice, that he must quit on the next Lady-day, it was held to be sufficient. *Doe* v. *Kightley*, 7 T. R. 63; and see *Doe* v. *Culliford*, 4 B. & R. 248.

(*o*) *Dunn* v. *Walker*, Peake's Ev. 367. *Dunn* v. *Wane*, Ibid. *Doe* v. *Vince*, 2 Camp. 256. *Doe* v. *Brookes*, 2 Camp. 257. See *Furley* v. *Wood*, 1 Esp. C. 198; *Doe* v. *Lea*, 11 East, 312. So a notice to quit on the 25th of March or the 8th of April, is sufficient, the disjunctive being used not to give an alternative, but to quit a holding from either Old or New Lady-day. *Doe* v. *Wrightman*, 4 Esp. c. 5.

(*p*) *Doe* v. *Wrightman*, 4 Esp. C. 5.

(*q*) *Doe* d. *Hall* v. *Benson*, 4 B. & A. 588. *Secus*, where the letting is by deed. *Doe* v. *Lea*, 11 East, 312. And see *Furley* v. *Wood*, 1 Esp. C. 198; *supra*, tit. CUSTOM.

(*r*) *Doe* v. *Smith*, 5 Ad. & Ell. 350.

(*s*) *Doe* v. *Archer*, 14 East, 245. *Doe* v. *Church*, 3 Camp. 71. For the lessor cannot split the tenancy, determining it as to part and continuing it as to the rest; but the Court will, if the notice be capable of such a construction, construe it as putting an end to the tenancy altogether. *Doe* v. *Archer*, 14 East, 245.

(*t*) *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41. *Doe* v. *Murless*, 6 M. & S. 110.

(*u*) *Doe* v. *Cox*, 4 Esp. C. 185.

(*x*) *Doe* v. *Spiller*, 6 Esp. C. 70.

(*y*) *Doe* v. *Fairclough*, 6 M. & S. 40.

(*z*) B. N. P. 96; Cowp. 622. What shall be deemed to amount to a disclaimer is usually a question of law. According to Best, J., notice is in no case necessary, unless a tenancy be admitted on both sides. *Doe* v. *Frowd*, 4 Bing. 557. If a tenant denies his tenancy, there can be no necessity for terminating that which does not exist. *Ib.* The question is, has he denied the landlord's title? The act must be one inconsistent with the landlord's title; the mere paying rent to another does not operate as a forfeiture of the lease. *Doe* v. *Pasquali*, Peake's C. 96. But if a tenant pay rent to a person claiming to be landlord, and allow him as such to branch and cut the trees, the submission to such acts amounts to an acknowledgment of title. Per Ld. Tenterden, in *Grubb* v. *Grubb*, 10 B. & C. 824. Where a tenant at will dies, and his

versely (*a*); but if it appear that the tenant has refused to quit on account of a dispute between contending claimants, notice will still be necessary (*b*). Such disclaimer, to be available, must be proved to have occurred before the demise (*c*).

Tenant at will.

In the case of a tenancy at will or otherwise, where the party is lawfully in possession (*d*), the plaintiff must prove an entry upon the premises, or a notice to quit, or demand of possession, or some other (*e*) act done by him to determine the tenancy, previous to the day of the demise in the declaration (*f*). The confession of the defendant by entering into the common rule, is not evidence to show such determination (*g*). One put into posses-

heir enters and claims the land as his own, notice is not necessary. *Doe* v. *Thompson*, 1 N. & P. 215. Where the defendant, holding under a tenant for life, in answer to a claim by the plaintiff as heir, stated, that he held the premises as tenant to *S.*; that he had never considered the plaintiff as his landlord; that he should be ready to pay rent to any one proved to be entitled to it, and that, without disputing the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner: he was held to have disclaimed. *Doe* v. *Frowd*, 4 Bing. 557. It is a disclaimer if the tenant say to the landlord, "I have no rent for you, for *A.* has ordered me to pay you none." *Doe* v. *Pitman*, 2 N. & M. 678. Where the tenant gives possession, and also the lease, to one who claims hostilely, it is a forfeiture of the lease. *Doe* v. *Flynn*, 1 C. M. & R. 137. Where the disclaimer is merely as to part, the plaintiff may recover *pro tanto*; and so where ejectment being brought against several, in respect of several tenements, the plaintiff may recover as to those who have disclaimed, although he fail as to the rest. *Doe* v. *Clarke*, Peake's Add. C. 239. A defendant, holding under a tenant for life, on his death receives a letter from the plaintiff, claiming as heir and demanding rent; he answers that the defendant was tenant to *S.*, and that he never considered the plaintiff his landlord, but would pay rent to the party entitled: held to be a disclaimer of plaintiff's title. There the lessor of plaintiff was, on death of tenant for life, entitled to treat defendant as a trespasser; and a notice to quit is only necessary where a tenancy is admitted on both sides. *Doe* v. *Frowd*, 4 Bing. 557. A letter, dated June 1813, disclaiming all connexion with the lessor of the plaintiff (to whom he had once paid rent) for many years, is sufficient evidence to support a demise laid in May 1813. *Doe* v. *Grubb*, 10 B. & C. 817. See *Doe* d. *Ld. Cawdor* v. *King*, Exchequer.

(*a*) A mere oral disclaimer, without any act done, is insufficient. Per Parke, B. in *Doe* v. *Stannion*, 1 M. & W. 702. And where the tenant, having made a bargain for the purchase of the property from his landlord, refused to give it up on demand, saying, he had bought and would keep it, and was ready to pay the money; it was ruled that it was no disclaimer superseding notice. *Ib.* Where any act has been done disclaiming the tenancy, and setting the landlord at defiance, as where the tenant attorns to another, the landlord may treat him as a trespasser. *Doe* v. *Whittick*, Gow. 195. Whether he be tenant merely from year to year, or for a longer term. *Doe* v. *Flynn*, 1 C. M. & R. 137.

(*b*) *Doe* v. *Pasquali*, Peake's C. 196.

(*c*) *Doe* v. *Litherland*, 1 Ad. & Ell. 784. *Doe* v. *Cawdor*, 1 C. M. & R. 398. So an admission of a disclaimer is insufficient, unless it be of a disclaimer before the demise. *Ib.*

(*d*) *Denn* v. *Rawlins*, 10 East, 261. *Doe* v. *Jackson*, 1 B. & C. 448. *Doe* v. *Stannion*, 1 M. & W. 700. A party suffered to occupy cannot be deemed a trespasser. Per Parke, B. *Ib.*

(*e*) *Goodtitle* v. *Herbert*, 4 T. R. 680.

(*f*) Anything amounting to a determination of the will is, in the case of a tenancy at will or permissive occupation, equivalent to a demand of possession. Where a purchaser, let into possession, refuses to complete his purchase, and assigns his interest, the assignment, without any demand, amounts to a determination of the will. *Doe* v. *Abbott*, Winton Summ. Ass. 1838; Roscoe on Ev. 437; and see *Doe* v. *Price*, 9 Bing. 356. *Ball* v. *Cullimore*, 2 C. M. & R. 120. *Doe* v. *Thompson*, 444. See further, tit. VENDOR & VENDEE. Such a demand may be made on the wife of the tenant at will, on the premises. *Doe* v. *Street*, 2 Ad. & Ell. 329.

(*g*) *Right* v. *Beard*, 13 East, 210. In the case of a tenant by sufferance, it is sufficient that the owner make an entry on the premises previous to ejectment, without any demand of possession. *Doe* v. *Lawder*, 1 Starkie's C. 308. In the case of *Weakly* v. *Bucknell*, Cowp. 473, where the defendant had had possession for eighteen years, under an unstamped agreement, for a lease for twenty-one years, and a half year's notice to quit had been duly served, it was held that the plaintiff could not recover, inasmuch as it would merely give the Court of Chancery an opportunity of undoing all again. *Qu.* In *Doe* d. *Nowell* v. *Adam*, where the defendant was let into

sion upon an agreement for the purchase of land, cannot be ousted of the possession before the lawful possession has been determined, by a demand, or otherwise (*h*). And so it is where a tenancy at will is created by means of a lease for four years, without writing (*i*). Tenant at will.

In ejectment for a forfeiture by the tenant or his assignee, the plaintiff must first prove the lease (*k*), and secondly, the breach of it (*l*). Forfeiture.

possession under an agreement for sale, with stipulations that the purchase-money should be paid by instalments, and some of the instalments had been paid, but default had been made as to others, it was held, that the plaintiff was entitled to recover possession. K. B. Easter T. 1819. Where *A.* agreed to let a house to *B.* for life, supposing it to be occupied by *B.*, or a tenant agreeable to *A.*, and a clause was to be added to give *B.*'s son the option to possess the house when of age, it was held that this was a mere agreement for a term, and that on *B.*'s death *A.* might recover the possession from *B.*'s executrix. *Doe* d. *Bromfield* v. *Smith*, 6 East, 530. *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. C. 106.

(*h*) *Right* v. *Beard*, 13 East, 210. *Newby* v. *Jackson*, 1 B. & C. 448. So where the party is in possession under a void or imperfect lease or conveyance. *Doe* v. *Fernside*, 1 Wils. 276. *Doe* v. *Edgar*, 2 Bing. N. C. 508. Or, where the tenant continues in possession after the expiration of a former lease, and pending negotiations for a new one. *Doe* v. *Stennett*, 2 Esp. C. 717. And in general, one lawfully in possession.

(*i*) *Goodtitle* v. *Herbert*, 4 T. R. 680.

(*k*) A clause of re-entry is to be construed strictly. Per Ld. Tenterden, *Doe* v. *Marchetti*, 1 B. & Ad. 720. But an agreement in a demise not to assign is a condition for the breach of which the lessor may maintain ejectment. *Doe* v. *Watt*, 8 B. & C. 308. Where an underlease contained a proviso, that for breach of covenant the lessor *and* lessee might enter, it was held that the lessee alone might take advantage of the proviso. *Doe* v. *White*, 4 Bing. 276.

(*l*) The defendant, on motion, is entitled to a particular of the breaches. *Doe* v. *Phillips*, 6 T. R. 597. As to proof of breaches, vide *supra*, COVENANT. A covenant not to let, assign, transfer, set over, or otherwise part with premises demised, is not broken by the depositing the lease as a security for goods sold. *Doe* d. *Pitt* v. *Hogg*, 4 D. & R. 226. A lessee who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable on the covenant for rent, though the premises are burnt down, and not repaired by the lessor after notice. *Belfour* v. *Weston*, 1 T. R. 300. *Camden* v. *Morton*, 1 Sel. N. P. 464. *Hare* v. *Groves*, 3 Anst. 687. Lessee covenanting to repair generally, is bound to rebuild, though the subject of repair be destroyed by accidental fire. *Bullock* v. *Dommett*, 6 T. R. 650. *Digby* v. *Atkinson*, 4 Camp. 275. So if a party covenant to keep a bridge in repair for a specific period, and it be destroyed by an extraordinary flood. *Brecknock Navigation* v. *Pritchard*, 6 T. R. 750. A covenant substantially to repair, uphold and maintain a house, extends to inside painting. *Marke* v. *Noyes*, 1 C. & P. 265. Notice given to repair in three months, according to the terms of a covenant, is evidence of the waiver of a breach of a general covenant to repair. *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606. Note, that this was distinguished from the case of *Roe* d. *Goatly* v. *Paine*, 2 Camp. 550, where the language of the notice was to repair *forthwith*, which did not (per Bayley, J.) prevent the plaintiff from bringing his action at any time. If a tenant set up a title, or assist another in setting up a title hostile to the landlord, it is a forfeiture. *Doe* v. *Flynn*, 2 Cr. M. & R. 137. The mere act of paying rent to a third person does not operate as a forfeiture of the lease. *Doe* v. *Parker*, Gow. 180. An omission to repair is not an act done within the meaning of a clause of re-entry for doing or causing to be done any act, &c. *Doe* v. *Stevens*, 3 B. & Ad. 290. By a memorandum of agreement to let as on lease, lands, part in possession and part as lives should fall in, it is "stipulated and conditioned, that the said lessee should not assign, transfer, underlet, or part with any part of the said lands, otherwise than to his wife, child, or children:" these words create a condition, for breach of which the landlord may maintain ejectment, and it is immaterial that the demise was by an instrument not under seal. *Doe* v. *Watt*, 8 B. & C. 308. And see Cro. Eliz. 242. 384. 386; Co. Litt. 203. A covenant to insure, and keep the premises insured during the term, and to deposit the policy with the lessor, with a clause of re-entry for breach of any of the covenants, extends to the lessee, his executors and assigns; and it is a breach if the premises are left uninsured during any part of the term, and a continuing breach for every portion of the time during which they are left uninsured; where, therefore, the lessor distrained on the 30th of September for rent then due, and the premises being uninsured, brings an ejectment upon a demise laid on the 24th October, although the distress was a recognition of a tenancy subsisting on the 30th September, and a waiver of any forfeiture previously incurred, yet the lessor is entitled to recover on a forfeiture incurred by the breach for not insuring be-

Forfeiture. Although the forfeiture be in not performing a covenant, it lies on the plaintiff to give some evidence of non-performance (*m*).

In ejectment against the assignee on a clause of re-entry for non-payment of rent, it has been held to be sufficient to prove the execution of a counterpart, without proving the original lease, or notice to produce it (*n*).

2dly. Determination by forfeiture. Where the landlord is entitled to re-enter for a forfeiture, it is unnecessary to prove an actual entry (*o*), or demand of possession (*p*). In general, where the covenant is to do an act, the plaintiff ought to give some evidence, it is said, of the omission to do the act (*q*).

In ejectment, upon a condition for re-entry for non-payment of rent, the landlord must prove an actual demand (*r*) of the rent, although no one be there to pay it (*s*), of the precise rent (*t*), on the precise day (*u*); upon the demised land, at the most notorious place upon it;

tween the 30th September and the day of the demise. *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428. Covenant not to convert or use rooms in a dwelling for certain purposes; for a continuing breach, after a receipt of rent with knowledge of the previous breach, the lessor may still take advantage of the forfeiture. *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & C. 376. Covenant not to erect or alter buildings without consent in writing of the landlord; a breach, and omission to reinstate the premises in their former condition, within thirty days after notice, is not a cause of forfeiture within the meaning of the clause giving power of re-entry if the tenant should make default in the performance of any or either of the clauses, such a proviso being confined to the not performing acts to be performed by the lessee. *Semble*, where the original lessee has underlet, and afterwards surrendered and taken a new lease of the landlord, without any surrender by the under-tenant, the intention and effect of the 4 Geo. 2, c. 28, s. 6, is to place all parties, as to every matter, in the same situation as if no surrender had taken place. *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715. An agreement was made to demise premises for a term "at and under the clear yearly rent of —*l.*," and the lessee agreed to repair and insure, &c.; it was also provided, that in case of the rent being in arrear for twenty-one days, the lessor should have the like power of re-entry, in case of breaches of any of the agreements therein mentioned, as if a lease had been granted; it was held, that the former part amounted to an agreement to pay that rent, and that *assumpsit* would lie for it, and that upon the latter clause, although inartificially expressed, the lessor might recover the premises for non-payment of the rent. *Doe* v. *Kneller*, 4 C. & P. 3. Upon a covenant in a building lease to erect certain houses within twelve months, and power in default for the lessor to re-enter; held, that there being a clear ground of forfeiture, the steward of the lessor having knowledge that the defendant, after the day stated, had proceeded for a short time in completing the works, it was a waiver of the right of re-entry. *Doe* v. *Brindley*, 12 Moore, 37. A lessee who leases for the whole term on condition, may enter on condition broken. *Doe* v. *Bateman*, 2 B. & A. 168. So may a feoffor in fee. *Ib.*

(*m*) *Doe* v. *Robson*, 2 C. & P. 245.

(*n*) *Roe* v. *Davis*, 7 East, 363; and see *Nash* v. *Turner*, 1 Esp. C. 217.

(*o*) It has been so held since the time of Lord Holt. 2 Will. Saund. 287, n. 16.

(*p*) Thus where the term is to depend upon the lessee's actual occupation, and he has become bankrupt, no demand of possession from his assignees, who have taken possession, is necessary. *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185. Nor is a demand of possession, as it seems, necessary in any case where the lessee of the plaintiff has a legal right to enter, independently of any contract or demise on his part. See *Doe* v. *Bradbury*, 2 D. & R. 706; *Doe* d. *Shirley* v. *Carter*, 1 R. & M. 237; *supra*, 303, note (*g*).

(*q*) *Doe* d. *Chandless* v. *Robson*, 2 Esp. C. 245. *Cor.* Abbott, L. C. J.

(*r*) Proof that the lessor went upon the land, and said to an under-tenant, "I am come to demand of you such a sum for my rent," is sufficient. *Doe* v. *Brydges*, 2 D. & R. 29. The grantee of a rentcharge, with power in default of payment to enter and receive the rents, may maintain ejectment, although no previous demand has been made. *Doe* v. *Horsely*, 1 Ad. & Ell. 766.

(*s*) *Kidwelly* v. *Brand*, Plow. 69; 1 Roll. Ab. 458. Covenant by lessee, that if rent be unpaid twenty-eight days, lessor may re-enter; *qu.* whether a demand of rent be first necessary. *Smith* v. *Spooner*, 3 Taunt. 246.

(*t*) 1 Leon. 305; Cro. Eliz. 209, *Fabian* v. *Winston*.

(*u*) See the cases, 2 Will. Saund. 287, n. 16; *Doe* v. *Paul*, 3 C. & P. 613.

at a convenient time before sunset (*v*), by the landlord, or by a person duly authorized by him to demand it by a power of attorney (*w*), which he produced at the time, or which he had ready to produce, having notified it to the tenant (*x*).

The same formalities must still be observed where there is a sufficient distress on the premises, unless they be expressly dispensed with by the terms of the lease (*y*).

Non-payment of rent.

By the stat. 4 Geo. 2, c. 28, which was made to relieve the landlord from the difficulties under which he laboured at common law, the landlord may, when one half-year's rent is in arrear (*z*), and no sufficient distress is to be found, and he has a right to enter for non-payment (*a*), serve a declaration in ejectment, or, in case it cannot be legally served, may affix it to the door of the demised messuage, or upon some notorious place on the lands comprised in the declaration, which service, or affixing of declaration, shall stand instead of a demand and re-entry. Under this statute, the plaintiff, after proof of the lease, and of service of declaration (*b*), or that it was affixed as the statute directs, must prove that there was not sufficient distress upon the premises. Proof must be given that every part of the premises was searched (*c*). Unless the tenant prevent such search by locking the door; for a distress which cannot be made without a trespass, is not available (*d*) within the Act.

Where the rent was due on Lady-day, and the declaration served on the 6th of June, and by the lease the lessor was empowered to re-enter in fourteen days after the time for payment, evidence that the plaintiff's broker went upon the premises *in May* and found nothing to distrain upon, was held to be presumptive evidence that there was no sufficient distress on the 2d of May, the day of the demise (*e*). On a clause not to assign or underlet, proof of occupation of the premises by a person appearing to be tenant, is, it is said, sufficient *primâ facie* evidence to throw it on the defendant to explain the nature of such possession (*f*).

(*v*) Ibid. and 7 T. R. 117; 7 East, 363; Cro. Eliz. 209; Harg. C. Litt. 202.

(*w*) Co. Litt. 201; 1 Roll. Ab. 458; *Mees* v. *King*, 2 B. & B. 514; Forrest, 19.

(*x*) *Roe* v. *Davis*, 7 East, 363.

(*y*) *Doe* v. *Masters*, 2 B. & C. 490.

(*z*) It is sufficient if at the trial the plaintiff prove that half a year's rent is in arrear, although he has claimed more in his particular of demand. *Tenny* v. *Moody*, 3 Bing. 3. A tenant may save the forfeiture under the statute, by a tender of the rent. If at the time of service of the declaration the tenant be ready to pay the rent, although he did not tender it when it became due, the statute gives him the same benefit as if it had been tendered at the time. Per Holroyd, J., *Doe* v. *Shawcross*, 3 B. & C. 756.

(*a*) Where the proviso was, that if the rent was in arrear twenty-one days, the lessor might re-enter, "although no formal or legal demand shall be made for payment thereof," it was held that the landlord was entitled to recover without either demand or re-entry. *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490. Lease reserving rent payable quarterly, proviso if rent be in arrear twenty-one days, *being lawfully demanded*, the lessor may re-enter, five quarters being in arrear, and no *sufficient distress*, the lessor may re-enter without demand made. *Doe* v. *Alexander*, 2 M. & S. 525. Proviso in a lease for the determination of the term on non-payment of rent, it is not competent to the lessee to determine the lease by non-payment. *Reid* v. *Parsons*, 2 Chitty's R. 247.

(*b*) The statute says, that the service of the declaration in ejectment shall stand in the place of the demand and re-entry; and the service of declaration has relation to the day when the landlord ought to have entered, as at common law. And therefore it is no ground of nonsuit that the declaration was served on a day subsequent to the day of the demise, the day of the demise being subsequent to the day on which the lessor ought to have entered at common law. *Doe* d. *Lawrence* v. *Shawcross*, 3 B. & C. 754.

(*c*) Per Heath, J., Hereford Summer Assizes, 1800, and afterwards by the Court of Exchequer. See 2 B. & B. 514. *Rees* v. *King*, 2 B. & B. 514; Forest, 19.

(*d*) Per Ld. Tenterden in *Doe* v. *Dyson*, M. & M. 77.

(*e*) *Doe* v. *Fuchau*, 15 East, 286.

(*f*) *Doe* d. *Hindley* v. *Richarby*, 5 Esp. C. 4. *Doe* v. *Williams*, 6 B. & C. 41. And

By the stat. 11 G. 4 and 1 W. 4, c. 70, s. 36, where a tenancy ends or right of action accrues during or after Hilary or Trinity terms, the lessor may at any time within 10 days after serve a declaration in ejectment (the action being brought in any of His Majesty's Courts at Westminster) entitled on the day next after the day of the demise in the declaration, &c., provided that at least six clear days notice of trial be given. The not commencing the action within 10 days is a mere irregularity, and cannot be objected at *nisi prius* (*g*).

Damages.

By the provisions of a late stat. (*h*), if it shall appear that the tenant has been served with due notice of trial, the landlord may, on the production of the consent-rule, and proof of his title to the whole or part of the premises mentioned in the declaration, give evidence of and recover the mesne profits which shall have accrued from the day of the determination of the tenant's interest down to the time of the verdict, or some preceding day specially mentioned therein.

Evidence for the defendant.

It is a general rule, that a tenant shall not be permitted to dispute his landlord's title (*i*), nor a mortgagor to impeach his own title at the time of the mortgage (*k*). Nevertheless it is competent to a tenant to show that the landlord's title has expired (*l*) subsequently to the demise. And as the

the declarations of such a person have been admitted in evidence. But see *Doe* v. *Payne*, 1 Starkie's C. 86, where it was held to be insufficient to prove that the premises were in possession of a stranger, who said that they had been demised by another stranger.

(*g*) *Doe* v. *Brindley*, 4 B. & Ad. 84.

(*h*) 1 Geo. 4, c. 87, s. 2. The statute applies only to cases where the term has come to a natural end, or been extinguished by a regular notice to quit: where the tenant had surrendered the lease, but afterwards refused to quit, the Court refused the rule calling upon him under the statute to enter into the recognizance. *Doe* d. *Tindal* v. *Roe*, 2 B. & Ad. 922. Notice of trial must be proved in an action brought in the county palatine of Lancaster. Per Holroyd and Park, Js.

(*i*) The estoppel of a tenant exists during his occupation only; during that he is not permitted to deny his landlord's title, for he has a meritorious consideration. A tenant under a tenant for life cannot dispute the title of the reversioner, for they are the same title (*Doe* v. *Whitroe*, 1 D. & R. 1); neither can a tenant dispute the title of the lessee of the landlord. *Rennie* v. *Robinson*, 1 Bing. 147. So if *B.*, claiming under *A.*, demise to *C.* for a year, and die, and *A.* bring ejectment against *C.*, the latter cannot dispute the title of *A.* *Barwicke* v. *Thompson*, 7 T. R. 488. See *Bryan* d. *Child* v. *Vinewood*, 1 Taunt. 208. But if the tenant be ousted by a title paramount, he may plead it. *Hayne* v. *Maltby*, 3 T. R. 438. In *Doe* d. *Lowden* v. *Watson*, 2 Starkie's C. 230, Lord Ellenborough held that it was competent to a sub-lessee, in an ejectment, to show that subsequently to the under-lease to him by the lessor of the plaintiff, the latter had assigned his interest. In *Doe* v. *Clarke*, Peake's Ev. App. 45, the defendants having paid rent in respect of cottages which were alleged by the lessor of the plaintiff to be encroachments, and having afterwards disclaimed, were admitted to disprove the *primâ facie* evidence of right arising from payment of rent. *Cor.* Bayley, J. Though a tenant set up an adverse claim against his landlord, he may still defend his possession under the lease. *Rees* d. *Powell* v. *King*, Forrest, 19. See Appendix.

(*k*) B. N. P. 110. *Lade* v. *Holford*, 3 Burr. 1416. A tenant cannot set up the title of the mortgagee against the mortgagor (per Buller, J., 1 T. R. 760). A tenant cannot insist against the will of the landlord that his own act amounts to a forfeiture (*Doe* v. *Banckes*, 4 B. & A. 401). *Doe* v. *Whitroe*, Dowl. & Ry. C. 1. *Doe* v. *Mills*, 2 Ad. & Ell. 17; and see *Doe* v. *Baytup*, 3 Ad. & Ell. 188, *supra*. A party admitted to defend as landlord is subject to the same estoppel as the tenant would have been had he defended. *Doe* v. *Mizen*, 2 Mo. & R. 56. The widow of a vendor, under an agreement that he shall hold for life, is estopped after his death from setting up a mortgage against the alienee. *Doe* v. *Skirrow*, 7 Ad. & Ell. 157. Where evidence of tenancy consists merely in showing payment of rent by the defendant to the lessor of the plaintiff, the defendant may show that the payment was to him merely as agent. *Doe* v. *Francis*, 2 Mo. & R. 57.

(*l*) *England* v. *Slade*, 4 T. R. 682. *Doe* v. *Ramsbotham*, 3 M. & S. 516. See *Doe* d. *Grundy* v. *Clarke*, 14 East, 488. A landlord does not by waiving his right on an under-letting, waive his right on any under-letting. *Doe* v. *Bliss*, 4 Taunt. 735.

tenant cannot deny the landlord's title, neither can any one controvert it who claims by him. A third person cannot defend as landlord where the tenant came into the possession under an agreement with the lessor of the plaintiff (which has expired), and paid rent to him, but afterwards disclaimed (*m*). Evidence for the defendant.

The defendant may prove in answer, a tender at any time on the last day for the payment of the rent (*n*), or a waiver of the forfeiture by the receipt of rent subsequently due (*o*), or by giving advice to a purchaser to purchase the term (*p*), provided the landlord had notice of the forfeiture; and reasonable evidence ought to be given that he had such notice (*q*); such receipt of subsequent rent will not set up a void lease for years (*r*). But as a lease for life cannot be avoided without entry, the acceptance of subsequent rent without entry will restore the lease (*s*). So the defendant may show a confirmation by the remainder-man, of a lease by a tenant for life (*t*). If the defendant rely on a waiver by the landlord of his notice to quit, by the acceptance of subsequent rent (*u*), it is a question of fact for the jury, whether it was paid Waiver of forfeiture.

(*m*) *Doe* v. *Lady Smythe*, 4 M. & S. 347. Where the lessor had demised mining premises, &c. to a company, of which he was also a partner, and who had paid rent to him, held that the company were estopped from disputing his title, although in an answer to a bill in Chancery, which was in evidence, he had admitted that he had no legal title; and that his being a partner was no objection to his maintaining the ejectment. *Francis* v. *Doe*, 4 M. & W. 331.

(*n*) Co. Litt. 201, 202, *a*.

(*o*) *Goodright* v. *Davis*, Cowp. 803; 3 Rep. 64; 2 T. R. 425; Co. Litt. 201. *Goodright* v. *Cordwent*, 6 T. R. 219. *Fryett* d. *Harris* v. *Jefferys*, 1 Esp. C. 393. Forfeiture by using rooms in a particular manner is not waived in case of continued user after acceptance of rent. *Doe* v. *Woodbridge*, 9 B. & C. 376.

(*p*) *Doe* d. *Sore* v. *Eykins*, 1 C. & P 154. *Secus* where the party has an annuity secured on the premises, and the advice is merely "to take to them." *Ibid.* So it is said, that though there be no release from or dispensation with the covenant, yet, if the conduct of the lessor be such (when in possession of both parts of the lease) as to induce a reasonable and cautious lessee to suppose that he was doing all that was necessary or required of him in insuring in his own name, and not in his own name and that of the lessor, he cannot recover as for a forfeiture. *Doe* d. *Knight* v. *Rowe*, 1 R. & M. 343.

(*q*) Cowp. 803. *Roe* v. *Harrison*, 3 T. R. 425. *Pennant's Case*, 3 Rep. 64, b.; 1 Will. Saund. 287, c.

(*r*) Co. Litt. 215; Will. Saund. 287; 3 Rep. 64; Willes, 176. See *Doe* v. *Banckes*, 4 B. & A. 401. *Reid* v. *Parsons*, 2 Chitty's R. 247. Where a lease for years is conditioned to be void for the benefit of the lessor, it is voidable only at his election. *Doe* v. *Banckes*, 4 B. & A. 401. *Reed* v. *Farr*, 6 M. & S. 121. And though it be provided that a lease or leases for lives shall be void for breach of covenant, and that it shall be lawful for the lessor to re-enter, &c., it is voidable only. *Arnsby* v. *Woodward*, 6 B. & C. 519. *Roberts* v. *Davy*, 4 B. & Ad. 664. So if the condition be that the lessor shall re-enter. *Goodright* v. *Davids*, Cowp. 804.

(*s*) 2 Will. Saund. 287; Co. Litt. 211, b.; Co. Litt. 215, a; 3 Rep. 64.

(*t*) The defendant held under a lease from a tenant for life, containing, besides the money rent, certain duties to be performed by the tenant, *inter alia*, of carrying three loads of culm from the pits to the lessor's dwelling-house yearly; shortly after the death of the tenant for life, at Michaelmas, the lessor of plaintiff, as the next remainder-man, desired his servant to go and look for carts to bring home culm, and he went to the defendant, and also to the other tenants, who accordingly carried a load to the house mentioned in the lease, and in the May following the defendant also sent two loads, which were received, as well as from other tenants; held, that whether the lease were valid or not, it was properly left to the jury to say, whether the culm was carried by the defendant and received by the lessor of plaintiff after his title accrued, in the way of rent, under the reservation to that effect in the lease; and the Court refused to disturb their decision that it was so carried and received. *Doe* d. *Tucker* v. *Morse*, 1 B. & Ad. 365. And see *Doe* v. *Watts*, 7 T. R. 83. See Index, tit. CONFIRMATION.

(*u*) Where a provision avoided the lease in case of repairs omitted three months after notice, and notice was given on the 1st of January, the receipt of rent due on the 25th of March is no waiver. *Doe* v. *Brindley*, 4 B. & Ad. 84. The right of re-entry is not waived by distraining for the rent, for the non-payment of which the lease became forfeited; for (although it was otherwise at common law) the statute

Waiver of forfeiture.

as rent, and received as such, or merely as a compensation for damage (*v*). He may show that the landlord has distrained (*x*) for subsequent rent, or brought covenant (*y*), or recovered for use and occupation (*z*), or brought any other action for the rent (*a*). But the merely lying by with knowledge of a forfeiture is no waiver (*b*); an agreement to allow the tenant more than the three months time to repair expressed in the proviso, is a suspension, not a waiver of the forfeiture (*c*). Where the breach which is the cause of forfeiture is a continuing one, the receipt of rent after one breach is no waiver of a subsequent breach by using rooms in a manner prohibited by the lease (*d*).

But if, after the expiration of a notice to quit, the landlord gives the tenant a fresh notice that unless he quit in 14 days he will be required to pay double value, the second notice is no waiver of the first (*e*).

A second notice to quit on a subsequent day is a waiver of the first notice (*f*). Where a tenant for years levied a fine, and the reversioner granted the reversion without taking advantage of the forfeiture, it was held that ejectment could not be maintained on the demise either of the grantor or of the grantee (*g*). It is in general a good defence to show that the lessor of the plaintiff has recognized a legal possession by the defendant as tenant, by the receipt of rent from him for a time subsequent to that on which the alleged title of the lessor of the plaintiff accrued, or by bringing an action of covenant for such

gives the right to eject only in the case where there is no sufficient distress. *Brewer* v. *Eaton*, 3 Doug. 231; 6 T. R. 220.

(*v*) *Doe* v. *Batten*, Cowp. 243; 2 H. B. 312. *Goodright* v. *Cordwent*, 6 T. R. 219. *Goodright* v. *Davis*, Cowp. 803. *Sykes* d. *Murgatroyd* v. ——, 1 T. R. 161, n. Note, that in the case of *Doe* v. *Batten* a receipt was given as *for rent*, in order to deceive the landlord. Per Wilson, J., 1 H. B. 312.

(*x*) *Zouch* v. *Willingall*, 1 H. B. 311. *Doe* d. *Taylor* v. *Johnson*, 1 Starkie's C 411. *Secus*, if he distrain for rent due before the expiration of the notice. *Ibid.* and *Brewer* v. *Eaton*, 6 T. R. 220. A payment of rent for a quarter ending after the expiration of a notice made to the landlord's banker without special authority, and without evidence that the money had come to the landlord's hands, is no waiver, although the rent was usually paid to that banker. *Doe* v. *Calvert*, 2 Camp. 387. Under a proviso for re-entry in case of rent in arrear for 21 days, the lessor distrained within the 21 days, but remained afterwards in possession; and Lord Ellenbo rough held that the forfeiture was not waived. *Doe* v. *Johnson*, 1 Starkie's C. 411.

(*y*) *Crompton* v. *Minshull*, Easter, 33 G. 2 Runn. Ej. 80. Where the lease contained a general covenant to repair, and a covenant to repair on three months' notice, and the lessor gave notice to repair forthwith, it was held to be no waiver of the breach of the general covenant. *Doe* v. *Paine*, 2 Camp. 520. But in such case a notice to repair in three months is a waiver of the breach of the general covenant, and ejectment does not lie until the expiration of the three months. *Doe* v. *Meux*, 4 B. & C. 606. And see *Doe* v. *Lewis*, 5 Ad. & Ell. 277. *Doe* v. *Miller*, 2 C. & P. 348.

(*z*) *Birch* v. *Wright*, 1 T. R. 387.

(*a*) *Roe* v. *Minshull*, B. N. P. 76.

(*b*) *Doe* v. *Allen*, 3 Taunt. 78.

(*c*) *Doe* v. *Brindley*, 4 B. & Ad. 84.

(*d*) *Doe* v. *Woodbridge*, 9 B. & C. 376. But where forfeiture by insolvency is waived by acceptance of rent from the insolvent after his discharge, the non-payment of a scheduled debt to the lessor is not a continuing insolvency. *Doe* v. *Rees*, 4 Bing. N. C. 384.

(*e*) *Doe* v *Steel*, 3 Camp. C. 117.

(*f*) *Doe* v. *Palmer*, 16 East, 53, n.; and see *Doe* d. *Scott* v. *Miller*, 2 C. & P. 348. *Secus*, if under the circumstances the tenant could not understand the second notice as amounting to a waiver of the first (*Doe* v. *Humphreys*, 2 East, 237). Where a landlord gave notice to quit, and after the expiration of that notice, gave notice to quit or pay double rent, the second notice was held to be no waiver of the first, or of the double rent to which the plaintiff was entitled under it. *Messenger* v. *Armstrong*, 1 T. R. 53. *Doe* v. *Steel*, 3 Camp. 115. So where no notice to quit was necessary. *Doe* v. *Inglis*, 3 Taunt. 54. A mere promise not to turn the tenant out unless the premises were sold, the premises being afterwards sold, is no waiver of the notice, and the tenant refusing to quit after the sale is a trespasser from the expiration of the notice. *Whiteacre* v. *Symonds*, 10 East, 13.

(*g*) *Fenn* v. *Smart*, 12 East, 444.

rent (*d*). Where a tenant for life made a lease, which was void, and a subsequent tenant for life received rent from the lessee the defendant, it was held that this was such a recognition of a lawful possession by the defendant that ejectment could not be maintained against him without notice to quit (*e*). But where the rent is not received as between landlord and tenant, but is attributable to another consideration, such receipt is not evidence of a recognition of a legal possession (*f*); and therefore the receipt of a nominal rent from one as *cestui que vie*, after the death of the tenant for life, is not sufficient to entitle the widow of the former to notice to quit (*g*).

A notice may be waived by the tenant who gives it, as well as by the landlord. Where the tenant continued in possession after the expiration of the notice, it was held to be a question for the jury whether he meant to waive the notice, or continue the possession in the exercise of a right supposed to exist by custom (*h*).

By mortgagor.

9. The proof of the execution of the deeds (*i*) by the mortgagor, who is in possession of the premises, is usually conclusive against him, since he cannot set up a title inconsistent with his own deed (*k*). And the receipt of interest as such since the date of the demise is no recognition of a lawful possession by the mortgagor or his tenant, to make a demand necessary (*l*). But if a third person be defendant, it is necessary to prove that the mortgagor was in possession, by the receiving of rents or otherwise, at the time of the mortgage (*m*). And where the defendant claims as tenant to the mortgagor under a lease prior to the mortgage, a regular determination of the tenancy by a notice to quit, must be proved (*n*). But where the mortgagor has let the premises subsequently to the mortgage, no notice is necessary (*o*), although the mortgage was assigned to the lessor after the defendant had been let into possession (*p*), unless he has by some act acknowledged a tenancy, as by the receipt of rent (*q*). If the tenant has a legal title to

(*d*) *Supra*, notes (*x*) & (*y*).

(*e*) *Denn* v. *Rawlins*, 10 East, 261. *Doe* v. *Watts*, 7 T. R. 83.

(*f*) 3 East, 260.

(*g*) *Right* v. *Bawden*, 3 East, 260.

(*h*) *Jones* v. *Sheare*, 4 Ad. & Ell. 832.

(*i*) *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 760, n.; and see tit. DEED; ESTOPPEL. A second mortgagee, who takes an assignment of a lease to attend the inheritance, and has all the title-deeds, may recover against the first mortgagee (not having had notice of such prior mortgage). *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755. A mortgagee of such a proportion of the tolls arising from a turnpike road, and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, may maintain ejectment, notwithstanding a clause in the Act that all the mortgagees shall be creditors on the tolls in equal degree. *Doe* d. *Barclay* v. *Booth*, 2 B. & P. 219.

(*k*) 1 T. R. 760. Peake's Ev. 313. The demise may be laid on a day anterior to the actual determination of the will. Per Buller, J., in *Birch* v. *Wright*, 1 T. R. 383. But if the deed contain a clause that the mortgagor shall remain in possession until default be made in payment, the demise must be laid on a subsequent day. *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*l*) *Doe* v. *Cadwallader*, 2 B. & Ad. 473. *Rogers* v. *Humphries*, 4 Ad. & Ell. 313. *Doe* v. *Hales*, 7 Bing. 322. But notice by the mortgagee to the mortgagor's tenant in possession, will not alone create a tenancy without attornment. *Evans* v. *Elliott*, 9 Ad. & Ell. 342. An agreement that the mortgagor may hold till such a day, operates as a re-demise till that day. *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*m*) *Ibid.*

(*n*) *Birch* v. *Wright*, 1 T. R. 379.

(*o*) *Keech* v. *Hall*, Doug. 21; 3 East, 449.

(*p*) *Thunder* v. *Belcher*, 3 East, 449.

(*q*) *Ibid.* and *Clayton* v. *Blakey*, 8 T. R. 3. Where the mortgagor after the mortgage and the mortgagee applies for rent, he cannot afterwards recover in ejectment on a demise laid on a day previous to the application. *Doe* v. *Hales*, 7 Bing. 322, and 5 M. & P. 132. In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a day later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest

By mortgagor.

the term, the lessor of the plaintiff cannot recover, although his only object is to get into possession of the rents and profits (*r*).

The lessor of the plaintiff need not prove any notice to the mortgagor to give up the possession, or any previous demand of possession (*s*).

It must appear that the title accrued by the mortgagor's default, before the day of the demise laid in the declaration.

A second mortgagee who takes an assignment of a term to attend the inheritance, and has the title-deeds, may recover against the first mortgagee (*t*).

By a rector, &c.

10. Where the plaintiff seeks to recover land as rector or vicar, he must, unless the defendant be estopped by an acknowledgment of tenancy or otherwise, prove his title. Where the rector has been instituted and *inducted* into a living, proof of the letters of institution (*u*), and of his induction, by which he acquires the corporeal possession, are sufficient evidence of title, without proof of title in the patron; for institution and induction (*v*) upon the presentation of a stranger is sufficient to bar the rightful claimant in ejectment, and to put the rightful patron to his *quare impedit* (*x*); and the plaintiff need not, until some proof has been given to the contrary, prove his subscription to, and reading of, the thirty-nine articles, and his assent to all things contained in the book of common-prayer, for the law will presume the affirmative where the negative includes a crime (*y*). Where, however, induction has not followed upon institution, it seems to be necessary to prove presentation by the patron, and that the recital of a presentation in the letters of institution would not be evidence of it (*z*). Where induction or possession has not followed, proof of a verbal presentation is sufficient (*a*); but it has been said that the patron would not be competent to

was paid, and consequently is no defence to the ejectment. *Doe* d. *Rogers and Wife* v. *Cadwallader*, 1 B. & Ad. 473. By the mortgage deed it was covenanted that in default of payment on the day, the mortgagee might enter and proceed to sell, &c.; held, that after that day the mortgagee was in the situation of a lessee whose term has expired, and no notice to quit was necessary to entitle the mortgagee to maintain ejectment. The payment of interest does not give any right to the possession of the land, as payment of rent would do. *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421, and see *Partridge* v. *Beere*, 5 B. & A. 604. *Keech* v. *Hall*, Doug. 21. *Moss* v. *Gallimore*, Ib. 282. A mortgagor remaining in possession is at all events nothing more than a tenant at sufferance, and is liable to be treated as tenant or trespasser, at the option of the mortgagee. *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767. The mortgagee is entitled to the growing crops. *Birch* v. *Wright*, 1 T. R. 383; *secus* where by special terms the mortgagor is tenant at will. *Ex parte Temple*, 1 Glyn & J. 216.

(*r*) *Doe* v. *Wharton*, 8 T. R. 2. *Aliter*, B. N. P. 96; Doug. 23. And see *Doe* v. *Maisey*, 8 B. & C. 767. *Doe* v. *Giles*, 5 Bing. 420.

(*s*) *Birch* v. *Wright*, 1 T. R. 279. The mortgagor is strictly tenant at will to the mortgagee. *Partridge* v. *Beer*, 5 B. & A. 604. The levying a fine by the mortgagor will not render an actual entry necessary. *Hall* v. *Doe*, 5 B. & A. 687.

(*t*) *Goodtitle* v. *Morgan*, 1 T. R. 755. *Right* d. *Jefferys* v. *Bucknell*, 2 B. & A. 278. See further *infra*, tit. ESTOPPEL.

(*u*) The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese. These ought to record the time of institution and upon whose presentation, Gibs. Cod. 813, and seem to be evidence of the fact of presentation so stated, where induction has followed.

(*v*) Induction may be proved either by any witness who was present, or by the indorsement on the mandate directed by the Ordinary to the Archdeacon, or by the return to the mandate, if a return has been made. *Chapman* v. *Beard*, 3 Ans. 942. 2 Phill. Ev. 257.

(*x*) B. N. P. 105. *Doe* d. *Kirby* v. *Carter*, 1 Ry. & M. 237. *Heath* v. *Pryn*, 1 Vent. 14.

(*y*) *Monke* v. *Butler*, 1 Roll. R. 83. *Powell* v. *Milbank*, Blacks. R. 851; 3 Wils. 355. *Williams* v. *East India Co.* 3 East, 199. *Sherard's Case*, cited 2 Bl. 853.

(*z*) B. N. P. 105; 1 Vent. 15; 1 Sid. 426. Letters of institution of a party, reciting the cession of his predecessor, followed by induction, are evidence of the cession. *Doe* v. *Carter*, R. & M. 238.

(*a*) B. N. P. 105; Co. Litt. 120, a. *R.* v. *Eriswell*, 3 T. R. 723. A presenta-

prove this right, although he were but the grantee of the avoidance (*b*). It has been stated, that reputation would be admissible to prove the fact; but this position may, with reason, be doubted (*c*). Some evidence is of course necessary to show that the property sought to be recovered is the property of the particular church; as that the premises were occupied or otherwise enjoyed by the preceding incumbent. Adverse possession is not in general evidence against the right of a rector or vicar, unless he be the party who has acquiesced in the possession (*d*). An incumbent is entitled to recover glebe lands, although the current year of a tenancy created by his predecessor is unexpired (*e*). A rector may recover on a lease avoided by his own non-residence (*f*); so on his own demise to a spiritual person (*g*), and the description of the lessee in the lease is evidence that he is a spiritual person. By a rector.

A resignation-bond having been declared simoniacal, the presentee of the Crown, who is put into corporeal possession of the church, on the avoidance, is entitled to maintain ejectment against the former incumbent (*h*).

11. Where the lessor of the plaintiff is a tenant in common (*i*), co-parcener, or joint-tenant with the defendant, he ought to be prepared with the consent-rule, to show that the ouster has been admitted (*j*); and it seems that if the defendant mean to deny the ouster, he ought to enter into a special consent-rule, which does not admit the ouster (*k*). By joint-tenant, &c.

The bare perception of the whole of the profits does not amount to an ouster (*l*); although such perception of the profits, continued for a great length of time, will be evidence of an actual ouster (*m*), for the mere possession supports the common title; and a bare refusal to pay over his share of the profits to a tenant in common, is not sufficient evidence of ouster without a denial of title; but if upon a demand of possession by a tenant in common the co-tenant refuse, and claim the whole, it is evidence of an actual ouster (*n*). Proof of ouster.

tion by a corporation must be in writing under the common seal; Gibs. Cod. 794. A corporation cannot present the head of the corporation. Vin. Ab. tit. Presentation.

(*b*) B. N. P. 105.

(*c*) Ibid.

(*d*) *Doe* d. *Cooper* v. *Runcorn*, 5 B. & C. 696. *Craft* v. *Howell*, Plowd. 538. *Stowel* v. *Zouch*, Ib. 355. *Barber* v. *Richardson*, 4 B. & A. 579.

(*e*) *Doe* d. *Kirby* v. *Carter*, 1 R. & M. 237, *cor.* Littledale, J. *Secus*, if an interval (*e. g.* of nine months) elapse from which an assent to the continuance of the tenancy may be presumed. *Doe* d. *Capes* v. *Somerville*, 6 B. & C. 126.

(*f*) *Frogmorton* v. *Scott*, 2 East, 467, under the stat. 13 Eliz. c. 20.

(*g*) Ib. under the st. 24 H. 8, c. 13, s. 3.

(*h*) *Doe* v. *Fletcher*, 8 B. & C. 25; 2 M. & Ry. 206. *Doe* v. *Inglis*, 3 Taunt.

(*i*) It is doubtful whether one of several parceners can recover in ejectment, on a forfeiture of a lease made by the ancestor. *Doe* v. *Lewis*, 5 Ad. & Ell. 277.

(*j*) *Doe* d. *White* v. *Cuffe*, 1 Camp. 173; 7 Mod. 39. *Oates* d. *Wigfall* v. *Brydon*, 3 Burr. 1895; Runn. Ej. 195.

(*k*) Ibid. and *Doe* d. *Gigner* v. *Roe*, 2 Taunt. 397. But see *Doe* d. *Hellings* v. *Bird*, 11 East, 49; Salk. 392.

(*l*) *Reading* v. *Rawstorne*, 2 Ld. Raym. 829; *Fairclaim* v. *Shackleton*, 5 Burr. 2604. The tenant in common had been in possession of the whole of the profits for twenty-six years; but there was no evidence of his having actually claimed the whole estate, and he had been admitted to one moiety only of the land. And see *Peaceable* v. *Read*, 1 East, 568. The stat. 3 & 4 Will. 4, c. 27, s. 12, provides that the possession of land, profits, or rent, by one or more as coparcener, joint-tenant, or tenant in common, of more than his or their undivided shares for his or their own benefit, or that of any other than the party entitled, shall not be deemed the possession or receipt of the latter. This it is said has made no difference in the practice in ejectment. Per Littledale, J. Bail court, M. T. 1838; Roscoe on Ev. 432; and see *Doe* v. *Horne*, 3 M. & W. 333.

(*m*) *Doe* d. *Fisher* v. *Prosser*, Cowp. 217.

(*n*) *Doe* d. *Hellings* v. *Bird*, 11 East, 49. *Doe* d. *Fisher* v. *Prosser*, Cowp. 217. So (*semble*) where three or four co-tenants authorized the using of the land for a railroad. Per Parke, B., *Doe* v. *Horne*, 3 M. & W. 333.

By joint-tenants.

The payment of an entire rent to the lessors of the plaintiff is evidence of their joint-tenancy (*v*), such as to support a joint demise in the declaration; but although the defendant prove that he has paid an entire rent to a receiver, for two jointly, for which the receipts stated the rent to be due to the two, yet they may recover on a declaration, stating separate demises by the two of the whole property, for by the several demises the joint-tenancy is severed (*p*). So if four joint-tenants jointly demise, such as have given notice to quit may recover on separate demises (*q*). A notice by one of several in the name of all, is sufficient as to all (*r*). It is sufficient for a purchaser under the sheriff to prove the writ without proving the judgment (*s*), unless he be the judgment creditor, in which case he must prove the judgment also (*t*).

Variance from local description.

IV. Proof must be given of the subject-matter sought to be recovered, and of its local situation, according to the allegations. Houses may be recovered under the description of land, for they are mere accessories to the land (*u*). Although it be not necessary to allege the land to be situated in a township or parish, yet if it be so described, a variance in proof will be fatal (*v*).

Variance from the demise.

If it appear that the title of the lessor of the plaintiff did not accrue until after the day of the demise laid in the declaration, the variance will be fatal; but a demise of copyhold lands laid between the times of the surrender and admittance, will be good, for the title relates from the admittance to the surrender, as against all except the lord (*x*).

(*o*) *Doe* d. *Clarke* v. *Grant*, 12 East, 221. *Qu.* whether receipts given by an agent in the joint names of two, will be evidence of a joint-tenancy. *Doe* v. *Read*, 12 East, 57.

(*p*) *Doe* d. *Marsac* v. *Read*, 12 East, 57. Ejectment will lie on the several demises of three joint-tenants. *Doe* v. *Fenn*, 3 Camp. 190, *cor.* Ld. Ellenborough. *Doe* d. *Raper* v. *Lonsdale*, 12 East, 39.

(*q*) *Doe* d. *Wayman* v. *Chaplin*, 3 Taunt. 420. *Doe* v. *Read*, 12 East, 57.

(*r*) *Doe* v. *Summersett*, 1 B. & Ad. 185.

(*s*) *Doe* v. *Murless*, 6 M. & S. 110.

(*t*) *Doe* v. *Smith*, 2 Starkie, C. 289.

(*u*) Ejectment will lie by the owner of the soil for land, part of the King's highway, or for an acre of land described as land, though a wall and park and part of a house be on it. *Goodtitle* d. *Chester* v. *Alner*, 1 Burr. 133; 1 Ld. Ken. 427. In Ireland, ejectment will lie for so many acres of mountain land, 1 Bro. P. C. 74; and see *Cottingham* v. *King*, 1 Burr. 621. The action does not lie for a messuage *or* tenement; but if the declaration be for a messuage and tenement, the Court will give leave to enter the verdict according to the Judge's notes. *Goodtitle* v. *Otway*, 8 East, 357. See *Doe* d. *Bradshaw* v. *Plowman*, 1 East, 441; and *Doe* d. *Stewart* v. *Denton*, 1 T. R. 11. The action is not maintainable against one who erects a stall in the street without leave of the owner of the soil; the proper remedy is trespass. *Doe* v. *Cowley*, 1 C. & P. 123.

(*v*) See tit. VARIANCE. Proof that the place where the house stands for which the ejectment is brought is watched by watchmen of the parish where it is alleged to be situate, is *primâ facie* evidence of its situation in that parish. *Doe* v. *Welch*, 4 Camp. 264. If the premises be described as situate in the *parish* of *A.* and *B.*, and part be in parish *A.*, part in parish *B.*, but there be no such parish as *A.* and *B.* the variance will, it seems, be fatal. (Per Parke, B.) *Doe* v. *Edwards*, 1 M. & M. 319; but leave was given to amend. Had the word parishes been used the allegation would have been admissible, *Ib.*; and see *Goodtitle* v. *Walter*, 4 Taunt. 671; Vol. I. tit. VARIANCE.

(*x*) *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. But where the devisee of a copyhold surrendered to the use of the will, died before admittance, his devisee, though afterwards admitted, could not, it was held, recover in ejectment; his admittance has no relation to the surrender, but the legal title remains in the heir of the surrenderor. *Doe* d. *Vernon* v. *Vernon*, 7 East, 8. *Doe* d. *Burrough* v. *Reade*, 8 East, 353. Where the lord of the manor by copy of court-roll granted to *A.* the reversion of certain premises then in his tenure to hold to *B.* for his life, immediately after the death of *A.*, it was held, that *B.* on the death of *A.* might maintain ejectment, having acquired a perfect legal title by the grant without admittance. For an admittance is necessary in those cases only where the estate passes from the surrenderor to the lord, and then

Variance from the demise.

A demise laid by the heir on the day when his ancestor died, is good; for the fiction that there is no fraction of a day, is not allowed to prejudice any party (*y*). So where the ejectment was brought by a posthumous son, and the demise was laid at the time of the father's death (*z*). No variance between the extent of the lease laid in the declaration, and the extent of the interest of the lessor of the plaintiff, is material, for the lease is but a fiction (*a*).

If such a title be not proved as would enable the lessor of the plaintiff to make such a demise in point of law as is alleged in the declaration, the variance will be fatal (*b*); and therefore, if *A.* be tenant for life, with remainder to *B.*, a count upon a joint demise by *A.* and *B.* cannot be supported, for it is not the lease of *A.* and *B.*, but the lease of *A.* confirmed by *B.* (*c*). So a count upon a joint lease, by tenants in common, is bad (*d*). There should, in such case, be a distinct count upon the separate demise of each tenant in common, or they should join in a lease to a third person, who may make a lease to try the title (*e*). But joint-tenants or coparceners may either join or sever (*f*).

Where the demise was upon a joint lease by the husband and wife, and proof was given of a lease made by a third person, by virtue of a power of attorney, executed by both, it was held to be a variance, but it was also held that the power of attorney was void as to the wife only, and that the lessee might declare on a lease by the husband alone (*g*). It seems that joint-tenants may make several demises (*h*).

Where the lease is alleged in the declaration to be by deed under the corporation seal, it is unnecessary to prove the fact, since by the rule the lease is admitted as stated (*i*).

Evidence of taking tithes only, is not sufficient to prove an ouster from a rectory (*k*).

A variance in the fractional amount sought to be recovered will not preclude the plaintiff from recovering any smaller fraction; if the declaration be for one-fourth of one-fifth part, and he prove his title to one-third part of a fourth of a fifth part, the verdict may be taken accordingly (*l*), but the

from the lord to the surrenderee by admittance; when it passes immediately from the lord to another by grant, no admittance is necessary. And in analogy to the case of freehold, a reversion may be granted without livery of seisin. *Roe* d. *Cosh* v. *Loveless*, 2 B. & A. 453. An admittance where there was no title to be admitted, as in the case of an administrator *de bonis non*, to the grantee of a copyhold *per autre vie*, cannot support an ejectment as on a grant by the lord. *Zouch* v. *Forse*, 7 East, 188. There can be no special occupant of a copyhold, the freehold being in the lord. *Ib. Smartle* v. *Penhallow*, 6 Mod. 65; 1 Salk. 88; 2 Ld. Raym. 994. See as to the surrender of chambers in an inn of court, *Doe* d. *Warry* v. *Miller*, 1 T. R. 393.

(*y*) 3 Wils. 274.

(*z*) B. N. P. 105.

(*a*) *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; Runn. 94.

(*b*) For the word "demise," when used in pleading, is to be taken in its legal sense; 3 T. R. 15; 2 Bl. 1077; 5 Burr. 2604; 1 Wils. 1; Moor, 682; Cro. Jac. 166; 1 Show. 342; 2 Wils. 232; Cro. Jac. 83; 1 Brownl. 39. 134. But see below, note (*d*).

(*c*) 6 Co. 14, b.; Woodfall's Land. & Ten. 461; Co. Litt. 45, a; Poph. 37.

(*d*) Cro. Jac. 166; 1 Ins. 200; 2 Wils. 232; 12 East, 221. *Doe* v. *Errington*, 1 Ad. & Ell. 750; and see Vol. I. But *qu.* whether, as a lease is admitted by the consent-rule, a lease may not be presumed in which each demised his undivided share. See *Doe* v. *Read*, 11 East, 57; and the observations of Gibbs, A. G.

(*e*) 2 Wils. 232.

(*f*) *Doe* v. *Read*, 12 East, 57. *Doe* v. *Fenn*, 3 Cowp. 190.

(*g*) Yelv. 1; 2 Brownl. 248; Cro. Jac. 617; Cro. Car. 165, *contra.*

(*h*) *Doe* v. *Read*, 12 East, 57.

(*i*) Per Ashurst, J., *Farley* on d. *Mayor, &c. of Canterbury* v. *Wood*, Runn. 150; 3 Esp. C. 198.

(*k*) Latch. 62; Runn. 136.

(*l*) 1 Sid. 239; 1 Burr. 330.

verdict cannot be taken for more than is claimed (*m*). So the verdict may be for any quantity of land less than that specified in the declaration (*n*). Upon a demise of the whole, an undivided moiety may be recovered (*o*). In general, the plaintiff may recover, according to his title, so much as he has a title to, where he declares for more, but not more where he declares for less (*p*).

Defendant's possession.

V. The plaintiff must prove that the defendant was in possession of the premises in question at the time of bringing the action (*q*); for otherwise, if the plaintiff could prove title to any premises answering the description in the declaration, he would be entitled to a verdict and his costs, although the defendant never intended to dispute his title to those premises, but only his title to others, which the plaintiff has failed to prove (*r*); but now, by a rule of the Court of King's Bench, a party, on being admitted to defend in ejectment, must, on entering into the common rule, specify the premises in respect of which he intends to defend, and admit that they are in his own possession, if he defends as tenant, or in the possession of his tenant, if he defends as landlord; and undertake to admit such possession on the trial of the cause (*s*). Where there is any doubt as to the identity of the premises sought to be recovered, the lessor of the plaintiff ought to produce the rule (*t*).

(*m*) 1 Burr. 330.

(*n*) Cro. Eliz. 13; Yelv. 114. It was formerly held, that upon a declaration for one acre, a verdict for half an acre would be bad, because it would be uncertain of which half the plaintiff was to have execution. The Court will not on the trial of an ejectment, where the plaintiff has proved his title to a verdict, inquire as to the metes and boundaries, which are to be tried more properly in an action of trespass. 2 Starkie's C. 477.

(*o*) *Doe* v. *Wippel*, 1 Esp. C. 360. *Doe* v. *Fenn*, 3 Camp. 190. *Roe* v. *Lonsdale*, 12 East, 39. The Court will not try a question of metes and bounds in an action of ejectment. *Doe* v. *Wilson*, 2 Starkie's C. 477.

(*p*) *Doe* d. *Burgess* v *Purvis*, 1 Burr. 326.

(*q*) *Astlin* v. *Parkins*, 2 Burr. 668; and per Bayley, J., *Doe* d. *James* v. *Stanton*, 2 B. & A. 371.

(*r*) See *Doe* v. *Cuff*, Camp. 173. *Smith* v. *Mun*, B. N. P. 110; 1 Wils. 220. *Goodright* v. *Rich*, 7 T. R. 327. *Fenn* v. *Wood*, 1 B. & P. 573. But see *Jesse* v. *Bacchus*, Runn. 293. *Fenn* v. *Cooke*, 3 Camp. 512. *Doe* v. *Alexander*, 3 Camp. 516. But the plaintiff is entitled to recover, although the defendant in possession is the servant of another. *Doe* d. *Cuff* v. *Stradling*, 2 Starkie's C. 187. It is sufficient that the defendant has the visible occupation of the premises, and it is not necessary that he should have such an interest as would enable him to maintain trespass. *Doe* d. *James* v. *Stanton*, 2 B. & A. 371. Where the defendant on being served with the declaration (not on the premises), answered as tenant in possession, and it appeared that he sold coals on the premises as servant to the proprietor of the premises (a coal-wharf); it was held, that the plaintiff was properly nonsuited. *Ibid.*

(*s*) See the rule, 4 B. & A. 196. It is there recited that plaintiffs have frequently been nonsuited in ejectment for want of proof of the defendant's possession, contrary to the true intent and meaning of the consent-rule. It is therefore ordered, "That from henceforth, in every action of ejectment, the defendant shall specify in the consent-rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed." Before this rule, it was held, that on ejectment against several defendants, the lessor might recover from each severally the tenement in his several occupation. *Doe* v. *Clarke*, Peake's Ev. App. 45.

(*t*) *Doe* d. *Lamble* v. *Lamble*, 1 M. & M. 237. But see where there is no doubt as to the identity of the premises sought to be recovered and those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent-rule. *Doe* d. *Greaves* v. *Roby*, 2 B. & Ad. 948.

Competency of witnesses.

VI. Where two persons are contending for the possession, who are to pay rent in different rights, it seems that the landlord is not a competent witness to prove the priority of demise, in an action of ejectment. As where *A.* the landlord demises to *B.*, and afterwards to *C.*, and the latter demises to *D.*, against whom *B.* brings ejectment, *A.* is not competent to prove the demise to *B.*, for the effect would be to change the possession (*u*). But if in such case no rent be reserved (*v*), or if the question arose on an action of covenant brought by *C.* against *D.*, then *A.* would be competent to prove the priority of the demise to *B.*; for the result would not alter the possession, and the verdict would not be evidence afterwards, either for or against *A.* the landlord (*w*). So in ejectment by one claiming as heir of *B.*, the son of an elder brother of *B.* is a competent witness for the defendant to show a better title in himself; if the defendant succeeds, the witness will not be benefited; if the plaintiff succeeds, his obtaining possession will not injure the witness, unless the defendant be his tenant (*x*).

Where the party in possession would be liable for mesne profits if the lessor of the plaintiff should succeed, he is an incompetent witness for the defendant (*y*).

A remainder-man, after a tenant in tail, is not a competent witness for the tenant in tail, on ejectment for the entailed property; for he would acquire a vested interest (*z*).

An executor in trust may be a witness with respect to the estate, as to prove the sanity of the testator (*a*). So where a grantee is a bare trustee, he is competent to prove the execution of the deed to himself (*b*). A co-defendant is not a competent witness (*c*).

A tenant is not competent to defend his landlord's possession (*d*). Where *primâ facie* evidence has been given against the defendant, a witness is incompetent to prove that he himself is the real tenant, and that the defendant is but his bailiff (*e*).

A lessor of the plaintiff cannot it seems be called as a witness by the defendant, though no title be proved in him (*f*). Where a lessor had become a bankrupt, and released his assignees, it was held that he was compe-

(*u*) Per Buller, J., in *Bell* v. *Harwood*, 3 T. R. 308, and *Fox* v. *Swann*, Sty. 482. *Smith* v. *Chambers*, 4 Esp. C. 164.

(*v*) Per Buller, J., in *Bell* v. *Harwood*, 3 T. R. 308.

(*w*) *Bell* v. *Harwood*, 3 T. R. 308. See also *Rex* v. *Woodland*, 1 T. R. 261; and *Fox* v. *Swann*, Sty. 482.

(*x*) *Doe* v. *Clarke*, 3 Bing. N. C. 429; and see *Doe* v. *Maisey*, 1 B. & Ad. 439; 5 B. & C. 335. *Rees* v. *Walters*, 3 M. & W. 527. As to the competency of creditors, executors, &c. of a testator to prove a will, see the stat. 7 Will. 4 & 1 Vict. c. 26.—WILL.

(*y*) *Doe* v. *Preece*, 4 C. & P. 556.

(*z*) *Doe* v. *Tyler*, 6 Bing. 394.

(*a*) 1 Mod. 107; Doug. 139. 141; 4 Burr. 2254.

(*b*) 1 P. Will. 287. 290.

(*c*) *Dormer* v. *Fortescue*, Runn. 250. *Doe* v. *Green*, 4 Esp. C. 198.

(*d*) *Bourne* v. *Turner*, Str. 633. *Doe* v. *Williams*, Cowp. 621. *Doe* v. *Pye*, 1 Esp. C. 304. *H.* and *W.* occupied a cottage divided, from 1808 till 1821 (as servants of *C.*, without paying any rent); a year or two before *C.*'s death, *H.* having taken *L.* to live with him, by will devised the moiety occupied by him to *W.*, and *L.* after the death of *H.* continued in possession: upon ejectment by *W.*, the defendants coming in to defend as landlords of *L.*, held, that as *L.* came in under *H.*, who might have maintained ejectment against him, *W.*, who claimed under *H.*, had a sufficient *primâ facie* title, and that as the defendants came in to defend *L.*'s possession, the latter was not a competent witness to dispute the title either of *H.* or *W.* *Doe* v. *Birchmore*, 1 P. & D. 488.

(*e*) *Doe* v. *Wild*, 5 Taunt. 183. S. P. *Doe* d. *Lewis* v. *Bingham*, 4 B. & A. 672. Where a witness stated on the *voir dire* that the lessor of the plaintiff had formerly assigned the premises to him to protect him from impressment, that he had given back the deed to the lessor of the plaintiff, and had never had any possession or beneficial interest in the premises, he was held to be incompetent, as having a direct interest in supporting the plaintiff's action. *Doe* d. *Scales* v. *Bragg*, 1 R. & M. 87.

(*f*) *Fenn* v. *Granger*, 3 Camp. 177. But the objection was waived.

tent (*g*). It seems that one who sells an estate without any covenant or warranty, on which he may be liable in case the title be defective, is a competent witness for the plaintiff; otherwise, if he be a mere mortgagor (*h*).

In ejectment by a mortgagee against an assignee under the Lords' Act, a letter written by the mortgagor to the plaintiff before the assignment is evidence against the defendant (*i*), and it will be presumed to have been written at the time of the date (*j*). The declarations of a deceased occupier against his own interest, and tending to show that his possession was not adverse, are admissible (*k*).

An admission made by the tenant in possession is evidence against one who claims as landlord (*l*), and defends jointly with the tenant, and relies on the tenant's title.

VII. *Trespass for mesne profits.*

Proof in action for mesne profits.

Where trespass is brought against the tenant in possession (*m*), for mesne profits, whether by the lessor or by the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; it is sufficient to prove the judgment in ejectment, and the writ of possession executed (*n*), the possession of the defendant, and the value of the profits; and this will entitle the plaintiff to recover from the time of the demise laid in the declaration (*o*). And in such case it seems to be sufficient to prove the judgment, without proving the writ of possession executed; for by entering into the rule to confess lease, entry, and ouster, the defendant is estopped from disputing the entry, both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry (*p*). But where the judgment was against the casual ejector, no rule having been entered into, the lessor must prove the execution of the writ of possession (*q*). Where in such case the defendant was landlord of the premises, and the ejectment was served upon the tenant, it was held that the judgment was not evidence against the defendant, without notice of the ejectment, for he could not be bound by a judgment obtained without his privity (*r*).

The plaintiff may prove his possession also by showing that he was let into possession by the defendant's consent (*s*).

Where the plaintiff had recovered, in ejectment against the wife, who had a separate maintenance, and who had lived apart from her husband for many years, and afterwards brought an action of trespass for mesne profits against the husband and wife, and it appeared that the declaration in ejectment had been served upon the wife alone, it was held that the judgment in eject-

(*g*) *Longchamp* v. *Fawcitt*, Peake's C. 71. Under the late statute it should appear either that his assignees accepted the lease, or that he delivered it up according to the statute. Vide *supra*, 189.

(*h*) *Anon.* 11 Mod. 364.

(*i*) *Doe* v. *Milburn*, 2 M. & W. 863.

(*j*) *Ibid.*

(*k*) *Doe* v. *Harbrow*, 3 Ad. & Ell. 67.

(*l*) *Doe* v. *Litherland*, 4 Ad. & Ell. 784.

(*m*) The action for mesne profits may be brought pending a writ of error. Adams on Ejectment, p. 181; 2 Roscoe on Real Actions.

(*n*) It is not necessary to execute a *habeas* where the plaintiff has been let into possession by the defendant. *Calvert* v. *Horsefall*, 4 Esp. C. 167.

(*o*) B. N. P. 87. *Astlin* v. *Parkin*, Mich. 32 Geo. 2, *per omnes Justic.*, on a case reserved. *Gulliver* v. *Drinkwater*, 2 T. R. 261. *Doe* v. *Davies*, 1 Esp. C. 358. *Doe* v. *Whitcombe*, 8 Bing. 46. The action lies where one tenant in common recovers against another. *Goodtitle* v. *Tombs*, 1 Wils. 668. But it seems that a tenant whose under-tenant wrongfully retains possession, is not liable for mesne process. *Burne* v. *Richardson*, 4 Taunt. 720.

(*p*) *Thorp* v. *Fry*, B. N. P. 87; Str. 5.

(*q*) B. N. P. 87.

(*r*) *Hunter* v. *Britts*, 3 Camp. 455. But the defendant having promised to pay the rent and costs to the plaintiff, the admission was held to be evidence of the plaintiff's possession, and of the defendant's trespass.

(*s*) *Calvert* v. *Horsfall*, 4 Esp. C. 167.

ment was not evidence against the husband, on the ground that the wife's confession of a trespass committed by her was not evidence against the husband in an action which was to subject him to damages and costs (*t*). Proof in action for mesne profits.

But it is evidence against one who comes into possession after the judgment, under the defendant in ejectment (*u*). It is otherwise if no privity of possession can be proved (*x*).

Where the action was brought by three plaintiffs, *A.*, *B.* and *C.*, and they gave in evidence a judgment in ejectment on a demise by *A.*, and on another demise by *B.* and *C.*, it was held to be sufficient, for the judgment showed that they were all entitled to the possession (*y*).

If the plaintiff can prove that his title accrued before the time of the demise, and also that the defendant was then in possession, he will be entitled to recover antecedent profits, but the defendant will be at liberty to controvert the title, which he cannot do if the plaintiff claim profits from the time of the demise only, for the defendant being tenant in possession must have been served with the declaration, and therefore the record is against him conclusive evidence of title. But the judgment is not evidence of an anterior title, and therefore to entitle himself to damages in respect of such anterior profits, the plaintiff must prove his own title to the previous possession (*z*); and if the action be brought against a precedent occupier, the plaintiff must also prove an actual entry; for trespass being a possesory remedy, it is essential to prove possession (*a*). And it seems to have been considered to be doubtful whether the plaintiff can recover any profits anterior to the time of actual entry (*b*), or whether a subsequent entry will not have relation to the time when the title accrued. As, however, trespass lies to recover mesne profits antecedent to the demise from the tenant in possession, on his confession of the plaintiff's entry (*c*), it seems, upon the same ground, that an actual entry would have a similar relation. Evidence should be given of the defendant's possession. As the action is against a trespasser in possession, it does not lie against a lessee whose under-tenant holds over after the expiration of the lessee's interest (*d*). The plaintiff is entitled to such profits only as accrued during the possession of the defendant (*e*).

If the action be brought after judgment against the casual ejector, the plaintiff may recover the costs of the ejectment as well as mesne profits (*f*). And he may recover as damages the costs incurred in a Court of Error in reversing a judgment in ejectment obtained by the defendant (*g*). And the defendant will not, under the plea of the general issue, be entitled to prove an

(*t*) *Denn* v. *White*, 7 T. R. 112.

(*u*) *Doe* v. *Whitcombe*, 8 Bing. 46.

(*x*) *Doe* v. *Harvey*, 8 Bing. 239; and it seems that the privity cannot be established by parol where the defendant came into possession under a written agreement; 8 Bing. 46.

(*y*) K. B. Easter Term, 1827. *Chamier* v. *Clingo*, 2 Chitty's R. 410; 5 M. & S. 64.

(*z*) *Decosta* v. *Atkins*, B. N. P. 87; per Eyre, C. J. Hil. 4 Geo. 2. *Doe* v. *Gibbs*, 2 C. & P. 615.

(*a*) *Ibid.*

(*b*) See B. N. P. 87. *Stanynought* v. *Cameron*, 2 Barnes, 367.

(*c*) *Ibid.* and 1 Sid. 239; 2 Roll. Ab. tit. Trespass by Relation.

(*d*) *Burn* v. *Richardson*, 4 Taunt. 720. But the defendant cannot defeat the action by showing that he entered by license of the defendant. *Girdlestone* v. *Porter*, Woodf. Land. and Ten. 511.

(*e*) *Girdlestone* v. *Porter*, Woodf. Lan. and T. 511.

(*f*) B. N. P. 89, as agreed by the Judges in *Astlin* v. *Parkin*, *Anon.* Lofft, 451. *Doe* v. *Hicks*, 7 T. R. 433. A party is entitled to recover in the action for mesne profits the costs of the ejectment, although they have never been taxed. *Symonds* v. *Page*, 1 J. & C. 29; and see *Gulliver* v. *Drinkwater*, 2 T. R. 261. *Goodtitle* v. *Toombs*, 3 Wils. 121. He may recover damages for his trouble, &c.; *Ib.* The amount of the taxed costs of the ejectment. *Brooke* v. *Brydges*, 7 Moore, 471. *Doe* v. *Davis*, 1 Esp. C. 358.

(*g*) *Nowell* v. *Roake*, 7 B. & C. 404.

agreement on the part of the plaintiff to waive the costs, the defendant paying certain rent for the premises (*h*). The defendant, where the judgment is not pleaded, is at liberty, it seems, to controvert the plaintiff's title (*i*).

VIII. *Effect of a judgment in ejectment.*

In an action of trespass for mesne profits, against the former defendant, the record is evidence of his title at the time of the demise (*k*). So it is also evidence between those who claim in privity with the parties (*l*). And where two recovered judgment in ejectment on several demises, it was held that this was admissible evidence in an action of trespass by them against two of the former defendants (*m*), since the judgment was perfectly consistent with their being tenants in common, and as such they might maintain trespass jointly. It is, however, to be observed, that in addition to the judgment, the plaintiffs proved a delivery of possession under a writ to their joint agent. Where the parties are different, the judgment is not evidence of title (*n*).

A judgment in ejectment is not conclusive as to the right, because it does not affect the inheritance (*o*).

ELECTION.

PROOF of making an election to purchase, see *R.* v. *Hungerford Market Co.*, 4 B. & Ad. 327; *infra*, tit. NOTICE. See tit. BANKRUPT.

EMBLEMENTS.

See *Graves* v. *Wild*, 5 B. & Ad. 105. Williams on Executors, tit. Emblements; Com. Dig. Biens, G. 1. 2.

EQUITY.

QUESTIONS peculiar to Courts of Equity devolve on Courts of Law in cases of bankruptcy (*p*). The rules of evidence are substantially the same in equity as at law (*q*).

ERROR (*r*).

IT is a general rule, that error in a record of a judgment does not defeat the judgment, so long as it stands unreversed (*s*). Thus error in a judgment of record is no answer to an action on the judgment (*t*). So a defendant in a criminal case may plead in bar an erroneous judgment of acquittal (*u*).

(*h*) *Doe* d. *Hill* v. *Lee*, 4 Taunt. 459.

(*i*) *Doe* v. *Huddart* 2 C. M. & R. 317.

(*k*) *Astlin* v. *Parkin*, Burr. 668; Ld. Raym. 730; *supra*, Vol. I. tit. JUDGMENT. But it is not conclusive unless it be pleaded. *Doe* v. *Huddart*, 2 C. M. & R. 317.

(*l*) *Supra*, Vol. I. p. 312. The judgment in the preceding ejectment is evidence, in an action for mesne profits, against a defendant who came into possession under the defendant in the ejectment. *Doe* v *Whitcomb*, 8 Bing. 46.

In an action for mesne profits, it appearing that the party had been put into possession under a written agreement which was not produced; held, that parol evidence was inadmissible to show under whom he held, and that in such an action the judgment in ejectment against a former tenant in possesion was not admissible in evidence against the party afterwards found in possession, without proving that he came in under the defendant, so to make him privy to the judgment in ejectment. *Doe* v. *Harvey*, 8 Bing. 239. A judgment against a tenant does not bind a landlord without notice. *Hunter* v. *Britts*, 3 Camp. 455.

(*m*) *Chamier* v. *Clingo*, 5 M. & S. 64; the issues were on not guilty, and *liberum tenementum*.

(*n*) Vol. I. tit. JUDGMENT.

(*o*) *Lomax* v. *Ryder*, 7 Bro. P. C. 145.

(*p*) *Doe* v. *Steward*, 1 Ad. & Ell. 311.

(*q*) *Glynn* v. *Bank of England*, 2 Ves. 38.

(*r*) It is a general rule, that error shall not be assigned in a thing to the advantage of the party. 5 Co. 39. 44; 7 Co. 4; 8 Co. 59.

(*s*) *R.* v. *Scott*, Leach's C. C. L. 445; *supra*, tit. COUNTER PLEA.

(*t*) *Horsly* v. *Daniel*, 2 Lev. 161.

(*u*) 9 H. 5, c. 2. See Starkie's Crim. Pl. 320.

A sheriff may justify under an irregular as well as under an erroneous judgment, so as the writ be not void; and a purchaser will, in such case, acquire a title under a sale by him, for they are not privy to the irregularity (*x*). A party may justify under an erroneous judgment, though it be afterwards reversed, for the judgment was the act of the Court; but not under an irregular one which has been vacated, for the irregularity was in the privity of the plaintiff or his attorney (*y*.)

ESTOPPEL (*z*).

ESTOPPELS are by record (*a*), specialty (*b*), livery, or by special circumstances, by which a man is excluded from some claim, averment, or proof. Unless a decree would operate as an estoppel if pleaded, it is of no effect in evidence (*c*).

Neither the tenant by the courtesy, nor the lord by escheat, can defeat an estate or freehold without showing the deed, for the act of livery is an estoppel which runs with the land, and bars all persons to claim it by virtue of any condition except such as appears on the deed (*d*); although the estate be created by law, the party has possession of the deed.

A party or privy (*e*) is usually concluded by his contract or admission, where that admission has been acted upon. A tenant is estopped from controverting his landlord's title to demise (*f*). A party who induces another to deliver goods to a woman, whom he represents to be his wife, cannot afterwards be admitted to say that she is not his wife. So a man is usually excluded from averment or proof by his own fraud. Where a tenant fraudulently concealed a declaration in ejectment, and the sheriff, with the concurrence of the tenant, on judgment by default seized not only land demised, but also mines not demised, in which the tenant had nothing more than a mere

(*x*) Tidd, 924, 8d edit.

(*y*) *Philips* v. *Biron et al.*, 1 Str. 509; Ray. 73; Tidd, 924. So in the case of an administrator where the administration is revoked, not reversed. P. C. Str. 509. Where an officer joins in defence with one who has no justification, he loses the benefit of it. Ibid.; and 1 Saund. 28; Cro. Jac. 27.

(*z*) As to the estoppel of a jury, see Vol. I. Ind. tit. ESTOPPEL.

(*a*) See tit. RECORD.—JUDGMENT.

(*b*) See tit. DEED. *A.* having an equitable fee in certain lands, on the 21st of January 1823, conveyed the same to *B.* by lease and release. The release recited that *A.* was legally or equitably entitled to the premises conveyed, and the releasor covenanted that he was or stood lawfully or equitably seised in his demesne of and in and otherwise well entitled to the same. The legal estate was subsequently conveyed to *A.*, and he afterwards, for a valuable consideration, conveyed the same to *C.* Upon ejectment brought by *B.* against *C.*, held, first, that there being in the release no certain and precise averment of any seisin in *A.*, but only a recital and covenant that he was legally or equitably entitled, *C.* was not thereby estopped from setting up the legal estate acquired by him after the execution of the release.

Held, secondly, that the release did not operate as an estoppel by virtue of the words "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and *A.* had not the legal title in the premises at the time when the release was made.

Held, thirdly, that this case did not fall within the rule that a mortgagor cannot dispute the title of his mortgagee, because *C.* claimed as a purchaser for a valuable consideration without notice a legal interest which was not in *A.* at the time of the mortgage to *B.* *A.* had then only an equitable interest which passed to *B.* whose title as to that was not disputed. *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 278.

(*c*) 1 Ad. & Ell. 18. See further *R.* v. *Directors of East India Co.*, 4 B. & Ad. 530.

(*d*) 10 Co. 94; Co. Litt. 226.

(*e*) A party admitted to chambers in Lincoln's Inn merely by order of the benchers, who are trustees in fee, without any formal conveyance from the party who surrenders under a like order, is not estopped as a privy in estate, by the acts of the former tenant. *Doe* v. *Errington*, 6 Bing. N. C. 70.

(*f*) *Supra*, tit. ADMISSION.

liberty to dig, it was held that the latter, in an action by the landlord, under the stat. 11 G. 2, c. 19, s. 12, was estopped, by his fraudulent act, from contending that the declaration applied to the land only, and not to the mines (*g*). So one who has conveyed an estate in order to confer a colourable qualification to kill game, cannot allege his own fraud to defeat the conveyance (*h*). But trustees are not estopped by acts done contrary to their duty as public trustees (*i*). Nor is an executor *de son tort*, but who afterwards takes out letters of administration, barred by an agreement in respect of the intestate's property (*k*).

EXAMINATIONS IN CASES OF FELONY.

See tit. ADMISSIONS and APPENDIX.

Admissibility.

EXAMINATIONS taken under judicial authority by virtue of different statutes, are in general (unless the statute specially enact the contrary) inadmissible against strangers, even after the deaths of the witnesses; for although they are taken judicially and upon oath, yet inasmuch as they are taken *ex parte*, the opportunity for cross-examination, which, it is to be remembered, is one of the two great tests of truth, is wanting (*l*). Hence the *ex parte* examination of a pauper, taken judicially (*m*) on oath before two magistrates (*n*), is not evidence in a settlement case; for the appellants had no power to cross-examine. But in the case of *The King* v. *Ravenstone* (*o*) the Court held that the examination of a pregnant woman, under the stat. 6 Geo. 2, c. 31, in the absence of the party upon whom she filiated the child, was evidence after her death, upon which the Court of Quarter Sessions might make an order of filiation. This decision is contrary to general principles; and the cases of depositions before magistrates, under the statutes of Philip & Mary, in felony, upon which the Court are reported to have relied in the above case, are in direct opposition to it.

Evidence of the examination of a prisoner before a magistrate, under the stat. 7 Geo. 4, c. 64, s. 3, has already been considered under the head of ADMISSIONS. It seems that in order to warrant the reading of such an examination in evidence, it is sufficient to prove the magistrate's signature, without calling either the magistrate or his clerk (*p*).

Although the Mutiny Act (*q*) makes an *attested copy* of a soldier's affidavit evidence, the original is, by reasonable intendment, also admissible (*r*), and

(*g*) *Crocker* v. *Fothergill*, 2 B. & A. 652.

(*h*) *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 267.

(*i*) *Infra*, tit. TRUSTEE.

(*k*) *Doe* v. *Glenn*, 1 Ad. & Ell. 49. But he may legalize his own acts. *Curtis* v. *Vernon*, 3 T. R. 587. Per Lord Kenyon, citing *Vaughan* v. *Browne*, 2 Str. 1106.

(*l*) *Supra*, Vol. I. tit. JUDICIAL INSTRUMENTS.

(*m*) By virtue of the stat. 13 & 14 Car. 2, c. 12, s. 1, which in giving power to the magistrates to remove, incidentally gives a power to examine upon oath. Per Lord Kenyon, *R.* v. *Eriswell*, 3 T. R. 721.

(*n*) *R.* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Nuncham Courtenay*, 1 East, 373.

(*o*) 5 T. R. 373. Vide *supra*, tit. DEPOSITIONS.

(*p*) In the case of *R.* v. *Chappel*, Wells Summer Assizes, 1834, Lord Denman refused to receive the examination of the prisoner bearing a mark only but not the prisoner's signature, although signed by the magistrate, without proof, by the magistrate or his clerk, that the examination was truly taken. In a later case (*R.* v. *Smith & another*, 2 Lewin's Cases, 139), Parke, B. was disposed to overrule a similar objection, and Lord Denman doubted as to his former ruling. In *R.* v. *Hope* (Central Criminal Court, 1835), the examination was received, although *marked* only; there, however, the constable who proved the examination was an attesting witness to it; but Patteson, J., said, that he was by no means satisfied that in *any case* it was necessary to call either the magistrate or his clerk.

(*q*) 55 Geo. 3, c. 180, s. 70.

(*r*) *R.* v. *Warley*, 6 T. R. 534. Upon

either the original or the attested copy is admissible, although the soldier be dead, or be beyond the realm (*s*). But no other attested copy but that delivered to the soldier is admissible (*t*); and such attested copy does not upon production prove itself, but must be authenticated by evidence of the handwriting of the magistrates (*u*).

EXECUTORS AND ADMINISTRATORS.

I. EVIDENCE IN ACTIONS BY EXECUTORS AND ADMINISTRATORS.
1. *Proof of title, when necessary.*
2. *Title, how proved.*
3. *Proof of the cause of action.*

II. EVIDENCE IN ACTIONS AGAINST EXECUTORS.
1. *Under the plea of ne unques executor.*
2. *Plene administravit.*
3. *Outstanding bonds, and judgment recovered.*
4. *On nil debet—Non devastavit, &c. to debt on judgment—Scire fieri, inquiry, &c.*

Proof of title, where necessary.

1. WHERE an executor or administrator brings an action (*x*) in his representative capacity merely, as where he declares in trover on a possession by the testator (*y*) or intestate, and a conversion in his lifetime (*z*), or upon a contract made by him, he makes a profert of the probate, or of the letters of administration, and if the defendant mean to dispute his right to sue in the representative character which he assumes, he must do so by his plea in abatement, and cannot make the objection by evidence under the plea of the general issue, or of any other plea in bar (*a*); for such a plea puts in issue the cause of action merely, and not the character in which the plaintiff sues (*b*).

Thus, if an administrator declare on an *assumpsit* to the intestate, the

the same principle that the service of notice of distress on a party is good notice, although the statute directs that it shall be left at his house. See tit. DISTRESS; but see *Burdon* v. *Ricketts*, 2 Camp. 121.

(*s*) *R.* v. *Warminster*, 3 B. & A. 321. Contrary to the opinion expressed by Lawrence, J., *R.* v. *Clayton-le-Moors*, 5 T. R. 706.

(*t*) *R.* v. *Clayton-le-Moors*, 5 T. R. 714.

(*u*) *R.* v. *Bilton*, 1 East, 13.

(*x*) By the 3 & 4 Will. 4, c. 42, s. 2, executors may bring actions for injuries to the real estates of the deceased, and actions may be brought against executors for an injury to property, real or personal, by the testator.

(*y*) *Blainfield* v. *March*, 7 Mod. 141.

(*z*) It has been said, that where the goods of the testator were never in possession of the executor, he must sue as executor. *Cockerill* v. *Kynaston*, 4 T. R. 280. And that whether the conversion were before or after the death, if the goods when recovered will be assets, he may sue for them as executor. And Lord Holt, C. J. in *Marsfield* v. *Marsh*, 2 Ld. Raym. 824, held, that if an administrator declared in trover upon a possession by the testator, and a conversion after his death, the defendant could not, under the plea of the general issue, show that there was an executor. But see the cases cited below, 440, note (*g*).

(*a*) *Blainfield* v. *March*, 7 Mod. 141. Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824. *Loyd* v. *Finlayson*, 2 Esp. C. 564; 1 Will. Saund. 275, n. 3; Salk. 285; Vin. Ab. Ev. P. b. 7, pl. 5; Peake's Ev. 373. And see *Elden* v. *Keddell*, 8 East, 187. *Newman* v. *Leach*, Barnes, 365.

(*b*) Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824. Under the plea of *non assumpsit*, it cannot be objected that the will has been proved in an improper court. *Stokes* v. *Batc*, 5 B. & C. 491. And by the general rule, 4 Will. 4, in all actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially raised. The plea of the general issue, however, admits simply the title, not the sufficiency of the title. *Adams* v. *Terre-tenants of Savage*, 6 Mod. 134.

Proof of title.

defendant cannot, under the plea of *non assumpsit*, dispute the grant of administration to the plaintiff, and if the letters were to be produced, he could not object the want of a proper stamp (*c*). So the plea of *non est factum* on a bond to the intestate, admits that the plaintiff is a good administrator (*d*). But if the plaintiff declare on a cause of action arising in his own time, he must, under the general issue, if it be essential to his claim, prove his title as executor or administrator, and the defendant may controvert it. Thus, if he declare as administrator upon his own possession, the defendant may, under the general issue, impeach his title, and show that there is an executor (*e*); and even if the plaintiff declare in trover upon a possession by the testator, and a conversion in his own time, it seems that the case is just the same as if he had declared, as he might have done, upon his own possession (*f*), and that he must prove himself to be such under the plea of the general issue, which raises the question of title (*g*). Where the plaintiff has not had the actual possession of the testator's goods, proof of his executorship seems to be essential to the proof of property in the goods; but where he has taken actual possession, evidence of this nature, as against a wrongdoer, is unnecessary, for bare possession is *primâ facie* evidence of property (*h*). Where the money of the testator is received by the defendant,

(*c*) *Thynne* v. *Protheroe*, 2 M. & S. 553. *Watson* v. *King*, 4 Camp. 272; Com. Dig. Abatement, [E.] 13. In *Hunt* v. *Stevens*, 3 Taunt. 113, the conversion was alleged to be in the time of the executor.

(*d*) *Gidley* v. *Williams*, 1 Salk. 38, 3d Resol.; Com. Dig. Pleader, [2 D.] 10; [2 D.] 14.

(*e*) Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824; Salk. 285.

(*f*) For the property in goods draws to it the possession in law. *Jenkins* v. *Plombe*, 6 Mod. 182. 2 Will. Saund, 47, k. and the cases there cited.

(*g*) *Hunt* v. *Stevens*, 3 Taunt. 113; and see the observations of Lawrence, J. *Ibid.* 10 East, 293; *Grimstead* v. *Shirley*, 2 Taunt. 116; and see *Bollard* v. *Spencer*, 7 T. R. 358, and the cases cited there; and 2 Will. Saund. 47, k. to show that where the conversion was in the time of the executor, he is liable to costs. *Contra*, *Cockerill* v. *Kynaston*, 4 T. R. 280. So, if an executor declare on an account stated with him as executor, without saying concerning monies due from the defendant to the testator; *Jones* v. *Jones*, 1 Bingh. 249. See *Hollis* v. *Smith*, 2 Taunt. 119. The promises in the declaration were all laid to the plaintiff as executor; pleas, the general issue and the statute of limitations; the plaintiff was nonsuited; it was held that it was so far an action on a contract between the plaintiff and defendant, as to entitle the defendant to his costs under 23 Hen. 8, c. 15. *Slater* v. *Lawson*, 1 B. & Ad. 893.

So where, in *assumpsit* by an administrator, the declaration containing a count upon an account stated with and promises to the administrator, the verdict upon the general issue being for the defendant, held that he was entitled to the costs, but as to the pleadings, to the costs of that count only in which the promises were laid as made to the plaintiff. *Jobson* v. *Forster*, 1 B. & Ad. 6; and see *Dowbiggin* v. *Harrison*, 9 B. & C. 666.

Where the cause of action arises in the lifetime of a testator, or intestate, and the executor or administrator cannot bring the action in his own name, he is not liable for costs. *Jones* v. *Wilson*, 6 M. & S. 178.

In *assumpsit* against an executor on promises by the testator, the defendant pleaded first, the general issue, and secondly, *plene administravit*; the plaintiff joined issue on the first, and took judgment of assets *quando acciderint* on the second plea; held in error that the defendant having, by pleading that the testator never promised, compelled the plaintiff to incur the costs of a trial, he was entitled to judgment as to those costs *de bonis testatoris et si non de bonis propriis*. *Marshall* v. *Wilder*, 9 B. & C. 655.

And now by the statute 3 & 4 Will. 4, c. 42, s. 31, in any action by an executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Judge of the court in which such action is brought, or a Judge of any of the superior courts, shall otherwise order, shall be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff; and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself. The clause is retrospective. *Freeman* v. *Moyes*, 1 Ad. & Ell. 338.

(*h*) *Blackham's case*, 1 Salk. 290. *Basset* v. *Maynard*, Cro. Eliz. 819. 5 Rep. 24. Moor, 691, 2. 2 Will. Saund. 47, c. *Watson* v. *King*, 4 Camp. 272. 2 Will. on Executors, 5. Where the conversion was

after the death of the testator, the executor may maintain an action in his own name (*i*), though he must make out his title by proof of his executorship. Where proof of title as executor is necessary, they will fail unless all the executors are joined, though those who are omitted have not proved the will (*k*). Where the plaintiff is bound to prove himself executor or administrator, it is competent to the defendant to repel the proof by evidence. Thus he may show that the letters of administration are not stamped with a sufficient stamp (*l*). Proof of title.

2. The title of the executor is established, as has already been seen, by proof of the death of the testator, and by the production of the probate (*m*), which is the only mode of proving the title to personal property under a will (*n*), but the right of the executor is derived from the will, and accrues immediately upon the death of the testator; the probate is but the evidence of his title (*o*); consequently the grant of a probate subsequently to the commencement of the action, but previous to the declaration, will be sufficient (*p*).

If the probate has been lost, an exemplification under the seal of the court, or an examined copy of the act-book (*q*), or the original will, properly authenticated, and indorsed as the instrument on which probate has been granted, will be admissible to prove it (*r*).

The defendant on the other hand may, on issue taken on a plea sufficient for the purpose (*s*), impeach the plaintiff's title as executor or administrator,

after the death, the executor may declare on his own possession, whether ever actually possessed or not. *Hollis* v. *Smith*, 10 East, 293. A judgment recovered by an administrator belongs to himself personally; therefore he need not declare in his representative character, in an action either upon the judgment, or for the escape of the debtor taken in execution thereon. *Bonafous* v. *Walker*, 2 T. R. 126.

(*i*) Per Ashurst, J., 2 T. R. 477. *Smith* v. *Barrow*. So, an administrator having recovered a judgment for a debt due to the intestate, needs not declare as administrator in an action on the judgment. *Crawford* v. *Whittal*, Dougl. 4, n.

(*k*) *Munt* v. *Stokes*, 4 T. R. 561.

(*l*) *Hunt* v. *Stevens*, 3 Taunt. 113.

(*m*) An executor has a right of action against the Bank for not permitting the transfer of stock by him, although such stock may have been specifically bequeathed. *Franklin* v. *Bank of England*, 9 B. & C. 156; and see *Mead* v. *Lord Orrery*, 3 Atk. 239.

Where one only of three executors took probate, liberty being reserved to the others to come in, &c., held that an action to their reversionary interest in the premises was well brought in the names of all in whom the legal property was vested. *Walters* v. *Pfiel*, 1 M. & M. 362.

Executors are not entitled to residue undisposed of, unless it appear to be intended so by the will or codicil. 1 Will. 4, c. 40.

(*n*) *R.* v. *Inhab. of Netherseal*, 4 T. R. 258. *Smith* v. *Milles*, 1 T. R. 480; *Penney* v. *Penney*, 8 B. & C. 335; *supra*, tit. EJECTMENT; and Vol. I. tit. JUDGMENT.

(*o*) *Smith* v. *Milles*, 1 T. R. 480.

(*p*) Salk. 301. As to the relation of an administrator's right, see 1 Com. Dig. tit. Administration [B.] 10. 2 Roll. Ab. 554, l. 15 & 25; and *R.* v. *Inhab. of Horseley*, 8 East, 405. The grant of administration as to title to personalty, and the liability of the administrator, relate to the death of the intestate. *Ibid.*

(*q*) Ca. tem. Hardw. 108. 8 East, 187; *et supra*, Vol. I. tit. JUDGMENT; Ind. tit. PROBATE.

(*r*) *Supra*, Vol. I. tit. JUDGMENT. *Gorton* v. *Dyson*, 1 B. & B. 219.

(*s*) When the defendant insists that the letters of administration are void by reason of extrinsic matter, or inapplicable to the purpose for which the plaintiff uses them, he must plead the facts specially; he cannot go into such evidence on issue taken on a plea merely denying that the plaintiff is administrator. And, therefore, if the plaintiff allege administration by the bishop of Chester, and the defendant deny that he was administrator, in manner and form, &c., the plaintiff cannot, under this issue, show *bona notabilia* in another diocese or province, by reason of his, the debtor's, residence there at the time of the death. *Stokes* v. *Bate*, 5 B. & C. 491; and see *Yeomans* v. *Bradshaw*, Carth. 373. *Hilliard* v. *Cox*, 1 Salk. 37. *Griffith* v. *Griffith*, Sayer, 83. The power of the bishop to grant administration is founded, not on the fact that the deceased died within the diocese, but on that of his having left goods there, per Lee, C. J., in *Griffith* v. *Griffith*, Sayer, 83; and it will be presumed, in the absence of proof to the contrary, that there were not *bona notabilia* in another diocese, *Ibid.* and per Bayley and Holroyd, Js., 5 B. & C.

Proof of title.

by showing either that the grant was void *ab initio*, as by evidence that the probate was forged; or (*t*) where letters of administration have been granted by a bishop or other inferior judge in another diocese, that the deceased had *bona notabilia* in another diocese (*u*); that he is still living, or that the will was forged (*x*); or that the grant of administration has been revoked (*y*), of which the act-book would be good evidence.

Title of administrator.

The title of an administrator is proved, as has been seen, by the production of the letters of administration (*z*).

The defendant cannot, under the general issue, object that there is another executor who is not joined; he cannot make such an objection, except by plea in abatement, after *oyer* of the probate, that the other executor is still alive (*a*). Neither can advantage be taken of the non-joinder of a co-executor as defendant, except by a plea in abatement, which must allege that the party not joined has administered, which must of course be proved on issue taken on such a plea (*b*).

498, 9; contrary to the ancient practice, when it was held to be necessary to aver that there were not *bona notabilia* in another diocese, per Holt, C. J., in *Denham* v. *Stephenson*, Salk. 40; *contra*, *Woodward* v. *Thomson*, Cro. Eliz. 907. *Skidmore* v. *Winston*, *ibid.* 879. Probate granted by an archdeacon under authority from the diocesan, is valid, where the party died within the archdeaconry, although he was possessed of a term lying within another archdeaconry within the same diocese. *R.* v. *Yonge*, 5 M. & S. 119. The authority of an administrator appointed according to the provisions of the stat. 38 Geo. 3, c. 87, during the absence of an executor from this country, does not become actually void, but merely voidable. *Taynton* v. *Hannay*, 3 B. & P. 26.

(*t*) Note, that if letters of administration are granted by a bishop or other inferior judge, where the deceased had *bona notabilia* in another diocese, they are wholly void. *Prince's Case*, 5 Rep. 30. *Blackborough* v. *Davis*, 1 P. Wms. 43. *R.* v. *Loggen*, 1 Str. 73; 2 Bing. N. C. 495. But in such case a probate is not void, but merely voidable, 1 Will. Saund. 274, note (3), per Ld. Macclesfield, 1 P. Wms. 767, 8; and per Thompson, L. C. B., *R.* v. *Whitaker*, Lanc. Sum. Ass. 1810. Where there are not *bona notabilia* within the province, the grant of administration by the archbishop is void. *Shaw* v. *Stoughton*, 2 Lev. 86; Com. Dig. Adm. B. 3. Where there are, however, *bona notabilia* in a diocese within the province, the grant by the metropolitan is voidable only. 2 Bing. N. C. 495; Com. Dig. Adm. B. 3. For the metropolitan has a jurisdiction throughout his province. A plea of *bona notabilia* in another diocese, is a plea in bar and not in abatement, for it does not give the plaintiff a better writ. In the case of an infant sole executor, administration is to be granted to the guardian till the infant attain his age. 38 G. 3, c. 87, s. 6.

(*u*) If a man have *bona notabilia* (*i. e.* to the value of 5*l.*) in several dioceses of the same province, there must be a prerogative administration; if in two of Canterbury and two of York, there must be two prerogative administrations; and if in one diocese of each province, each bishop must grant one; B. N. P. 141.; Salk. 39; 5 B. & C. 493. Debts due by specialty are deemed to be the deceased's goods in the diocese where the securities happen to be at the time of his death; 1 Will. Saund. 274, note (3); and this is so in the case of a covenant to pay money out of the funds of a company whose stock lies out of the diocese. *Gurney* v. *Rawlins*, 2 M. & W. 87. A lease for years is *bona notabilia* where the lands lie; Com. Dig. Adm. B. 4. Foreign bonds, and securities of foreign debtors, cannot be administered here without letters of administration in this country. *Attorney-general* v. *Bouwens*, 4 M. & W. 171. But debts by simple contract follow the person of the debtor, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death. Ibid.; and Cro. Eliz. 472. Off. of Ex. 46. Godolph. 70. Judgment and statutes and recognizances are *bona notabilia* in the place where they are given or acknowledged. Ibid. Dyer, 305. *Kegg* v. *Horton*, 1 Lutw. 401. *Gold* v. *Strode*, 3 Mod. 324. *Adam* v. *Savage*, 2 Ld. Raym. 855. The goods which a testator, dying in *itinere*, has with him, do not make his testament liable to the Prerogative Court. *Doe* v. *Ovens*, 2 B. & A. 423. A metropolitan administration of goods within a peculiar is not void (and *qu.* whether voidable). *Lysons* v. *Barrow*, 2 Bing. N. C. 486.

(*x*) *Supra*, Vol. I. tit. JUDGMENT.

(*y*) *Supra*, Vol. I. Ib.

(*z*) *Supra*, 407.

(*a*) Com. Dig. Abatement [E.], 13; 1 Will. Saund. 291, g, and the cases there cited.

(*b*) *Swallow* v. *Emberson*, 1 Lev. 161; and 3 T. R. 560. Where a creditor is made a co-executor, but neither proves the will nor acts, he may maintain an action against

Title of administrator.

If administration granted to a creditor be afterwards repealed at the suit of the next of kin, the creditor may still retain against the rightful administrator: for where administration is granted to a wrong person, it is only voidable; but where it is granted in a wrong diocese, it is wholly void, and there can be no retainer (*c*). So a payment to one who has obtained probate under a forged will is good against a subsequent rightful administrator (*d*).

Where the widow of an intestate delivered goods of the intestate to a creditor of the intestate, in satisfaction of the debt, and the lawful administrator brought trover against the creditor, it was held that this single act of intermeddling by the widow did not constitute her an executrix *de son tort* (*e*), so as to legalize the delivery; and even if the widow had by her acting rendered herself liable as executrix *de son tort*, it would be very doubtful whether such a delivery could be set up in defence to an action by the lawful administrator (*f*). At all events, it seems that a payment by an executor *de son tort* will not be available either to himself or to the creditor, unless it be made in the due course of administration, and that the payment will not be allowed to the executor *de son tort*, even in mitigation of damages, where there is a deficiency of assets whereby the rightful executor is prevented from satisfying his own debt (*g*).

Cause of action.

3. A count by an administrator, on a promise to the intestate, will not be supported by proof of a promise to the administrator (*h*). And where the executor declared on a promise to the testator, in a note made to the testator six years before the action, and upon the plea of *non assumpsit infra sex annos*, the plaintiff proved a promise to himself within the six years, it was held, on a conference by all the Judges, that the evidence did not maintain the declaration (*i*).

Executors may sue as such on promises to themselves as executors (*k*).

the other for his demand. *Rawlinson* v. *Shaw*, 3 T. R. 557.

(*c*) B. N. P. 141.

(*d*) *Allen* v. *Dundas*, 3 T. R. 125. Vide *infra*, note (*n*).

(*e*) *Mountford* v. *Gibson*, 4 East, 441.

(*f*) *Ibid.*; and see Bl. Comm. 507, 8.

(*g*) *Ibid.*; and see the observations of Lawrence, J., 3 East, 453–4. And see 1 Will. Exors. P. 1, B. 3, C. 5; *Layfield* v. *Layfield*, 7 Sim. 172.

(*h*) *Sarell* v. *Wine*, 3 East, 409.

(*i*) *Dean* v. *Crane*, 6 Mod. 309; and see 2 Ld. Raym. 401.

(*k*) One of two executors having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereof; and afterwards permitted the money to be lent out to a third person, by whom it was paid to *A.*; *A.* on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor. Held that both executors might join in an action brought to recover the money against *A.* Held also, that it does not amount to a *devastavit* if an executor lends out, on private security, money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject. *Webster* v. *Spencer*, 3 B. & A. 360. A note indorsed to an executor as such, belongs to him in his representative character; therefore he may join a count upon such note with counts on promises to his testator. *King* v. *Thorn*; *Same* v. *M'Linnan*, 1 T. R. 487. Where a bill of exchange was indorsed generally to *A.* as administratrix, for a debt due to *B.* the intestate, and *A.* died after the bill became due, but before payment, it was held that the administrator *de bonis non* of *B.* was entitled to recover. *Catherwood* v. *Chabaud*, 1 B. & C. 150. For it is now settled, contrary to the old cases, that an administrator may sue in his representative capacity, on a contract made with him as such. A count for money paid by the plaintiff, as executrix, may be joined with a count for money paid by the testator. *Ord* v. *Fenwick*, 3 East, 104. So an executor may join a count, on promises to himself as executor, with counts on promises to the testator, whenever the sum recovered will be assets in his hands. *Powley* v. *Newton*, 2 Marsh. 147; 6 Taunt. 458. He may join a count for money received to his use as such, with counts on promises to the tes-

Proof of cause of action.

Where an executor sues on a promissory note, laying a promise to himself, the plea of non-assumpsit puts in issue the promise so laid, but not the making of the note (*l*).

An administrator to the effects of the husband may maintain an action against a second husband of the widow to obtain possession of premises rented by the deceased, without giving any notice to quit, although the defendant has for several years paid the rent to the landlord (*m*). The right of an executor is derived from the will, and he is in legal possession from the time of the death, even before probate granted (*n*), though the probate is the only legal evidence of his title.

tator. *Petrie* v. *Hannay*, 3 T. R. 659. A count for goods sold by *A.*, as administrator of *B.* to *C.* may be joined with an account stated between *C.* and *A.* as administrator, whether the sale or the account be in the personal or representative character. *Cowell* v. *Watts*, 2 Smith, 410; 6 East, 405. So an administrator may join a count on goods of the intestate, sold by him after the decease, with counts on promises to the intestate. *Thompson* v. *Stent*, 1 Taunt. 125. Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator since the death of the intestate, as administrator. *Semble secus*, if a bond or other higher security had been given, because the effect of such new and higher security would be an extinction of the simple contract debt. Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator, as administrator, since the death of the intestate, because, when recovered, the amount would be assets. Judgment on that ground was affirmed in error. *Robinson* v. *Lyall*, 7 Price, 501. And in general, an executor, suing as such, is not liable to costs where his demand, when recovered, will be assets. *Thompson* v. *Stent*, 1 Taunt. 322. In the above case of *Catherwood* v. *Chabaud*, it was held to be sufficient to make profert of the letters of administration *de bonis non*, *Ibid*, for they prove both administrations, *Ibid.* Administration *de bonis non* is essential to enable the administrator of an executor to sue a tenant for holding over in his own time, notwithstanding the tenant may have attorned to him. *Tingrey* v. *Brown*, 1 B & P. 310. An administrator *de bonis non* cannot maintain an action to recover equitable assets in the hands of an agent to trustees, and a promise by such agent to pay is a mere *nudum pactum*. *Clay* v. *Willis*, 1 B & C. 164. An administrator who has made a wrongful payment (induced by misrepresentation) out of the assets, may recover in his representative character. *Clarke* v. *Hougham*, 2 B. & C. 149. But counts on promises by a testator cannot be joined with counts which show a personal liability. *Rose* v. *Bowler*, 1 H. B. 108. *Secus*, where the count states an account stated by the defendant as executor, of monies due from him as such. *Powell* v. *Graham*, 7 Taunt. 580. And he is not personably liable on such a count to judgment *de bonis propriis*. *Ibid.* *Secar* v. *Atkinson*, 1 H. B. 102; *Powley* v. *Newton*, 6 Taunt. 453; *Ellis* v. *Bowen*, Forest, 98. But a count for money had and received by the defendant as executor to the use of the plaintiff, cannot be joined with a count on an account stated by the defendant as executor. *Jennings* v. *Newman*, 4 T. R. 347; *Ashley* v. *Ashley*, 7 B. & C. 444. An administrator *de bonis non* may, under equity of the stat. 17 Car. 2, c. 8, sue on a promise to the former representative. *Hirst* v. *Smith*, 7 T. R. 182. The executor residing abroad, administration was granted to *M.*, his attorney, with the will annexed, for the benefit of the executor; held, that upon the death of the executor the grant to *M.* was at an end, and that administration *de bonis non*, subsequently granted to the plaintiff, was good; but that he could not recover upon a count stating the promise to have been made to the executor. *Sewercrop* v. *Day*, 3 N. & P. 670.

(*l*) *Timms* v. *Platt*, 2 M. & W. 720.

(*m*) *Doe* v. *Bradbury*, 2 D. & R. 706. The administrator of the husband who survived his wife and died without taking out administration of her effects, cannot recover her choses in action; for that purpose administration must be taken out to the wife. *Betts* v. *Kimpton*, 2 B. & Ad. 273.

(*n*) *Smith* v. *Mills*, 1 T. R. 480. The property vests in an executor from the time of the death; in an administrator from the time of the grant of the letters of administration; and therefore where *A.* took out letters of administration under a will, by which he was appointed executor, and after notice of a subsequent will sold the goods of the testator; held, that the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold; and that *A.* was not entitled, in mitigation of damages, to show that he had administered the assets to that amount. *Woolley* v. *Clark*, 5 B. & A. 744.

An administrator of one who held as tenant from year to year holds as his testator did, and may recover on his own demise in ejectment (*o*). Proof of cause of action.

In general an executor or administrator may recover in respect of any breach of contract by which an injury has been done to the estate of the testator or intestate, although the latter might at his election have sued in contract or in tort. He may maintain an action against an attorney for negligence in transacting the business of the deceased (*p*); or against a coach proprietor on a contract for safe conveyance, in respect of an injury to the person, occasioned by negligence in driving (*q*).

The administrator of a mortgagee of colliery may maintain trover for coals raised after he had taken out administration, although he had not and the mortgagor had not taken possession (*r*).

A creditor cannot defend an action by the legal representative by a delivery made by an executor *de son tort* (*s*).

If a stranger receive rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground-rent, due at the same time, for the same premises, he may deduct such payment, in an action by the executor, for the rent; but not a payment of ground-rent, arising after the death of the testator (*t*).

If an executor or an administrator unnecessarily declare as such, it is mere surplusage, and no profert or proof is necessary (*u*).

II. Upon the plea of *ne unques* executor (*x*), which must be specially pleaded if the defendant mean to deny that he is such (*y*), the plaintiff must prove the affirmative. Direct evidence is by the probate, or letters of administration, but as these can seldom be in the power of the plaintiff, Actions against executors.—Ne unques executor.

(*o*) *Doe* v. *Porter*, 3 T. R. 13. And see *R.* v. *Inhabitants of Stone*, 6 T. R. 295; 1 C. M. & R. 834.

(*p*) *Knights* v. *Quarles*, 2 B. & B. 102. He may sue for holding over contrary to stat. 4 Geo. 2, c. 28. *Tingrey* v. *Brown*, 1 B. & P. 310. But he cannot sue for a breach, since the death, of a covenant for further assurance of an estate in fee made with testator, unless in respect of an injury which has thereby accrued to the personal estate. *Kingdon* v. *Nottle*, 1 M. & S. 355. A personal representative cannot sue for the breach of a promise of marriage made with the deceased, unless perhaps in respect of some loss which the personal estate has thereby sustained. *Chamberlain* v. *Williamson*, 2 M. & S. 408. An executor cannot, under the equity of the statute *de bonis asportatis*, have trespass for cutting down trees in the testator's lifetime. *Williams* v. *Breedon*, 1 B. & P. 329. Nor can an executor sue under stat. 9 Anne, c. 14, for money lost by his testator at play. *Brandon* v. *Pate*, 2 H. B. 311.

(*q*) *Ibid.*

(*r*) *Fraser* v. *Swansea Canal Comp.*, 1 A. & E. 354.

(*s*) *Mountford* v. *Gibson*, 4 East, 441.

(*t*) *Wilkinson* v. *Cawood*, 3 Anst. 905.

(*u*) *Crawford* v. *Whittal*, Doug. 4.

(*x*) An executor is usually liable personally on contracts which he himself makes, though they are made in his representative capacity. A bond by an executor, by which he, as executor, binds himself, his heirs, &c. makes him personally liable; so that he cannot plead *plenè administravit*, when sued thereon. *Barry* v. *Rush*, 1 T. R. 691. So if executors make a promissory note, by which they, as executors, jointly and severally, promise to pay on demand. *Childs* v. *Monins*, 2 B. & B. 460. So an executor of a deceased partner who continues the trade, though for the benefit of the infant children, is liable personally as a partner. *Wightman* v. *Townroe*, 1 M. & S. 412. A testator directs that his business shall be carried on by *E. P.* The executors permit *E. P.* to get in the outstanding debts. There being no such direction in the will, the executors are liable. *Pistor* v. *Dunbar*, 1 Anst. 107. As to their liability to funeral expenses, see 3 Y. & J. 25.

(*y*) And therefore under the plea of *plenè administravit*, the defendant cannot show that he acted merely as agent to the executor. B. N. P. 143. The effects of an intestate having vested in the king by a forfeiture for felony, if the ordinary grant letters of administration to *A.* in consequence of a warrant from the king, and they run in the usual form, viz. "To pay debts, &c." though with this additional clause,—"For the use and benefit of his Majesty;"—*A.* may be sued by the intestate's creditors, and shall not be permitted to impeach the validity of the letters of administration. *Megit* v. *Johnson*, Doug. 542.

Ne unques executor.

notice should be given to the defendant to produce them. It must be presumed that the document, if it exist, is in the defendant's possession, and therefore it seems that the ordinary proof of possession, as preparatory to the admission of parol evidence, is here unnecessary.

It has already been seen that an examined copy of the act-book, stating that letters of administration were granted to the defendant, are proof that she is administratrix, although no notice has been given to produce the letters of administration (*x*). So it seems that the original will, produced by an officer of the ecclesiastical court, bearing the seal of the court, and indorsed as the instrument on which probate was granted, with the value of the effects sworn to, and on which probate was obtained, is original evidence to prove the probate (*a*).

Executor de son tort.

The most usual proof that a party is executor, arises from his acts of intermeddling with the property of the deceased, which in law constitutes him executor *de son tort*.

What acts will make a man executor *de son tort* is a question of law, but it is for the jury to say whether the facts are sufficiently proved (*b*); but it is said that slight circumstances of intermeddling are, in point of law, sufficient for the purpose (*c*), such as the receiving money of the testator's after his death, although it was received according to an order in his lifetime (*d*).

Where a creditor took a bill of sale of the debtor's goods, and allowed them to remain in his possession, and after the death of the debtor took possession of the goods and sold them, it was held that he thereby made himself executor *de son tort*, since the continuance of the debtor's possession was inconsistent with the deed, which was therefore fraudulent against creditors (*e*). But the interfering for purposes of decency, charity, or kindness, as in ordering the funeral of the deceased, paying his debts or legacies out of the party's own pocket, or taking an inventory of his effects, is not such an intrusion as will render the party liable (*f*). An executor who has not proved the will, does not make himself liable by assisting a co-executor who has proved (*g*).

Answer.

The defendant may prove in answer that he acted under the authority of

(*x*) Vol. I. tit. JUDGMENT.—PROBATE. *Davis* v. *Williams*, 13 East, 231. And see *Elden* v. *Keddell*, 8 East, 187. See also *R.* v. *Barnes*, 1 Starkie's C. 243, and *Gorton* v. *Dyson*, 1 B. & B. 219. In the latter case, it seems that the original will was indorsed.

(*a*) *Gorton* v. *Dyson*, 1 B. & B. 219. And see the observations of Richardson, J. *Ibid.* 221.

(*b*) *Padgett* v. *Priest*, 2 T. R. 97. The authority of a servant, employed in selling his master's property, is determined by the death of the master. By continuing the sale, therefore, he becomes executor *de son tort*. *Ibid.*

(*c*) *Edwards* v. *Harben*, 2 T. R. 597. In one case the merely taking a book, and in another a bedstead, was held to be sufficient; Noy, 69. The entering on a lease for years, Bac. Ab. Exors. B. 3; or pleading any other plea than that of *ne unques* executor, Ib.; or the suing for, receiving or releasing debts due to the estate, will be evidence to prove the fact; Com. Dig. Adm. C. 1.

(*d*) 2 T. R. 597.

(*e*) *Edwards* v. *Harben*, 2 T. R. 597.

(*f*) 3 Bac. Ab. tit. Executor, 21. *Denman* v. *Hampton*, K. B. Sitt. after T. T. 1830. So in locking up the goods of the deceased, directing the funeral, feeding his cattle, providing necessaries for his children; Will. on Ex. P. 1, B. 3, C. 5. Proof that the defendant, being the widow of the deceased, a hair-dresser, continued to live in the house, and opened the shop, the entrance to the house, but there was no evidence of any sale of goods by her, or of doing more than giving the note, and of having the goods valued, preparatory to taking out administration; held that these were not acts sufficient to constitute her executrix *de son tort*. *Serle* v. *Waterworth*, 4 Mees. & W. 9; and 6 Dowl. 684; but judgment reversed on error, 4 Mees. & W. 795.

(*g*) 2 Cox's C. C. 274.

the rightful administrator (*h*), or as agent to an executor, who, though he never proved the will, yet acted as such (*i*), or that he had a claim upon the goods of the deceased (*k*). Answer.

Where *A.* and *B.* are the executors of *C.*, and on the death of *A.*, *D.* his executor, possesses himself of the effects of *C.*, it seems that he is not liable as the executor of *C.* (*l*). An executor *de son tort* cannot discharge himself from an action by the creditor by delivering over the effects in his possession to the rightful owner after action brought (*m*). The plaintiff on issue taken on this plea may have a verdict against the real executors, on counts alleging promises by the testator (*n*).

2. Upon issue on the plea of *plenè administravit*, it lies on the plaintiff to prove affirmatively that the defendant had assets (*o*). On this issue no evidence can be given of assets after the writ sued out (*p*). And if assets have in fact accrued since the issuing the writ, the plaintiff may, it seems, reply the fact (*q*). Plene administravit.

In proof of assets the plaintiff may give in evidence the inventory of the personal estate of the deceased, delivered by the defendant in the ecclesiastical court; but a copy of the inventory is not admissible, unless it be signed by the defendant, although it has been signed by the appraisers (*r*); and he may show that the goods have been undervalued (*s*). A leasehold estate is assets to the value of the term (*t*). Evidence of such an inventory is sufficient to throw it on the executor, to show how he has disposed of the goods and money specified in the inventory (*u*). But if it be *primâ facie* evidence of effects or assets with which the executor is acquainted, it is Proof of assets.

(*h*) Peake's C. 86; Cro. Eliz. 472.

(*i*) *Cottle* v. *Aldrich*, 4 M. & S. 175. *A.*, *B.* and *C.* are appointed executors, of whom *C.* alone proves the will. *C.* makes *D.* jointly with *B.* his agent in the administration, who accordingly administers during *C.*'s lifetime under his authority. *C.* dies, leaving *A.* and *B.* surviving. *D.* continues to administer, consulting with *B.* from time to time, and acting under his advice. Held, that *D.* was chargeable as executor *de son tort* for the intermeddling since *C.*'s death. Had *B.* acted as executor, *D.* would not have been so chargeable; but this he did not, since the advice he gave was not an acting as executor. *Ibid.* Living in the house and carrying on the trade of deceased (a victualler), is sufficient intermeddling to make a defendant executor *de son tort*, and as such liable *de bonis propriis*; notwithstanding his wife proved the will after the action was commenced. *Hooper* v. *Summersett*, Wightw. 16.

(*k*) One who takes possession under a fair claim of right, is not chargeable as executor *de son tort*. *Femings* v. *Jarratt*, 1 Esp. C. 335.

(*l*) *Hall* v. *Elliott*, Peake's C. 86; but see 5 Co. 33.

(*m*) *Curtis* v. *Vernon*, 3 T. R. 587; 2 H. B. 18. *Secus*, *semble*, if he deliver the goods to the rightful executor before action brought. *Ibid.* *Padgett* v. *Priest*, 2 T. R. 97.

(*n*) *Griffiths* v. *Franklin*, M. & M. 146. He cannot recover on counts on promises by all as executors. *Ib.* *Qu.* Whether there can be an executor *de son tort* where there is a lawful executor. *Hall* v. *Elliott*, Peake's C. 87. *Read's Case*, 5 Co. 34.

(*o*) The produce of the sale of the good-will of a house held for some time by the administratrix as tenant at will, is assets. *Worral* v. *Hand*, Peake's C. 74. See *Jury* v. *Woodhouse*, Barnes, 333.

(*p*) Per Ld. Kenyon, C. J., in *Mara* v. *Quin*, 6 T. R. 10.

(*q*) Per Ashurst, J., *Mara* v. *Quin*, 6 T. R. 11.

(*r*) B. N. P. 140. *Welbourne* v. *Dewsbury*, per Eyre, C. J. H. 12 Geo. 1.

(*s*) B. N. P. 140.

(*t*) *Ibid.* And where the plaintiff, in an action against the administratrix, held a lease in his hands, upon which he had a lien, it was held that the lease was to be considered as assets in the hand of the administrator, who had power to redeem it. *Vincent* v. *Sharp*, 2 Starkie's C. 507. And assets in Ireland are assets here. *Ibid.*; and 1 Barnes, 240.

(*u*) *Ayliff* v. *Ayliff*, B. N. P. 142. *Giles* v. *Dyson*, 1 Starkie's C. 32. In an action against several executors who all proved, and pleaded *plene adm.*, it was held that two only having signed the inventory, it could not be taken as evidence against the third, who was therefore entitled to a verdict. *Parsons* v. *Hancock*, 1 Mood. & M. C. 330.

Proof of assets.

rebutted by showing that no effects actually came to his hands (*x*). Proof that articles of furniture were bought by the deceased and seen in his house shortly before his death, is evidence of assets (*y*).

It has been held, that if the defendant in his inventory does not distinguish between sperate and desperate debts, it is *primâ facie* evidence to charge the defendant with all which are not actually stated to be desperate (*z*); but in a later case Lord Ellenborough required further and reasonable evidence to be given, in order to show that the debts had actually been received by the defendant (*a*). In principle, it seems to be rather unreasonable to construe an admission that a debt is due, and that it is not desperate, into an acknowledgment that it has been received, unless there be some ground for suspecting fraud; and the *onus* of proof, it is to be recollected, lies on the plaintiff. At all events the defendant may rebut the presumption by proving a demand of the debt, and a refusal to pay it (*b*), even in the case of sperate debts. If an executor submit to arbitration, agreeing to pay what shall be awarded, he admits that he has assets (*c*); but a mere submission to arbitration is not an admission of assets (*d*); neither does the payment of interest on a bond amount to such an admission; for it is unreasonable to conclude, from his having enough to pay the interest, that he has also enough to satisfy the principal (*e*). So, proof that an administrator admitted that the debt was just, and should be paid as soon as he could pay it, is not evidence to charge the defendant with assets, for he could not be understood to pledge himself to commit a *devastavit*, by paying that debt before others of a higher nature (*f*). But where an executor on being applied to for payment referred the creditor to *A. B.* for information as to assets, it was held that the admission of assets by *A. B.* was equivalent to an admission by the defendant (*g*). If the executor compound with creditors, and in a suit by one plead *plenè administravit*, such composition will be evidence against him of assets (*h*). Proof

(*x*) *Steam* v. *Mills*, 4 B. & Ad. 657. And the case of *Foster* v. *Blacklock* was not assented to.

(*y*) *Mann* v. *Long*, 3 Ad. & Ell. 699. There Pattison, J., intimated that he dissented from the opinion expressed by Lord Tenterden in *Foster* v. *Blacklock*.

(*z*) B. N. P. 140. *Smith* v. *Davis*, M. 10 Geo. 2. Per Hardw. C. J., *Shelley's Case*, Salk. 296. Per Holt, C. J., Went. Off. Ex. 160.

(*a*) *Giles* v. *Dyson*, 1 Starkie's C. 32. And in a subsequent case, Parke, B., said, that he assented to Lord Ellenborough's doctrine.

(*b*) *Shelley's Case*, Salk. 296, and B. N. P. 240.

(*c*) *Barry* v. *Rush*, 1 T. R. 691. The question as to assets is concluded against the executor, by the arbitrator directing him to pay the sum awarded. *Worthington* v. *Barlow*, 7 T. R. 453. Debt against an executrix on an award on her own submission; plea, first, *plene administravit*; secondly, that no evidence was offered before the arbitrator of her having assets at any time before the making of the award. Held on demurrer, that the action of debt lies against the representative on an undertaking originating with him; secondly, that by submitting to the reference without protesting that she had no assets, she could not afterwards be permitted to say so: submitting to a final settlement could only be by paying what should be found to be due. *Riddell* v. *Sutton*, 5 Bing. 200, and 2 M. & P. 245.

(*d*) *Pearson* v. *Henry*, 5 T. R. 6. And a promise by the administrator to pay the debt of the intestate where there are no assets, is *nudum pactum*. Per Buller, *Ibid.*

(*e*) *Cleverly* v. *Brett*, 5 T. R. 8, in n. But see the *Corporation of Clergymen's Sons* v. *Swainson*, 1 Ves. 75.

(*f*) *Hindesly* v. *Russel*, 12 East, 232. An undertaking by an executor, on accepting a bill for a demand on the estate, to pay on receipt of sufficient effects, means effects received after demands entitled to priority are satisfied. *Bowerbank* v. *Monteiro*, 4 Taunt. 844.

(*g*) *Williams* v. *Innes*, 1 Camp. 364.

(*h*) B. N. P. 145. Per Holt, C. J.

of the stamp on the probate is *admissible* evidence of assets (*i*). But it is doubtful whether it be sufficient evidence as to the amount of assets (*k*).

Proof of due administration.

After proof of assets in the hands of the defendant, it is incumbent on him to discharge himself by the proof of the due administration of such assets, which he may do under this issue (*l*). He may prove the existence and payment of debts of as high a degree, or of debts of inferior degree, without notice (*m*); but he cannot under this issue give in evidence the payment even of judgment debts made subsequently to the purchase of the writ; for the question is, whether the defendant had fu ly administered at the time when the action (*n*) was commenced. If the plaintiff reply specially, that he sued out his original on a particular day, and that the defendant had then assets, and the defendant rejoin that he had no assets then, he thereby admits the day of suing out the original as alleged by the plaintiff; but if the plaintiff in his replication alleged assets at the time of exhibiting the bill on a day specified under a *videlicet*, and conclude to the country, then, although that day be the first day of the term, the defendant may show that the bill was exhibited afterwards, for he could not in the latter case, as in the former, put the time in issue by his rejoinder (*o*), and the day mentioned in the replication is not material. By this plea the defendant alleges that he has administered the effects of the deceased, paying his debts according to the course and order which the law prescribes (*p*). He must prove the

(*i*) *Foster* v. *Blakelock*, 5 B. & C 328, 8 D. & R. 48. But it is evidence only of the smallest amount which the stamp would cover. *Curtis* v. *Hunt*, 1 C. & P. 180. S P. *Duncan* v. *Hampton*, Sit. after T. T. 1830. And see the Appendix.

(*k*) *Mann* v. *Lang*, 3 Ad. & Ell. 699. *Stearn* v. *Mills*, 4 B. & Ad. 657.

(*l*) He is liable to the amount only of assets in his hands. *Harrison* v. *Beccles*, 3 T. R. 688. On a plea of judgment recovered, and *plenè administravit præter*, and replication of assets ultra, if assets are proved in the defendant's hands, he may give evidence of the payment of other debts with those assets previous to the action brought. *Smedley* v. *Hill*, 2 Blk. 1105.

(*m*) B. N. P. 143; 2 Show. 81; 1 Raym. 745. Even debts on simple contract may be paid before specialties, unless timely *notice* be given. *Sawyer* v. *Mercer*, 1 T. R. 690; 1 Mod. 174; 3 Mod. 115. *Shetelworth* v. *Neville*, 1 T. R. 454.

(*n*) *Anon.* Salk. 153. Such payment should be pleaded. *Ibid.* Dyer, 32, a. Where the issue was whether there were assets in the hands of the defendant on the *day* when the writ was sued, and it appeared that he received money on that day, but paid it over by order of the court on the same day, before the writ was sued out, it was held to be insufficient, and the jury found assets; but the defendant might have protected himself by pleading the fact specially. *Preston* v. *Hall*, Clay, 66; Vin. Ab. Ev. P. b. pl. 3.

(*o*) B. N. P. 144. *Corbett's Case*, 1 Leon. 312. These decisions were previous to the alterations as to process.

(*p*) See 2 Bl. Comm. 511. According to the rule of priority he must pay, 1st, all funeral charges and the expenses of proving the will, and the like, and none but necessary expenses of a funeral are allowed against creditors, nor usually more than 5*l*. See B. N. P. 143. In an action against an executor of a party who had been a captain in the army, issue taken upon the plea of *plene adm.*, the judge had allowed 70 *l*. for funeral expenses, and the plaintiff being nonsuited, the Court thinking it too large a sum, directed a new trial, unless the defendant would permit the plaintiff to enter up judgment for such sum as, after allowing 20 *l*. for the funeral expenses and the probate duty, would remain in the defendant's hands. *Hancock* v. *Podmore*, 1 B. & Ad. 260, and see *Stag* v. *Punter*, 3 Atk. 119. It seems that the experses of proving the will are to be allowed under this plea, although not actually paid, the executor being personally liable to them. 2 Starkie's C. 528. 2dly. Debts due to the king on record or by specialty. 3dly. Debts which by particular statutes are to be preferred to all others, as for poor's rates, 4thly. Debts of record as for judgments (if docketed according to the stat. 4 & 5 Will. & Mary, c. 20) but otherwise not. See *Hickey* v. *Hayter*, 6 T. R. 384. *Steele* v. *Rorke*, 1 B. & P. 307. 5thly. Debts due on special contracts, as for rent; *Thompson* v. *Thompson*, 9 Price, 464; or on bonds, covenants, and the like, under seal. Lastly, debts on simple contracts; viz. notes unsealed, and verbal promises; and amongst these simple contracts, servants' wages have by some been preferred to any other. 2 Comm. 511. An executor *de son tort* is entitled to avail himself of payments duly

Proof of due administration.

existence of the debt, as well as the payment, and for that purpose the creditor himself to whom the debt has been paid is a competent witness (*q*). Where the payments have been made upon the testator's bonds, they should be produced and proved in the usual way, by means of the attesting witnesses; and though upon payment they have been destroyed, evidence cannot be received of their existence, except by means of the attesting witnesses (*r*).

Where the action is on a specialty, he must prove that he paid the debts on bonds or other specialties sealed and delivered; but where the present action is on a debt by simple contract, he may prove the payment of a debt, without proof of the bond by which it is secured; for although there was no bond it was still a good payment in the course of administration (*s*). A debt for rent *arrere* is equivalent to a debt by specialty (*t*). A judgment against the testator, not docketed, is to be considered as a debt on simple contract only, and therefore the defendant, under this plea to an action of debt on a judgment against the testator, may give in evidence the payment of bond debts (*u*). An administrator may prove payment of a simple contract debt without notice of the specialty debt on which the action is founded (*x*). On issue on a plea of *plenè administravit* before notice, it was held that the defendant having invested the residue of the funds in his own name, although for the benefit of the legatees, to whom he had paid the dividends for many years, was still liable as for assets in hand (*y*). It is no defence to an action on a bond, that the defendant paid the money over to a co-executor, in order to satisfy the bond, and that he applied the money to the satisfaction of his

made in the course of administration. The reasonable expenses only of the funeral will be allowed. *Edwards* v. *Edwards*, 2 C. & M 612. If unreasonable, the administrator will be liable, even although he sanction them before taking out letters of administration. *Lucy* v. *Wolrond*, 3 Bing N. C. 841. He will be liable to reasonable expenses although he did not order the funeral, if credit were not given to another. *Brice* v. *Wilson*, 3 N. & M. 512.

(*q*) B. N. P. 143. *Kingston* v. *Grey*, 1 Ld. Raym. 745; 1 Show. 81. In *Campion* v. *Bentley*, 1 Esp. C. 343, it is said, that on issue joined on a replication of *per fraudem* to a plea of judgment recovered, the conusee is not competent to prove that it was obtained *bonâ fide*; *sed quære.*

(*r*) *Gillies* v. *Smithers*, 2 Starkie's C. 528. But where the suit is on a simple contract, and the defendant relies on the payment of bonds of the deceased, it is (as is said) sufficient to prove payment, for although they be not bonds, it is a good administration. See B. N. P. 143. Interest on a bond incurred by the laches of the executor will not be allowed. *Saunderson* v. *Nichol*, 1 Show. 81.

(*s*) B. N. P. 143, cites *Kingston* v. *Grey*, 1 Ld. Raym. 745. In that case it does not appear whether the action was on a bond or simple contract, but probably the latter; and from the terms of the short report of this case, it seems that the creditor proved the *debt*.

(*t*) Bac. Ab. Ev. L. Roll. Ab. 927. Off. of Ex. 145. The executor is liable in debt and *detinet* where land demised to his testator is of the value of the rent, and *pro tanto*, when of less value. *Rubery* v. *Stevens*, 4 B. & Ad. 241; and see the rule, Pollexfen's Rep. 192. A representative cannot get rid of a liability to rent without assent, as he might assign to a beggar. Per Wood, B. *Thompson* v. *Thompson*, 9 Price, 471. And the administrator may retain for a half year's rent, during which the intestate died, *Ibid.* And such rent is equal to a specialty debt, *Ibid.* A chattel interest vests in the representative, in the same manner as in the testator. *Doe* v. *Porter*, 3 T. R. 13. He cannot waive for the term; he must waive *in toto* or not at all. *Billinghurst* v. *Spearman*, 1 Salk. 297. An administrator who has occupied the premises, cannot plead to an action of covenant for non-repair and not paying rent and taxes, that the premises yield no profit, *Freman* v. *Morison*, 1 Bing. N. C. 89.

(*u*) *Hickey* v. *Hayter*, 6 T. R. 384; *Steele* v. *Rooke*, 1 B. & P. 307; 2 Saund. 7, n.; Tidd. 919, 3d edit.

(*x*) Com. Dig. Administration, C. 2d edit. by Kyd; 2 Cro. 535; 3 Lev. 115; 3 Mod. 115; 1 T. R. 600. *Supra*, 323 (*a*).

(*y*) *Smith* v. *Day*, 2 M & W. 684; and *qu.* whether such payment before notice could be proved.

own simple contract debts (*z*). He may give in evidence a retainer for his own debt of equal degree (*a*); that the intestate before marriage with the defendant, gave a bond to *J. S.* conditioned to leave the defendant 500 *l.*, and that she retained to satisfy the obligation (*b*); that he has paid debts out of his own money, to the amount of the assets (*c*); that he has redeemed part of the testator's goods, which had been pawned to their full value, with his own money, and has paid the value of the residue in discharge of his debts (*d*). So he may show that he has retained money to pay the expenses of administration, to which he has made himself liable, although the money has not been actually paid (*e*). Proof of due administration.

An executor *de son tort* (*f*) is not entitled to retain for his own debt, though of higher degree, even although the rightful executor (after action brought) consent to the retainer (*g*); but if, under this plea, he give in evidence a retainer, the plaintiff cannot object, that as executor *de son tort* he cannot retain, without showing the will, and who are rightful executors (*h*). He may, after action brought by a simple-contract creditor, pay a specialty debt, and plead the payment of that debt in bar of action (*i*). An executor may also, it seems, give in evidence the payment of the residuary effects to the legatee, after the expiration of a year from the testator's death, without notice of the plaintiff's demand (*k*); so he may show that he was but executor *durante minore ætate*, and that he paid particular debts and legacies, and delivered over the residue of the testator's personal estate to the infant when he came of age (*l*); for his power then ceases, and the new executor is liable to all actions (*m*). But he will be liable for as much as he has wasted (*n*), to creditors, it seems, as well as to the new executor.

Under a plea simply of no assets, the defendant must still shew payment in due course of administration (*o*).

The plea of *plenè administravit* admits the debt, but not the *amount* of it, and therefore, unless the action be of debt for a sum certain, the plaintiff must prove his debt, and the amount of his damages (*p*).

(*z*) *Cross* v. *Smith*, 7. East, 246.

(*a*) *Plumer* v. *Marchant*, 3 Burr. 1380. It is a general rule, that wherever the executor might have sued for the debt, or might have paid it, he may retain for it. And see *Bond* v. *Green*, Brownl. 75; Bro. Ex. 18. On the plea by an administrator of a retainer, it is sufficient to show a legal contract and liability. *Harry* v. *Jones*, 4 Price 89. One of two executors may retain for his own debt out of a balance due from both to the estate. *Kent* v. *Pickering*, 2 Keene, 1.

(*b*) She is entitled to retain out of the personal assets so much as is equal to the damages which she has sustained by breach of the covenant. *Loane* v. *Casey*, executrix, 2 Bl. 965; B. N. P. 140–1; 3 Burr. 1380. But where the husband covenanted to pay the wife an annuity of 20 *l.*, or that his heirs, executors, &c. should pay the sum of 400 *l.* *to the trustees*, to remain vested in them; it was held, that the widow, being administratrix, could not retain the 400 *l.* *Thompson* v. *Thompson*, 9 Price, 464. *A.* having lent money to *B.* on a bond, takes out administration *de bonis non*, he may retain for the bond debt. *Weekes* v. *Gore*, 3 P. Wms. 184; and after his death it will be presumed that he elected to pay his own debt first.

(*c*) B. N. B. 140. Co. Litt. 123.

(*d*) *Ibid.*

(*e*) *Gillies* v. *Smithers*, 2 Starkie's C. 528; Cor. Abbott, L. C. J.

(*f*) But if an executor *de son tort* take out administration, his previous acts are good by relation. Mo. 126. Com. Dig. Administration, C. 3.

(*g*) *Curtis* v. *Vernon*, 3 T. R. 587; 2 H. B. 18.

(*h*) B. N. P. 143. But see Peake's Ev. 349, 3 ed.

(*i*) *Oxenden, gent., one, &c.* v. *Clapp, executrix*, 2 B. & Ad. 309.

(*k*) 1 Esp. C. 276. Cor. Ld. Kenyon, C. J. The payment of legacies six months after probate does not discharge the executor's liability on a covenant, although he paid them without notice, *Davis* v. *Blackwell*, 9 Bing. 5.

(*l*) 1 Mod. 174. He should produce the letters of administration.

(*m*) *Ibid.*

(*n*) *Ibid.* And 6 Co. *Packham's* case; and Latch. 160. But see 1 Mod. 175.

(*o*) *Reeves* v. *Ward*, 2 Bing. N. C. 235.

(*p*) Salk. 296; B. N. P. 140.

On issue taken on the plea of *plenè administravit præter*, the defendant may prove payment of debts before action brought, as well as under the general plea (*q*).

An executor cannot, under the plea of *plenè administravit*, give in evidence the existence of outstanding debts of a higher nature, without pleading them (*r*).

Outstanding bonds.

3. Where the day of payment on a bond is past, although the defendant sets out the condition in his plea, he will thereby cover assets to the amount of the penalty, unless the plaintiff reply *per fraudem*; and on issue joined on such replication, proof that the obligée would have taken less than the penalty, and not exceeding the sum which the executor had to pay, will be evidence of fraud (*s*).

Judgment recovered.

Upon a replication *per fraudem* to a plea of judgment recovered, evidence that the creditor would have taken less than the sum, is evidence of fraud, unless the executor show that he had not assets to pay that amount (*t*). Evidence in such case, that the judgment was confessed for more than the true debt, is strong, but not conclusive, evidence of fraud, and the defendant may show in answer that the judgment was entered for more than was due by mistake, and that the fact was known to the plaintiff before action brought (*u*). If several judgments be pleaded, and any one be proved to be false and fraudulent, the plaintiff will succeed as to all (*v*).

Where the defendant pleads a judgment for 100 *l.*, and goods to the amount of 5 *l.* only, the substance of the issue is that the defendant has no more than will satisfy the judgment (*w*).

He may show that payments relied on were out of trust funds, no part of assets (*x*).

Outstanding bonds, &c.

It will be presumed that an obligation entered into by the testator is

(*q*) *Smedley* v. *Hill*, Bl. 1105.

(*r*) B. N. P. 141.

(*s*) 1 Saund. 334 (*n*); B. N. P. 141. If issue be taken on the existence of the bonds, the defendant must prove them, and if he fail as to one he will fail as to all. Salk. 312.

(*t*) Salk. 312; B. N. P. 142. If a judgment, confessed by an executor, for more than the sum due, is pleaded, the plaintiff may either reply, showing specially what sum is due, &c. or *per fraudem* generally; if the latter, and the issue thereon is found for the defendant, he is entitled to a general judgment. *Pease* v. *Naylor*, 5 T. R. 80. The plaintiff ought to reply the sums really due. *Ib.* An executor may plead as an outstanding debt, the penalty of a bond of indemnity given by the testator to the obligee, who is surety for him in another bond, both of which were forfeited in his lifetime, and still unpaid, though the surety has not yet been damnified. And an averment that the bond was forfeited in the testator's lifetime, not showing how, is sufficient. *Cox* v. *Joseph*, 5 T. R. 307. Where to a declaration on the testator's covenant, after pleas of *plenè adm.* and retainer for a simple contract, the executor at the assizes pleaded *puis darrein cont.* a judgment recovered on a bond "after the last continuance" (the last day of Trin. term), to wit, on 2d Aug. "as of the Trinity term preceding," to which the plaintiff replied, that the defendants had notice of the bond before the commencement of the action; held that the replication was bad on demurrer, and that the plea was properly pleaded, for although the judgment was alleged to have been recovered of the term, which by fiction of law, therefore, related back to the first day of the term, and so was strictly before the last continuance; yet the defendants might be permitted by averment to show, that in fact the judgment was recovered after that continuance, in order that they might not be deprived of the privilege allowed by law. *Lyttleton* v. *Cross*, 3 B. & Cr. 317; and 5 D. & R. 165. A judgment cannot be pleaded for the benefit, not of the individual, but for the *general benefit of creditors*. *Gorst* v. *Hutton*, York Sum. Ass. 1834.

(*u*) *Pease* v. *Naylor*, 5 T. R. 80.

(*v*) Salk. 312; B. N. P. 142. See *Chamberlaine* v. *Pickering*, 1 Freem. 28; *Gilbert* v. *Dee*, Ib. 537.

(*w*) *Moore* v. *Andrews*, Hob. 133; 1 Saund. 333, (*n*).

(*x*) *Marston* v. *Downes*, 1 A. & E. 39.

founded on a just debt, unless the contrary be averred in pleading, and issue taken upon it (*y*).

Upon the plea of a retainer and judgment recovered, it is sufficient for the plaintiff to falsify either claim (*z*).

A letter written by a creditor to an executor intimating the intention of the creditor to charge the executor personally and not as executor, does not preclude the creditor from objecting to the course of administration (*a*).

Cause of action.

The proof of the cause of action is usually the same as it would have been against the testator or intestate himself (*b*).

Debt suggesting a devastavit.

4thly. If an executor suffer judgment by default, or judgment be given against him on a demurrer to the declaration; or if he plead payment of a bond, and omit to plead *plenè administravit*, or *plenè administravit præter*, it will operate as an admission of assets in an action against him on the judgment, suggesting a *devastavit* (*c*); for it is an universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it in another action founded upon it, or in a *scire facias* (*d*). And, therefore, in an action against an executor on a judgment suggesting a *devastavit*, on issue taken on the plea of *non devastavit*, it is sufficient to prove the judgment, and the return of *nulla bona* to the *fieri facias* (*e*).

Whether the defendant plead *non devastavit* to a *scire fieri* inquiry, or *nil debet*, or not guilty, or *non devastavit* to an action of debt against him, sug-

(*y*) Cro. Jac. 35; B. N. P. 142. *A.* being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenants to pay the firm all his then debts, and such other debts as should subsequently accrue. *A.* dies without having satisfied the original debt, and having contracted further debts subsequent to the execution of the deed. Held, that his executors, two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt. *De Tastet* v. *Shaw*, 1 B. & A. 664.

(*z*) *Campion* v. *Bentley*, 1 Esp. C. 343.

(*a*) *Richards* v. *Brown*, 3 Bing. N. C. 493.

(*b*) A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor. And in such action it is neither necessary to aver assets, nor a promise by the executor. By three; Burrough, J. *dissentiente*. *Powell* v. *Graham*, 7 Taunt. 580. An executor is bound by his testator's agreement not to bring error; such an agreement precludes him from bringing error on a judgment in *scire facias* brought to make him party to the former judgment, since that is not a new action, but a continuation of the old one. *Executors of Wright* v. *Nutt*, 1 T. R. 388. The personal representative of a tenant may be charged, in his representative character, for breaches of covenant, by one to whom the premises have come by assignment since the death. *Lady Wilson* v. *Wigg*, 10 East, 313. The general rule is *actio personalis moritur cum persona*. Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by the testator expressed or implied, the action survives against the executor. *Secus*, if it be a tort, or arise *ex delicto*, supposed to be by force, and against the peace. *Hambly* v. *Trott*, Cowp. 375. An action, *ex contractu*, lies against an executor for the value of timber wrongfully cut down by the testator. *Utterson* v. *Vernon*, 3 T. R. 549. Trover does not lie against an executor for a conversion by his testator. *Hambly* v. *Trott*, Cowp. 371. Debt is not maintainable against a personal representative, on the simple contract of the deceased. *Barry* v. *Robinson*, 1 N. R. 293.

(*c*) *Erving* v. *Peters*, 3 T. R. 685. *Ramsden* v. *Jackson*, 1 Atk. 292. *Rock* v. *Leighton*, Salk. 310; 1 Ld. Raym. 589; Hob. 199.

(*d*) Per Buller, J. 3 T. R. 689. The pleas of non est factum, release, payment, non assumpsit, &c. admit assets. 1 Saund. 335, (*n*). Judgment for the plaintiff by default, or on demurrer, is evidence of assets, although no *devastavit* has been returned by the sheriff. *Leonard* v. *Simpson*, 2 Bing. N. C. 176. *Rock* v. *Leighton*, 1 Salk. 310. *Palmer* v. *Waller*, 1 M. & W. 689.

(*e*) *Erving* v. *Peters*, 3 T. R. 685. *Shelton* v. *Hawling*, 1 Wils. 259. *Chaloner* v. *Chaloner*, cited *ibid.*

gesting a *devastavit*, he cannot give in evidence the want of assets (*f*); nor can he do so upon a writ of inquiry after judgment by default in the original action (*g*); nor would a previous judgment be evidence for him (*h*), for although under the issue of *non devastavit* the defendant may give in evidence any matter which would have been a discharge to him under the plea of *plenè administravit* (*i*), yet under the latter plea the former judgment would not be evidence.

On issue taken on the plea of *non detinet* to an action of debt, suggesting a *devastavit*, the issue is on the defendant, the judgment being conclusive as to assets (*k*).

Promise by an executor.

A promise by an executor to pay a debt of the testator, where there are no assets, is a mere *nudum pactum* (*l*), even although he has given a written promise (*m*); but *assumpsit* will lie against an executor on a promise made by the testatrix to pay a debt for which she gave her bond during coverture (*n*).

An executor is liable for the expenses of the testator's funeral, if on his omission another order it, if he has assets (*o*).

An executor of a joint contractor may show, under the general issue, that another joint contractor still survives (*p*).

Legacy.

No action lies to recover a party's distributive share of a legacy, though the administrator has expressly promised to pay it (*q*). It is otherwise where the executor has agreed to retain the stated amount for the legatee (*r*).

After the executor's assent to a legacy of a specific chattel, an action lies against him to recover it (*s*). The proof of title will be similar to that already stated in the action of ejectment (*t*); if the plaintiff bring trover he should prove a demand and refusal, subsequent to the assent, and before the commencement of the action.

A release by one of several executors binds the rest (*u*).

(*f*) 3 T. R. 693; 1 Will. Saund. 219, c.

(*g*) *Treil* v. *Edwards*, 6 Mod. 308; 2 Str. 1075.

(*h*) *Rock* v. *Layton*, 1 Ld. Raym. 591.

(*i*) Per Gould, J. *Rock* v. *Layton*, 1 Ld. Raym. 591.

(*k*) *Hope* v. *Bague*, 3 East, 2.

(*l*) *Pearson* v. *Henry*, 5 T. R. 6. *Rann* v. *Hughes*, 7 T. R. 350. But a promise founded on a new consideration, as forbearance, is binding. 1 Will. Saund. 210. note (1). A promise by *A.* to *B.* that in consideration of his procuring, at his own expense, administration to the estate of *C.* to be granted to *A.*, he would pay over to him dividends due, since the death, upon stock which *C.* held in trust for *B.*, is not binding on the estate. *Parker* v. *Baylis*, 2 B. & P. 73.

(*m*) *Rann* v. *Hughes*, 7 T. R. 156. See *Parker* v. *Baylis*, 2 B. & P. 73.

(*n*) *Lee* v. *Muggridge*, 5 Taunt. 36.

(*o*) *Tugwell* v. *Hayman*, 3 Camp. 298.

(*p*) 5 East, 261.

(*q*) *Jones* v. *Tanner*, 7 B. & C. 542.—It seems to be a settled rule of law, that no action at law lies to recover a legacy. *Ib.* per Littledale, J. the Judgment of Lord Kenyon in *Decks* v. *Strutt*, 5 T. R. 690, has always been considered as an unqualified decision, that an action at law does not lie for a legacy.

(*r*) *Hart* v. *Minors*, 2 Cr. & M.

(*s*) *Williams* v. *Lee*, 3 Atk. 223. An assent to a life interest in a chattel enures as an assent to a bequest in remainder, but if in such case the life interest be given to the executor he shall be presumed to take possession as executor and not as legatee, where the assent would amount to a *devastavit*. *Richards* v. *Brown* 3 Bing. N. C. 493.

(*t*) *Supra*, 409.

(*u*) Executors have a joint and several interest, which cannot be divided. Each may dispose of the goods, surrender or release, and the power survives. Com. Dig. Administration [B.] 12. It is, therefore, unnecessary for co-executors to join in a receipt, each has a power over the whole funds; *secus* as to co-trustees. *Chambers* v. *Minchin*, 7 Ves. 9. 186. *Bull* v. *Stokes*, 11 Ves. J. 323, 324. An executrix who has treated the testator's goods as her husband's cannot object to their being taken in execution for the husband's debt. *Quick* v. *Staines*, 1 B. & B. 293. An executor may dispose of the

The declarations of the wife are not evidence against the husband, in a joint action by them in right of the wife as executrix; for the husband being a party to the record, has an interest in the cause, and that cannot be prejudiced by any act or by the *evidence of his wife* (*x*).

EXTINGUISHMENT.

THINGS out of the land due only in respect of the land, and part of the profits of the land, are extinguished by unity of possession, if a man hath an equal estate in both; *e. g.* as in the case of a way common, and what has no existence during the unity. Vin. Ab. Extin. (G.) *Secus* of things done in another respect, *e. g. Franchises*, or where the person, not the land, is chargeable. Dav. 5, Vin. Ab. Extin. (G.) Or of a thing natural, *e. g.* a watercourse. *Jury* v. *Pigot*, Poph. 170. 3 Buls. 340. A gutter is not extinguished, but the mending of a gutter is. Bro. Ent. pl. 60. An easement running with a house is not extinguished. Vin. Ab. Ext. (D.)

FALSE PRETENCES.

IT is necesssary to prove (*y*), 1st, The pretence as laid in the indictment (*z*); 2dly, Its falsity; 3dly, The obtaining the goods or money as alleged; 4thly, By means of the false pretence; 5thly, With the intent specified.

Proof of the false pretence.

It is not essential to prove that the prisoner used the very words which constitute the false pretence, as alleged in the indictment; it is sufficient to prove acts and conduct which virtually amount to the false pretence laid. Thus, where the pretence alleged was that the prisoner pretended that a paper produced to the prosecutor was a true paper, and that it had been signed by *W. S.* It appeared that in fact the prisoner, when he offered the paper, (which was in the form of a promissory note for ten shillings and sixpence, and resembling those which were generally circulated in the neighbourhood on the credit of *W. S.*), made no representation whatsoever; but the learned Judge (*a*) was of opinion that the offering the note as genuine

assets of the testator, so that the testator's creditors cannot follow them in the hands of a *bonâ fide* purchaser. *Whale* v. *Booth*, 4 T. R. 625, n. (a). The sale or disposition of the testator's or intestate's goods by one of two executors or administrators, binds the other. *Pannell.* v. *Fenn*, 1 Rol. Ab. 924; 1 Gouls. 185; Dyer, 23, b. So either an executor, 2 Ves. 267; or an administrator, *Willand* v. *Fenn*, 11 Geo. 2, Sel. N. P. 761, note (8); may bind another by releasing a debt to the testator or intestate. But a fraudulent receipt given by one executor is not binding on the rest. Vide *infra*, tit. RECEIPT.—RELEASE.

(*x*) *Alban* v. *Pritchett*, 6 T. R. 680; and see *Winsmore* v. *Greenbanke*, Willes, 597; and tit. HUSBAND AND WIFE.

(*y*) See Crim. Pleadings, tit. FALSE PRETENCES. And the st. 7 & 8 Geo. 4, c. 29, s. 53.

(*z*) It is essential that such pretence should consist in some false and fraudulent representation as to the existence or non-existence of some specific fact, by the credit given to which, either wholly or in part, the property is obtained. 4th Report of Crim. L. Commissioners, p. 72. The obtaining a cheque for 1,000 *l.* for money to take up a bill upon a representation by the defendant, that he had money enough in his pocket to meet the bill all but 200 *l.*, when in fact he had not more than 300 *l.* in his pocket, was held to be within the statute. *Crossley's Case*, 2. Lewin's, C. C. 164. A pretence that the party would do an act which he never intended to do, as that he *would* pay for goods, is not within the statute. *R.* v. *Goodhall*, Russ. & Ry. C. C. L. 461. So a false excuse made by a pauper, that he had not clothes made, with intent to excuse himself from working, is not within the Act, though the fact induce an overseer to furnish him with clothes. *R.* v. *Wakeling*, Russ. & Ry. C. C. L. 504; and see *R.* v. *Codrington*, 1 C. & P. 661.

(*a*) Graham, B.

Proof of the pretence.

was equivalent to a representation that it was so, and the twelve Judges all held afterwards that the conviction was right (*b*).

The proof of the pretence must correspond with the allegations in the indictment. An allegation that the defendant pretended that he had paid a sum of money into the Bank of England is not supported by proof that he said that the money had been paid into the Bank (*c*). Where several act in concert, the pretence conveyed by the words of one, in the presence of the rest, will support an allegation of a false pretence by all (*d*).

2dly. The proof of the falsity of the pretence must of course correspond with the allegations.

It is not necessary to prove that the whole pretence as set out on the indictment is false; for part may be true, and part false, even although the whole be alleged to be false (*e*).

Proof of obtaining, &c.

3dly. The obtaining the money or goods.—This offence borders frequently very closely upon felony; for if the property be obtained with intent to defraud the owner, the only criterion for judging of the nature of the offence is this, whether the owner divested himself wholly of the property by the delivery, or merely parted with it for a temporary purpose. If *A. animo furandi* pretend to *B.*, the owner of a horse, that he has been sent for it by *C.*, who requested to borrow it, and *A.* by this pretence obtain the horse, and sell it, he is guilty of larciny; but if *A.* in such case, and with the like intention, were to obtain from *B.* a sum of money on pretence that *C.* wanted to borrow it, and would repay it another time, the offence would not amount to felony (*f*): the distinction is, that in the one case the owner meant to part entirely with the whole property; in the other, with the temporary possession only.

Ownership.

An allegation that the prisoner obtained from *A.*, the servant of *B.*, three shillings of the monies of *B.*, by falsely pretending that nine shillings were due for the carriage of a parcel, whereas six shillings only were due, is not supported by proof that *A.* paid the three shillings out of his own money, having no money of *B.*'s in his hands at the time (*g*), for it would be merely optional in *B.* to reimburse *A.*; but it seems that if in such case *A.* had had three shillings of the money of *B.* in his possession, the evidence would support the allegation (*h*).

Where the prisoner was charged with obtaining money by false tokens, and it appeared that in fact he had obtained a bank-note, it was held that it might

(*b*) *Freeth's Case*, Stafford Lent Ass. 1807. Russ. & Ry. C. C. L. 127. See also *Story's Case*, Russ. & Ry. C. C. L. 81. Where the pretence alleged was a representation that a cheque was a good and genuine order for the payment of money, it was held to be proved by evidence of a false representation by the prisoner, that he had an account with the bankers on whom it was drawn, and that it would be paid. *R.* v. *Parker*, 2. Mood. C. C. 1.

(*c*) *Rex* v. *Plestow*, 1 Camp. 494, *cor.* Lord Ellenborough.

(*d*) *Rex* v. *Young*, 3 T. R. 98.

(*e*) See the observations of the Judges in *R.* v. *Perrott*, 2 M. & S. 379, where the false pretence was alleged to be, *that the clerks expected fees*, that a pound note must be sent as a fee to the head clerk, *and that nothing could be done without it*. It was held to be unnecessary to prove the parts in *italics*; and per Abbott, L. C. J. Mich. 1826, the constant practice on the circuit is to rule that it is sufficient to prove part of the pretences. Where, however, the pretence as laid consists of two parts, which are jointly laid as the means of defrauding, one of which turns out on the evidence to be insufficient, the prisoner cannot be convicted. *R.* v. *Wickham*, 2 P. & D. 333; 10. Ad & Ell. 34.

(*f*) *Coleman's Case*, 1 Leach, 303, n. (a). *Atkinson's Case*, East's P. C. 673.

(*g*) *Rex* v. *Douglas*, 1 Camp. 212, *cor.* Lord Ellenborough.

(*h*) *Ibid.*

(upon the evidence) be presumed that he had received the money at the Bank (*i*). The late statute specifies chattel money or valuable security, as the subject of the offence, and the allegations and proofs ought to correspond with the fact (*k*).

By means of the false pretence.

4thly. By means of the false pretence.—It is sufficient to show that the money was obtained immediately by the means and instrumentality of the false pretence, although a previous confidence subsisted which rendered that pretence effectual; as where an agent, employed by the prosecutor to pay wages to his servants every week, delivered in a false account of payments, by means of which he obtained a larger sum than was due (*l*).

5thly. The intention to defraud. *See* tit. FORGERY.

It is no ground of acquittal that it appears on the trial that the obtaining amounted to larciny (*m*).

FALSE RETURN, *see* SHERIFF.

FEOFFMENT.

Effect of.

IF the issue be *feoffavit vel non* (*n*), and a deed of feoffment and livery (*o*) be proved, the defendant cannot adduce evidence to prove that it was made by covin to defraud creditors, for it is a feoffment, and the covin ought to have been specially pleaded; but if the issue had been seised or not seised, the covin would have been evidence, for he remains seised as to creditors, notwithstanding the feoffment (*p*). Though a deed be proved, and possession for forty years can be proved, it is but evidence of a feoffment, and cannot be pleaded as such (*q*). If the land be in lease, the assent or *ouster* of the tenant must be proved (*r*), unless the lessee, his wife, family and servants, be absent (*s*), and then it is sufficient although his cattle be on the land.

FINE (*t*).

Proof of.

THE chirograph of a fine is evidence of it, because the chirographer is appointed by the law to give out copies of the agreements between the

(*i*) *Hale's Case*, 9 St. Tr. 94.

(*k*) 7 & 8 G. 4, c. 29, s. 53.

(*l*) *Witchell's Case*, East's P. C. 830.

(*m*) 7 & 8 G. 4, c. 29, s. 53.

(*n*) A feoffment might be by livery without deed. Gil. L. E. 85, and may be so pleaded. But if a man plead a feoffment, *per fait*, *quære* whether he can give a parol feoffment in evidence. *Ib.* and 2 Roll. Abr. 672. *Semble*, if a demise be pleaded by deed, evidence of a parol demise is not admissible. Gilb. L. Ev. 86. *Vide supra*, tit. CORPORATION.

(*o*) In making livery of seisin no particular form of words is necessary, nor is even the word seisin necessary, but it is a question for the jury, under the circumstances, whether the feoffor intended to give possession of the premises to the feoffee in order to confirm his title under the deed of feoffment. *Doe* v. *Stock*, 1 Gow, C. 178. And see Shep. Touch. 209. Where there was no other evidence of livery of seisin than the memorandum indorsed on the feoffment, it was held that the possession for less than 20 years was insufficient to found a presumption of it, and that the feoffment being produced out of the possession of the adverse party, did not dispense with the necessity of proving it, where the party producing it took no interest under it, and had never acknowledged it as a valid instrument, but the contrary. *Doe* v. *Marquis Cleveland*, 9 B. & C. 864.

(*p*) B. N. P. 257; Hob. 72.

(*q*) 1 H. 8, 28 H. 8; Dyer, fol. 22, pl. 135, in *Core's Case*, and per Coke, C. J. in *Isaac* v. *Clarke*, 2 Bulstr. 306.

(*r*) Com. Dig. Feoffment, B. 7.

(*s*) *Ibid.*; and *supra*, Vol. I. Ind. tit. FINE.

(*t*) As to the operation of fine levied on a contingent estate by way of estoppel during the contingency, see *Doe* v. *Oliver*, 10 B. & C. 186. By the stat. 3 & 4 W. 4, c. 74, s. 2, after the 31st of December 1833, no fine shall be levied or common recovery suffered.

Proof of.

parties that are lodged of record. But where the fine is to be proved with proclamations (*u*), as it must be, to bar a stranger, they must be proved by an examined copy of the roll, for the chirographer is not authorized to make out copies of the proclamations, and therefore his indorsement on the back of the fine is not evidence of them (*x*).

A fine does not operate until it has been executed (*y*).

Both parties and privies to a fine are absolutely barred by it (*z*); and so are *strangers*, who have at the time of levying the fine a present interest, unless they interpose their claim within five years after proclamations made (*a*), provided they do not labour under some legal impediment (*b*); such persons have five years allowed in which to prosecute their claims after such impediments are removed (*c*). Those whose rights accrue after the levying the fine and proclamations made, originating in some cause anterior to the fine, must prosecute their rights within five years after the time when such rights accrue (*d*). But as against one who has no seisin of the estate, even although he has a chattel interest in it, as a term for years (*e*), the levying a fine operates nothing, but may be defeated under the plea that *partes finis nihil habuerunt* (*f*). The payment of rent by the tenant in possession to the conusor of the fine is *primâ facie* evidence of the seisin of the latter (*g*); but the mere receipt of rent by a stranger to the legal title is not sufficient (*h*). Proof that a writ of possession, after a recovery in ejectment, was executed on the evening of the 6th of November, the first day of term, by the entry of the officer on the land, and his claiming it for the cognizor, although the possession of the tenant who afterwards paid rent to the cognizor was not actually changed, was held to be evidence of a seisin to support a fine levied on the 8th of November, but relating to

(*u*) A fine without proclamations makes a discontinuance, but does not bar the estate-tail. Com. Dig. tit. Fine, G. 1; and see 27 Edw. 1; the stat. 4 Hen. 7, c. 24; 31 Eliz. 2; 2 And. 109.

(*x*) *Chettle* v. *Pound*, B. N. P. 229; *Allen's Case*, 13 Car. 1, Clayt. 51. *Hatch* v. *Bluck*, 6 Taunt. 486.

(*y*) Pl. Comm. 357, b. It may be executed either by entry or by writ (West. Symb. 85. Com. Dig. Execution, A. 6); by writ of *habere facias seisinam* within the year, or *scire facias* afterwards. *Ibid.* and Com. Dig. Fine, E. 15.

(*z*) 2 Inst. 516; Com. Dig. Fine, I.

(*a*) See the stat. 4 Hen. 7, c. 24. A fine operates as a conveyance of an interest by way of estoppel, Watk. Prin. Conv. 252; and if the party levying the fine have no interest, none can pass. Parties and privies in blood *and* estate are estopped. Hob. 33; Watk. Prin. Conv. 255; *Grant's Case*, 10 Co. 50; *Johnson* v. *Bellamy*, 2 Leon. 36; 3 Co. 87. But they are not bound unless they be privies in estate as well as in blood. *Ib.* But although a fine works nothing, 20 years' wrongful possession after fine will bar an ejectment. *Doe* v. *Gregory*, 2 Ad. & Ell. 14. As to the effect of a fine by tenant in tail to give a tortious fee, see *Doe* v. *Finch*, 4 B. & Ad. 283.

(*b*) Coverture, infancy, imprisonment, insanity, and absence beyond sea.

(*c*) Stat. 4 Hen. 7, c. 24.

(*d*) 4 Hen. 7, c. 24. When once the five years have begun to run, they go on, notwithstanding any subsequent disability. *Doe* v. *Jones*, 4 T. R. 300. But if a person labour under several impediments, he shall have five years after the last impediment removed. 1 Lev. 215; Bl. Comm. 375, a.

(*e*) 5 Rep. 123; Hardr. 401.

(*f*) Hob. 334. Except as against parties or privies. See *Doe* d. *Cooper* v. *Runcorn*, 5 B. & C. 696. But a freehold may be acquired by *disseisin*. Watk. Prin. Conv. 254. But if the feoffment be fraudulent, the fine may be reversed. *Fermor's Case*, 3 Co. 78; Cowp. 694; 1 Burr. 117. —Fine. A fine levied by a mortgagor in fee, who remains in possession after the day of payment, is a nullity, for he has no freehold. In order to constitute a title by disseisin there must be a wrongful entry. *Hall* v. *Doe* d. *Surteis*, 5 B. & A. 687; and see *Doe* v. *Perkins*, 3 M. & S. 271; *Smartle* v. *Williams*, 1 Salk. 245; *Rowe* v. *Power*, 2 N. R. 1; 1 East, 575.

(*g*) *Doe* d. *Foster* v. *Williams*, Cowp. 621; 11 East, 495.

(*h*) B. N. P. 104; *supra*, tit. EJECTMENT.

the 6th (*i*); and it seems that the receipt of rent after a fine has been levied for a period antecedent to the fine, is *primâ facie* evidence of the cognizor's possession of the premises during the time for which rent was received (*k*).

FORCIBLE ENTRY.

One who has a right of possession cannot legally take it by force, and is liable to a criminal prosecution if he use violence and commit a breach of the public peace (*l*). But he may assert his right, and take possession if he can do it peaceably, without incurring any penalty; and being in possession, may retain it, and plead that it is his soil and freehold, or otherwise, according to his interest. And though the violent and forcible assertion of a right may subject the party to criminal animadversion, yet it does not render him liable to a civil suit for merely taking that which was his own. The taking possession with such a number of persons as is calculated to deter the rightful owner from sending them away and resuming possession, constitutes a forcible entry (*m*). A judge of assize may refuse to award restitution after a true bill found by the grand jury for a forcible entry and detainer, and the Court has not jurisdiction to interfere (*n*).

FOREIGN LAW.

The existence of a foreign law or custom is to be proved as a matter of fact, by evidence to show what the law or custom is; and the Court will not presume that the law, even of Scotland, agrees with that of England upon any particular point (*o*); and it is clear, that the written law of a foreign country must be proved by documents properly authenticated, and not by *parol* (*p*). And in one instance it has been held (*q*) that the unwritten law of a foreign country must also be so proved (*r*). Before an instrument

Proof of.

(*i*) *Doe* d. *Osborne* v. *Spencer*, 11 East, 495.

(*k*) *Ibid.* per Ld. Ellenborough.

(*l*) See Lord Kenyon's observations in *Taylor* v. *Cole*, 3 T. R. 295.

(*m*) *Milner* v. *Maclean*, 2 C. & P. 17.

(*n*) *R.* v. *Harland*, 1 P. & D. 93.

(*o*) And therefore, where the plaintiff's cause of action in *assumpsit* arose in Scotland, Ld. Eldon held that the defendant was bound to prove that the defence of infancy was available by the law of Scotland. *Male* v. *Roberts*, 3 Esp. C. 163. And in general, if an action be brought on a contract, made in a country where the liability of the defendant differs from his liability in this country, it lies on the defendant to show it. *Brown* v. *Gracey*, 1 D. & R. 41. If a defendant justify an arrest in a foreign country, *qu.* whether it be not incumbent on him to prove that it was justifiable according to the law of that country. *Mure* v. *Kay*, 4 Taunt. 43. See *Mostyn* v. *Fabrigas*, Cowp. 174.

(*p*) *Clegg* v. *Levy*, 3 Camp. 166. As to impeach the validity of an agreement. *Ibid.* and *Millar* v. *Heinrick*, 4 Camp. 155. In order to prove the written law of a foreign country, it seems that an examined copy of the original law ought to be produced. In *Picton's Case*, 24 Howell's St. Tr. 494, Lord Ellenborough said, "In order to prove the written law of any nation, a copy of that law should be produced. If I were sitting at Guildhall, and proof of foreign regulations were necessary, I should require an authenticated copy of those regulations." On a question as to the law of Jewish marriages, Lord Stowell directed questions to be addressed to the tribunal of the Bethdin, and the answers were received and acted upon, in analogy to the practice of the Court of Chancery, where the law of a foreign country is received, not on oath, but on a reliance on the honour and integrity of the professors of that law; and further information was received on the depositions of persons conversant in that law. *Lindo* v. *Belisario*, 1 Haggard, 216.

(*q*) In the case of *Bohtlinck* v. *Inglis*, 3 East, 380, evidence was admitted of one of the mercantile navigation laws of Russia, and also of a documentary opinion of the Judges of the Custom-house court of St. Petersburgh, on the effect and operation of that law, signed by the presiding Judges of that Court; and a question on a special case was reserved for the opinion of the Court of K. B. upon the admissibility of the latter document; but the Court gave no opinion.

(*r*) *Boehtlinck* v. *Schneider*, 3 Esp. C. 58, per Ld. Kenyon, C. J.

made in a foreign country, which derives a legal effect and operation from the law of that country, can be admitted in evidence, the existence of the law itself must be proved by witnesses (*s*). An instrument purporting to be a divorce under the seal of the Synagogue at Leghorn is not admissible to prove such divorce, unless the law of the country be previously established (*t*).

Although by the municipal laws of a foreign country, certain formal proceedings are required to enable parties to sue as partners, this will not prevent their suing as such in this country (*u*).

FORGERY (*x*).

Proof of forgery.

IT is necessary to prove:—1st. A making within the county;—2ndly, That it was a false making in law and in fact;—3dly, Of the particular instrument set forth;—4thly, With intent to defraud, &c.

A making within the county.

It is essential in the first place to *connect* the prisoner with the instrument alleged to be forged, as by evidence of his having uttered or published it, or of its being found in his possession.

It is seldom that direct evidence can be given of the fact of forgery. In the case of negotiable securities the evidence is usually applied to the uttering rather than to the forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in the case of a bond or will, after proof that the instrument has been forged by some one, a strong presumption necessarily arises against the party in whose favour the forgery is

(*s*) *Ganer* v. *Lady Lanesborough*, Peake's C. 17, *cor.* Ld. Kenyon.

(*t*) *Ibid.*; and see *Mure* v. *Kay*, 4 Taunt. 43; *Burrows* v. *Jemino*, 2 Str. 733; *Fremoult* v. *Dedire*, 1 P. Wms. 429; *Feaubert* v. *Turst*, 1 Brown's P. C. 38. As to proof of an Irish stat. *vide* Vol. 1. and Index, tit. STATUTE.

(*u*) *Shaw* v. *Harvey*, 1 M. & M. 528. A plea of discharge in Scotland upon a *cessio bonorum* does not preclude an English creditor from afterwards suing his debtor in England upon the contract (made in England), although he had opposed such discharge in Scotland, as he might have appeared to object to the jurisdiction. If the plea had alleged that the plaintiff had or ought to have availed himself of the benefit of the Scotch law, by receiving a distributive share of the defendant's estate, it might have made a difference. *Phillips* v. *Allan*, 8 B. & C. 477. See *Smith* v. *Buchanan*, 1 East, 6. Where a female domestic slave by birth accompanied her mistress to England and returned back voluntarily with her to A., the place of birth and servitude, held, that although not subject to control or coercion whilst in England, yet that on her return to such place of birth and servitude without manumission, the dominion and property of her master revived. *Slave Grace*, 2 Hagg. 94; and see *Sommersett's Case*, 22 How. St. Tr. 1. A foreign contract must be construed according to the law of country where made, but the remedy must be according to law of England. *De la Lega* v. *Vianna*, 1 B. & Ad. 284. As to the effect of a foreign bankruptcy in passing bankrupt's property in this country, see *Sill* v. *Worswick*, 1 H. B. 655. A plea of judgment recovered for the same cause of action in the Vice-Admiralty Court of Sierra Leone, not being a court of record, and the judgment being only evidence of the cause of action, and not shown to be binding and conclusive on the defendant, is not a bar to a count on the original ground of action, *Smith* v. *Nicholls*, 5 Bing. N. C. 208; and 7 Dowl. P. C. 283.

(*x*) The characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of gaining credit by deception, 5th Rep. of Crim. L. Commiss. 65. With respect to the false making, the offence extends to every instance where the instrument is, under the circumstances, so constructed that it may induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive; and in this respect a forged instrument differs from one which is merely false, in stating facts which are false, *Ib.*

The offence may be defined to consist in the false and fraudulent making of an instrument with intent to prejudice any public or private right, *ib.* And see 4 Comm. 247. *R.* v. *Coogan*, Leach's C. C. L. 448. *R.* v. *Taylor*, 2 East, P. C. c. 19, s. 47. *Parkes & Brown's Case*, 2 Leach's C. C. L. 275. *Jones & Palmer's Case*, 1 Leach's C. C. L. 366. 3 Jus. 169.

made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the instrument so proved to have been forged is in the hand-writing of the prisoner, must, if unexplained, necessarily be strong evidence of guilt (*y*).

The prosecutor cannot give secondary evidence of the forged deed, unless he has given the prisoner notice to produce it, and notice at the assizes is insufficient; but if the prisoner has declared it to be destroyed, no notice is necessary (*z*).

Comparison of hands is not evidence to prove the forgery; but, as will be seen, persons of skill may be admitted to give their opinion, whether the particular hand-writing on the forged instrument is natural and genuine, or feigned and imitated; because, as it is said, a judgment may be formed upon such points by habit and experience (*a*). So where the question is, whether a seal has been forged, engravers of seals may testify as to the difference between a genuine impression and the one alleged to be false (*b*).

A making within the county*.

Proof must also be given that the offence was committed within the county. The bare fact of finding the forged instrument in the county where the party who forged it was at the time, is not *primâ facie* evidence that he forged it in that county. Brown being an accomplice of Parkes, who had forged a note, uttered it in Middlesex, in the absence of Parkes, who was apprehended in the same county, with forty similar notes in his possession, dated Ringhton, Salop, and a majority of the Judges held, that there was no evidence of the commission of the forgery in Middlesex (*c*). In *Crocker*'s case, the prisoner being indicted in the county of Wilts, it appeared that whilst he was in London his lodgings in Wiltshire were searched in the presence of his wife, and in a pocket-book (in which his name had been written by himself) the note in question was found, bearing date more than two months before, at which time he was in another county; the prisoner was convicted, but afterwards received a pardon, on the ground (as has been stated) that a majority of the Judges were of opinion that there was not sufficient evidence of the commission of the offence within the county (*d*).

False making in law.

2dly. Such a false making as in point of law amounts to a forgery, consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right. It is falsely made if it be falsely made in any material part (*e*). Any fraudulent alteration of a written instrument in any material part (*f*), whether it be by addition, diminution, erasure, transposition, or any combination of these acts, or by any other device or means whatsoever (*g*), seem to be sufficient in law to constitute a false making of the instrument so altered (*h*). The false making may consist in

(*y*) See *R.* v. *Parkes & Brown*, East's P. C. 964.

(*z*) *R.* v. *Haworth*, 4 C. & P. 255.

(*a*) See tit. HAND-WRITING. *Cary* v. *Pitt*, Peake's Ev. Appen. lxxxv.; *R.* v. *Cator*, 4 Esp. C. 117.

(*b*) By Lord Mansfield, C. J. in *Foulkes* v. *Chad*, cited Russel, 1509; and Phill. on Ev. 227.

(*c*) *R.* v. *Parkes & Brown*, 2 East, P. C. 992.

(*d*) Russel, 1500.

(*e*) 2 East, P. C. 855; 3 Ins. 171.

(*f*) See 5th Rep. of the Crim. L. Com. 70; and Teague's C. 2 East, P. C. 979; *R.* v. *Elsworth*, *ib*, 986; *R.* v. *Treble*, 2 Taunt. 328; 2 East's P. C. 583; *R.* v. *Beckett*, Russ. & Ry. C. C. 251. Per Lord Ellenborough, 5 Esp. C. 100; *R.* v. *Marsh*, 3 Mod. 56.

(*g*) *R.* v. *Bigg*, 3 P. Wms. 419.

(*h*) Supra note (*x*), and Criminal Pleadings, tit. FORGERY.

* By the st. 1 W. 4, c. 66, the *venue* may be laid in county where the prisoner is apprehended, or where he is in custody.

False making in law.

the alteration of a genuine instrument, by expunging an indorsement (*i*); inserting a legacy in a will, afterwards executed by another, who is ignorant of the alteration (*k*); applying a genuine signature and seal to a false writing, such as a release (*l*); inserting the name of a person in an indictment against whom the bill was not found (*m*): or fabricating a document, which is not a copy of a genuine instrument, in order to offer it in evidence as a true copy (*n*); the altering a deed in a material part (*o*): altering the name of a banker at whose house a provincial bank-note is made payable (*p*); or altering the date of a bill of exchange, in order to accelerate the time of payment (*q*); for in each case a new and false instrument is created, and as much mischief, indeed frequently more, is likely to arise than would have arisen if the whole instrument had been fabricated; in such cases it is a general rule, that the alteration of part is a forgery of the whole (*r*). So the offence may consist in the making a false instrument in a man's own name, as if, after executing a genuine deed of feoffment, he make a subsequent one, for purposes of fraud, of a date prior to the former (*s*); or if a person indorse a name as the indorsement of another person of the same name (*t*) with that of the payee of the note.

If any person, being deceived as to the contents of any written instrument, be, by means of such deception, fraudulently induced to sign or otherwise execute such instrument, it is in law a false making by the party so fraudulently inducing him to sign or execute such instrument (*u*). If several persons make distinct parts of or otherwise jointly contribute to the making of a false instrument, it is a false making by each (*x*).

But a false *making* is essential. The mere false representation by the prisoner that he is the person whose name is on the note, is no forgery, for there is no false making (*y*); but it has been held, it seems, that the making a note by the prisoner in his *own name*, and dating it as of a place with which he has no connection, with intent afterwards to pass it off as the note of another, is a forgery (*z*).

(*i*) *R.* v. *Bigg*, 3 P. Wms. 419.

(*k*) 1 Haw. c. 70, s. 2. 6; Moor, 760; Noy, 101.

(*l*) 3 Ins. 171; 1 Haw. c. 70, s. 2.

(*m*) *R.* v. *Marsh*, 3 Mod. 66; 1 Haw. c. 70, s. 2.

(*n*) *Upfold* v. *Leit*, 5 Esp. C. 100, by Lord Ellenborough.

(*o*) Moor, 619; 2 East's P. C. 986.

(*p*) *R.* v. *Treble*, 2 Taunt. 328. 2 Leach, 1040.

(*q*) East's P. C. 853. *Master* v. *Miller*, 4 T. R. 320.

(*r*) East's P. C. 855; Crim. Pl. 478; 1 Haw. c. 70, s. 2. 4, 5; 3 Inst. 169, 170. *R.* v. *Dawson*, East's P. C. 855. 978.

(*s*) 1 Haw. c. 70, s. 2; 3 Inst. 169; Fost. 117; 1 Hale, 683; Pult. 47, b.; 27 Hen. III.; Moor, 655.

(*t*) *Mead* v. *Young*, 4 T. R. 28; *R.* v. *Brown*, East's P. C. 963.

(*u*) 1 Haw. P. C. c. 70, s. 2; 2 East's P. C. 856; Moor, 760; Noy, 101.

(*x*) *R. v. Kirkwood and others*, 1 Moody's C. C. 304; *R.* v. *Dade*, ib. 307.

(*y*) *Hevey's Case*, East's P. C. 856; Leach, 268. The indictment in such case should be for obtaining money under false pretences, if money has been obtained.

(*z*) See the case of *Parkes & Brown*, East's P. C. 963. According to the finding of the jury, the case stood thus: — Parkes signed a promissory note in the name of *Thomas Brown*, with the consent of the other prisoner, whose name was Thomas Brown, dated *Ringhton*, Salop, and Brown afterwards uttered it, with a false representation that the note was his brother's; there was no evidence that the prisoner Brown had any residence in or connection with Ringhton. The Judges were of opinion that the prisoners were properly convicted, on the ground that it had not been signed by *the Thomas Brown*, whose name it purported to be; for the note imported that he resided at Ringhton, and was a correspondent of Down & Co. (the bankers where the money was payable according to the terms of the note). In this case, the date "Ringhton, Salop," on the note, and the place of payment, were particularly specified by Grose, J., who delivered the opinion of the Judges, as constituting a false making. The false repre-

False making in law.

It seems to be perfectly settled, that the making a false instrument in the name of another, whether the prisoner does or does not assume to be that other, being a real person, is a forgery (*a*). And also, that the making an instrument in the name of a non-existing person is forgery (*b*), although the name be assumed by the party at the time for the purpose of fraud, and to avoid detection, and the credit be given to the person and not to the instrument (*c*), and although no additional credit be obtained by the false name (*d*).

In *Aicles's Case*, where the prisoner drew a bill in the name of John Mason, No. 4, Argyle-street, Oxford-road, and it appeared that the prisoner had assumed the name (the residence being correct) a month before, considerable doubt seems to have been entertained by the Judges on the question, whether this amounted to forgery, although the Jury found that the name had been assumed for the purpose of that very fraud (*e*). This finding seems, however, to decide the point; if the lodging had been taken, and the name assumed, but one hour before the making of the instrument, there would have been no room for doubt, and the lapse of a month can make no difference, for it is still one act of contrivance for the purpose of fraud. The continued residence and use of the name might indeed be *evidence* to a jury that the prisoner was, for legal purposes, the person he assumed to be in making the instrument, but its *effect* is defeated by their finding that this was for the purpose of committing the fraud; in other words, it is a finding that he was not the person in whose name the note was drawn.

Where the prisoner has signed a bill of exchange, or other instrument, in

sentation by Brown, that it was the note of his brother, was also mentioned as a circumstance of importance; but as this was no part of the instrument itself, being a mere false statement made subsequent to the fabrication of the note, it could be no ingredient in the false making, although it was evidence of the fraudulent intention on uttering the note, and also of the intention of the parties when the note was made. In the abstract, it amounts to this, that a man who signs his own name to a note, dated at a place where he does not reside, and payable at a banker's where he has no money, is a forgery. It is remarkable, that in the above case the jury did not expressly find an intention on the part of the prisoners, at the time of the making, to utter it as the note of a third person. If the note contained a mere promise to pay, (without place of date or payment,) signed by the prisoner, and was afterwards uttered by him in the name of another, the case would be more doubtful. See also *R.* v. *Webb*, 3 B. & B. 228.

(*a*) *Dunn's Case*, East's P. C. 966; where the prisoner assumed the character of Mary Wallace, a real person, and signed a note in the name of the latter, in the presence of the prosecutor. *Hadfield's Case*, Russel, 1425. Ev. Coll. St. vol. 6, p. 580; where the prisoner pretended to be the Hon. Augustus Hope, and drew the bill in question in his name. And see *R.* v. *Lewis*, Fost. 116; *R.* v. *Wilks*, 2 East, P. C. 958; *R.* v. *Ballard*, 1 Leach, 83; *R.* v. *Lockett*, ib. 94; *R.* v. *Abraham*, 2 East's P. C. 940.

(*b*) *Lewis's Case*, Fost. 106; where the prisoner forged a power of attorney in the name of Elizabeth Tingle (a non-existing person), administratrix of her father, R. Tingle, a seaman. *Bolland's Case*, East's P. C. 958; Leach, 83; where the prisoner indorsed the name of Banks (a non-existing person) on a genuine bill. *Lockett's Case*, East's P. C. 940; where the prisoner made an order on a banker in the name of a fictitious person, purporting to be made by one who kept cash there.

(*c*) *Sheppard's Case*, East's P. C. 967; 1 Leach, 226; where the prisoner obtained goods at a silversmith's in the name of Turner, and gave a draft in that name; and where the prosecutor swore that he gave credit to the prisoner, and not to the draft.

(*d*) *Taft's Case*, East's P. C. 959. The bill, with a general indorsement upon it, had been stolen, and on offering it to be discounted at a banker's, being required to indorse it, the prisoner, Edward Taft, wrote upon it the name of John Williams. *Taylor's Case*, East's P. C. 960; where the prisoner having unduly obtained a bill of exchange, obtained payment from the drawee, and indorsed a receipt on the bill in the name of William Wilson (a fictitious person), held to be forgery; Buller, J. *dubitante*.

(*e*) East's P. C. 969, 970; 6 Ev. St. 580; Russel, 1436.

False making in law.

a name which he has assumed, and which he alleges to be his own name, it is a question of fact for the consideration of the Jury whether (although the name be not strictly his own) he has habitually used it, and become known by it, or whether he has assumed it for the purpose of committing the particular fraud. If he has acquired the name which he has used, by habit and reputation, so that he is known and recognized by it, he is not guilty of a false making in the use of it; but if he has adopted and assumed it for the very purpose of committing the fraud, it is but part of the contrivance itself, and therefore can afford no defence to the charge of forgery; it can make no difference in such case, whether the name was assumed immediately before and preparatory to the perpetration of the crime, or some length of time before (*f*).

False making in fact.

It is essential to prove the falsity of the instrument, either by showing that the writing is not that of the person by whom it purports to have been made, or by showing that no such person exists; in the former instance, it is necessary, in the first place, to identify the person whose hand-writing is afterwards to be negatived, with the person whose instrument the prisoner meant to imitate.

In *Sponsonby's Case* (*g*), the prosecution for forging an indorsement by William Pearce, the payee of a genuine bill, failed, because Davis the drawer was not called to prove that the William Pearce, whose signature was negatived, was the real payee of the bill.

If the description on the face of the bill apply to several persons, the signatures of all must be negatived.

It may be proved by circumstances, that the prisoner meant to simulate the writing of a particular person.

Where the prisoner, being himself the payee of the note uttered, stated that *W. H.* of *B.* was the maker, it was held that it was sufficient for the prosecutor to show that it was not the note of that person, and that it lay on the prisoner to prove it to be the genuine note of another *W. H.*, if it were so (*h*).

(*f*) Where the prisoner, Samuel Whiley, drew a bill in the name of Samuel *Milward*, to pay for goods ordered by him of the prosecutor at Bath, seven or eight days before, in the same name, and it appeared that on the day before he ordered the goods he put a brass plate with the name of Milward on his door at Bath (where he had lived for about a month previous to the transaction), the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know. The learned Judge left it to the jury to say, whether the prisoner had not assumed the name of *Milward* in the purchase of the goods and delivery of the draft, in order to defraud the prosecutor, and they found in the affirmative; and the Judges afterwards held, that fraud having been found by the jury, the conviction was right. (*Whiley's Case*, Cor. Thompson, B. Somersetshire Spr. Ass. 1805; and afterwards by the Judges, Russel, 1439). So where the prisoner Francis made an order on a banker for the payment of money in the name of *Cooke*, it was proved that the prisoner's real name was Francis, although he had occasionally assumed other names; it was left to the jury whether, in the particular instance, the prisoner had assumed the name for the purpose of fraud, and the jury finding the fact, the Judges held that the conviction was right. (*R.* v. *Francis*, Russel, 1440); four of the Judges were absent.

(*g*) Leach, 374, *cor.* Adair, Serj. Some evidence of identity was certainly requisite, but it seems to be very doubtful whether it would, as laid down in the above case, be essential to call the drawer as the best witness of the fact. It was there held that the fact, that the William Pearce produced as a witness, was intimate with the drawer, and had received a letter from him, signifying that such a bill had been remitted to him, and directing the application, was not sufficient evidence of identity.

(*h*) *Hampton's Case*, 1 Ry. & M. C. C. 255. The giving a forged note to an agent or accomplice, that he may pass it, is a disposing thereof to him within the stat. *Giles's Case*, 1 Ry. & M. C. C. 166. Upon a charge of uttering forged notes, in order to show the guilty knowledge, evidence of uttering (subsequently to the act under

Where the bill purported to have been drawn by Andrew Holme, payable to John Sowerby, and the prisoner, on negotiating the bill, stated that John Sowerby, the indorsee, was the son of John Sowerby, of Liverpool, a cheesemonger, the father was examined as a witness, and proved that there was no other person but his son in Liverpool to whom the description given by the prisoner applied, and also proved that the indorsement had not been written by his son. It was objected, that Andrew Holme, the drawer, ought to have been called in order to prove who the payee really was, but it was held to be a sufficient answer, that the prisoner had acknowledged that the signature of Andrew Holme (his uncle) was a forgery (*i*). False making in fact.

On an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove facts tending to show that he was the party personated (*k*).

3. Proof must be given of those averments which are necessarily introduced upon the record, to show that the forged instrument was of the description of those the forgery of which is prohibited by the statute; as that it was a bond, will, or receipt. Thus where the indictment is for forging a receipt for money on a navy-bill, evidence is requisite to show, as averred, that the signature of the party upon the bill operates as a receipt (*l*). Proof of descriptive averments.

In *Wall's Case* (*m*), on an indictment for forging a will of lands, where the will set forth purported to have been attested by two witnesses only, the Judges held that the prisoner had been improperly convicted for want of

inquiry) of bills precisely similar as to the names of drawers and acceptors, which were also forgeries, is admissible. *R.* v. *Smith*, 4 C. & P. 411.

(*i*) *Downes's Case*, East's P. C. 977. On an indictment for uttering a forged acceptance, purporting to be the acceptance of W. & Co. No. 3, Birchin-lane, it is not sufficient to prove that it is not the acceptance of W. & Co. No. 20, Birchin-lane. *R.* v. *Watts*, 3 B. & B. 197.

(*k*) *Parr's Case*, East's P. C. 997.

(*l*) *R.* v. *Hunter*, Leach, 711. It is sufficient, if from its terms the instrument operate as a receipt as averred, although the word receipt be not used. *Boardman's Case*, 2 Lewin's C. 181. Where a paper was in reality a certificate of work done, but which, if genuine, it was proved by parol evidence would have been an authority for payment of the sum mentioned in it; it was held to be sufficient to sustain an allegation in the indictment for forging a warrant for payment of money, and that it is not necessary to show by averments that the instrument is within the meaning of the statute. *Reg.* v. *Rogers*, 9 C. & P. 41. An indictment for uttering a forged order for goods, the letter purporting only to be a request, and the person whose name was forged having no authority to order, was held to be wrong, as he might have been indicted for uttering a forged request. *Reg.* v. *Newton*, 2 Moody, 59. The prisoner was charged with uttering a forged bill; it appeared that the bill was not addressed to a drawee by name, but at a house of business; and having an acceptance forged on it, it was held to be properly described as a bill of exchange. *Reg.* v. *Hawkes*, 2 Moody, 60. Where a forged letter containing the request to let the prisoner have goods, added also a promise to answer for the amount; it was held to be not less a forged request within the Act. *Reg.* v. *White*, 9 C. & P. 282. A paper simply stating the goods, and signed in the name of a customer, the prosecutor being in the habit of delivering goods on such papers, was held to amount to a request for the delivery of goods within the statute. *Reg.* v. *Pulbrook*, 9 C. & P. 37.

(*m*) East's P. C. 953. *Tamen qu.*; for how could it make any difference, whether the supposed testator had or had not lands upon which the will, if genuine, could operate? *Qu.* what were the averments in the indictment. Where the prisoner, having obtained an order for payment, signed in the names of the chairman and one guardian, added the name of another; held, that by uttering the instrument, he put forth as true whatever was stated on it, and that its appearing from the minutes that another person was chairman on the day of the date was immaterial. *Reg.* v. *Pike*, 2 Moody, 70. The forgery of a power of attorney for any pension due or supposed to be so, is within the 7 Geo. 4, c. 16, s. 38, although it may be that no such pension exists to which such document professes to relate. *Reg.* v. *Pringle*, 2 Moody, 127.

Proof of descriptive averments.

evidence at the trial to show what estate the supposed testator had in the lands so devised, since in the absence of such proof it was to be presumed that the estate was freehold.

Where the indictment alleged that a bill of exchange had been signed by H. Hutchinson, and it appeared that the signature was a forgery, it was held that the variance was fatal (*n*).

It seems to be a general rule, that if the forged instrument appear on the face of it to be valid as the instrument which it is alleged to be, an indictment lies for forging it, although from some collateral fact the instrument, if genuine, would not have been available; but that it is otherwise where the defect appears on the face of the instrument itself (*o*). Thus an indictment is maintainable for forging a conveyance, although the estate may be described by a wrong name (*p*); for forging a will, although the supposed testator be still living (*q*), or be described in the forged will by a wrong christian name (*r*); or for forging a bill of exchange, or other instrument, on paper not stamped (*s*), although no stamp could legally be impressed upon the instrument after it was made; consequently such an instrument is admissible in evidence on an indictment for forgery, although unstamped (*t*). And in general, no evidence of collateral facts is available in defence for the purpose of showing that the instrument could not, if genuine, have been legally enforced.

Purport variance.

The purport of a writing is that which appears on the face of it, and if the writing when produced does not appear to be that which according to the allegation it purports to be, the variance will be fatal (*u*); as, where the indictment stated that the bill purported to be a bank-note, and the instrument produced in evidence was in the form of a promissory note, "I promise to pay, &c. for Self and Company of my bank in England" (*x*).

If the instrument given in evidence correspond with the description in the indictment, but is defectively executed in any respect, it is a question for the jury whether it is a counterfeit of the kind of instrument the forgery of which is charged; and if the resemblance be sufficient to impose upon persons of ordinary observation, although persons of experience could not have been deceived, it will be sufficient to support the allegation of forging the particular description of instrument, or a paper writing purporting to be that instrument; as where, on an indictment for forging a bank-note, it appeared that the word pounds was omitted in the body of the bill (*y*), and there was no water-mark on the paper; so where the notes were so ill executed that the difference between the false and genuine notes was very

(*n*) *Carter's Case*, East's P. C. 985.

(*o*) Forging an acceptance of an incomplete instrument, as where at the time no drawer's name was inserted, is not a forgery of an acceptance of a *bill of exchange* within 1 Will. 4, c. 66, s. 64. *R.* v. *Butterwick*, 2 Mood. & R. 196.

(*p*) *Japhet Crook's Case*, Str. 901. For other instances, see Crim. Pleadings, 110, 2d edit.

(*q*) *R.* v. *Murphy*, 10 St. Tr. 183. *R.* v. *Sterling*, Leach, 117. *Coogan's Case*, 2 Leach, 593.

(*r*) *Coogan's Case*, East's P. C. 948.

(*s*) *R.* v. *Hawkeswood*, Leach, 295; East's P. C. 955. *R.* v. *Morton*, Ibid. *R.* v. *Reculist*, Ibid. 956. *R.* v. *Davis*, Ibid.

(*t*) *Ibid.*

(*u*) See East's P. C. 883; Doug. 302. *R.* v. *Reading*, Leach, 672.

(*x*) *R.* v. *Jones*, *cor.* Lord Mansfield, Doug. 302; 2 East's P. C. 883.

(*y*) *R.* v. *Elliott*, 2 East's P. C. 951; 2 N. R. 93. By the stat. 2 & 3 Will. 4, c. 123, s. 3, it is sufficient to describe the instrument as in an indictment for stealing the same. *See* 11 Geo. 4, & 1 Will. 4, c. 66, s. 10.

apparent in several particulars, some persons having in fact been deceived by them (*z*). Purport variance.

An allegation that the whole of an instrument was forged, is proved by evidence of an alteration of a genuine instrument for the purposes of fraud (*a*).

4thly. The *intention* to defraud must be proved as averred (*b*). Such an intention is usually evidenced principally by the act itself, which, from its nature, in general leaves no room for doubt upon the point. The inference is frequently confirmed by the conduct and behaviour of a guilty party, in the artifices and falsehoods which he employs for the purpose of effecting his object, or of avoiding detection. The subsequent uttering or publication of the forged instrument is admissible and strong evidence to prove the original design in forging the instrument; and whether the making or uttering of a forged instrument be done with intent to injure a particular person as alleged, is matter of evidence to the jury (*c*). Intent.

A party is guilty of uttering a forged bill within the statute, where he utters it in payment of a debt and knowing that the names of the parties on the bill are fictitious, although he intend at the time to take up the bill, the party to whom he utters it not knowing that the names on the bill are of merely fictitious persons (*d*).

Where the intent as laid was to defraud *A.*, *B.*, &c. the stewards of the feast of the Sons of the Clergy, and it appeared that the individuals specified were trustees of a charitable fund, and that the money which had been obtained by means of the forgery was trust money, it was held to be sufficient, since the money was theirs as against all the world but subscribers (*e*).

If a banker having authority to pay money to *A.*, *B.* and *C.*, and to them only, pay it to *A.* and to two strangers who personate *B.* and *C.*, the instrument is properly alleged to have been made with intent to defraud those bankers, for they remain liable for the amount (*f*).

It is sufficient to show that concealment was the object of the forgery (*g*); and the assumption of a name which the party writes as his own, is evidence of an intention to evade responsibility under a feigned name, and so to defraud (*h*).

If the intent to defraud a corporation be alleged, an intent must be proved to defraud them in their corporate capacity; and if an intent to defraud several in their individual capacities be alleged, and it should appear that the real intention was to defraud them in their corporate character, it seems that the variance would be fatal (*i*.)

Where a wife, in pursuance of directions given by her husband, utters a forged instrument in his absence, they may be tried together, and the wife may be convicted as a principal in the felony, and the husband as an acces- Principals and accessories, &c.

(*z*) *Hoost's Case, cor.* Le Blanc, J., 2 East's P. C. 950.

(*a*) *Supra*; and *Dawson's Case*, East's P. C. 978; 1 Stra. 19; Crim. Pl. 91, 92. *Teague's Case*, East's P. C. 172. See further as to variance, tit VARIANCE.—PERJURY; and Crim. Pleadings, 2d edit. 101. 253.

(*b*) East's P. C. 854. 988; 1 Leach, 215.

(*c*) *Barrow's Case*, East's P. C. 989. 1 Leach, 77. *Elseworth's Case*, East's P. C. 989.

(*d*) *R.* v. *Hill*, 2 Moody's C. C. 30.

(*e*) *R.* v. *Jones & Palmer*, East's P. C. 991. 1 Leach, 366.

(*f*) *Dixon's Case*, 2 Lewin's C. 178.

(*g*) *R.* v. *Aickles*, East's P. C. 968. *Shepherd's Case*, East's P. C. 967. But where the immediate effect of the act is to defraud, the jury ought to find the intention. *Shepherd's Case*, Russ. & Ry. C. C. L. 169.

(*h*) Ibid.

(*i*) See *R.* v. *Jones & Palmer*.

Principals and accessories, &c.

sory before the fact (*k*). Where the witness, in consequence of a communication with the husband, went to his house, and there saw the wife, where the communication between the husband and the witness was mentioned, and the wife sold to the witness several forged notes and delivered them to him, and after delivery, but before change had been received by the witness out of the money given to the wife, the husband put his head into the room and said "Get on," but did not otherwise interfere, it was held that the wife might properly be convicted; for although the law, out of tenderness to the wife, when a felony (*l*) is committed in the presence of the husband, raises a *primâ facie* presumption in her favour of coercion by the husband, yet it is necessary that the husband should be actually present and taking part in the transaction (*m*).

Proof of uttering with a guilty knowledge.

Proof that the prisoner exhibited a forged instrument as a true and genuine instrument, is evidence that he pronounced or published it (*n*). With respect to the proofs on this subject, see tit. COIN (*o*).

Defence.

On an indictment for forging a will, it is no defence to show that probate of the will has been granted by the Ecclesiastical Court (*p*).

Competency.

Formerly, upon a conviction for forgery, the forged instrument was condemned, and ordered to be destroyed. Hence a party who would, if the instrument had been genuine, have had an interest in its destruction, either because he would have been liable upon it, or because it would have barred his claim against another, was regarded as an incompetent witness, since, at all events, the proof against him was rendered much more difficult by a

(*k*) *R.* v. *Morris*, Leach, 1096.

(*l*) But the rule does not extend to cases of murder.

(*m*) 1 Hale 46. Kel. 37. 2 East's P. C. 559. *Hughes's Case*, cor. Thompson, B. Lancaster Lent Ass. 1813, MS.

(*n*) East's P. C. 972. 3 Ins. 172. The uttering a forged order, under a false representation, is evidence of the *scienter*. *R.* v. *Shepherd*, Leach, C. C. L. 265. Evidence of a delivery of a forged bank-note by *A.* to *B.* in order that *B.* may put it off, is a disposing and putting away by *A.* within the statute 15 G. 2, c. 13. *R.* v. *Palmer*, 1 N. R. 96. Where the prisoner, on quitting the office of assistant overseer, delivered over to his successor, amongst other vouchers, a paper in the usual form, "£. for the high constable," signed *J. H.*, which had been altered to a larger sum, it was held to amount to an uttering a forged receipt with intent to defraud the high constable. *Reg.* v. *Boardman*, 2 Mo. & R. 147.

(*o*) *Supra*, tit. COIN. See also *R.* v. *Ball*, 1 Camp. 324. Russ. & Ry. C. C. L. 132. The prisoner uttered a forged bank-note on the 17th of June, and evidence was admitted that on the 20th of March preceding he had uttered a 10 *l.* note of the *same* manufacture, and that there had been paid into the bank of England various forged notes, dated between the preceding months of December and March, all of them of the same manufacture, and having different indorsements upon them of the hand-writing of the prisoner. It was also proved, that when apprehended, he had in his possession paper and implements fit for making notes of the same kind with those produced. All the Judges were of opinion that the evidence was admissible to prove the prisoner's intention. Where the prisoner was charged with having feloniously uttered a 5 *l.* bank of England note, on the 27th of November, and evidence was given of his having uttered a forged 2 *l.* note of the bank of England on the 4th of July preceding, and that he had also uttered a provincial note of the Leicester bank about six weeks before the uttering in question, and that he had uttered a 5 *l.* bank of England note about the end of November, which was returned to him as bad; it was held that the conviction was improper, no evidence having been given, as to two of the notes, that they had been actually forged. And some of the Judges were of opinion, that even in case evidence had been given that the second and third notes were forged, yet that, being notes of a different description and denomination, the evidence as to uttering them ought not to have been received. *R.* v. *Millard*, 1 Russ. & Ry. C. C. L. 245. On an indictment for uttering a forged bill of exchange, other forged bills on the same house, found on the prisoner at the time of his apprehension, are evidence against him. *R.* v. *Houghton*, Russ. & Ry. 130. *R.* v. *Wylie*, 1 N. R. 92. *R.* v. *Roberts*, 1 Camp. 339.

(*p*) *R.* v. *Buttery & Macnamara*, cor. Garrow, B., O. B. 1817; and afterwards by the Judges.

conviction. The objection to competency survived the practice on which it was founded, and hence the rejection of witnesses on this ground has been considered to be an anomaly (*q*), for it was certainly irreconcilable with the general principles now established on the subject of interest (*r*). It was said, that where the prisoner, if the instrument were genuine, might sue the witness upon it, the latter had a direct interest in the conviction, because it was not to be presumed that the Crown would, after conviction, attempt to establish a claim upon that instrument against the witness (*s*); and that although the instrument were made for the benefit, not of the prisoner but of a third person, and although the conviction would not be evidence against that person being in *inter alios*, yet that an impediment would be thrown in the way of his recovery, since the Court would impound the forged instrument; and the party convicted could no longer be a witness (*t*). Competency.

The general rule therefore was, that a party who had an interest in setting aside the instrument, supposing it to be genuine, was an incompetent witness for the Crown, on a prosecution for forgery (*u*).

Thus it was held in *Treble's Case*, that the supposed maker of a note, purporting to be made payable on demand, at his own house, or at his banker's in London, was competent to prove that he had not made it payable at the banker's where it purported to be payable (*x*); yet here the evidence seems to have tended to the very fact of forgery itself.

So upon an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove the amount of the stock which he had at the Bank (although not to prove the false signature), for the purpose of showing the intention to defraud him, as alleged in the indictment (*y*). On an indictment for forging a promissory note which bore an indorsement by the prisoner, of the receipt of a year's interest, it was held that the supposed maker was not competent to negative the fact of payment, because it tended to prove the forgery; but all the Judges agreed that such a witness was competent to prove all the facts perfectly collateral (*z*). The objection to competency in such cases no longer rests upon any principle, although the practice has become too inveterate to be wholly rejected; yet it is obvious that it ought to be strictly restrained within its ancient limits; and upon this ground, perhaps, the distinction between evidence of the very fact of forging, and collateral facts, may have proceeded.

The objection to competency ceased where the witness had no interest in the destruction of the instrument. Thus, where *A.* drew a bill on *B.* payable at the banking house of *C.*, *B.*'s acceptance having been forged, but *C.* having given him credit to the amount, although he had paid the bill; *B.*

(*q*) See Ld. Ellenborough's observations, *R.* v. *Boston*, 4 East, 572. And see 2 East, 993.

(*r*) See tit. INTEREST.

(*s*) Co. Lit. 352. 2 Ins. 39.

(*t*) *R.* v. *Whiting*, 1 Salk. 283. 1 Lord Raym. 396. 2 Haw. c. 46. 424. East's P. C. 994; but see *R.* v. *Bray*, R. T. Hardw. 358. *Smith* v. *Prager*, 7 T. R. 63.

(*u*) *Russell's Case*, Leach, 8. *Reeve's Case*, Ibid. 812. *Caffey's Case*, East's P. C. 995. *R.* v. *Rhodes*, 2 Str. 728. *Thornton's Case*, 2 Leach, 634. See also *Crocker's Case*, 2 N. R. 87; 2 Leach, 987. *R.* v. *Bunting*, East's P. C. 996. *R.* v. *Rhodes*, Leach, 31. But see B. N. P. 284. An executor is a bare trustee claiming no interest under the will.

(*x*) *Treble's Case*, 2 Taunt. 328; 2 Leach, 1040.

(*y*) *R.* v. *Parr*, East's P. C. 997.

(*z*) *Crocker's Case*, 2 N. R. 87; 2 Leach, 987. It is said that Lord Ellenborough, C. J., Macdonald, C. B., and Lawrence and Le Blanc, Js., were of opinion that the witness was competent on all points, except the fact of forgery.

Competency

was held to be competent to prove the forgery (*a*). So where the party whose receipt has been forged, had recovered the amount from the prisoner (*b*). So the supposed testator might prove the forgery of his will (*c*). So a witness might be rendered competent by a release (*d*) as from the holder to the drawer, there being no other name on the note.

of an agent.

So one who signed an instrument as the mere agent of another, as a cashier at the Bank, who gives security for the faithful discharge of his duty, was held to be competent to prove the forgery of his name, for he is not responsible on the instrument, and it is not to be presumed that he acted criminally and fraudulently in breach of his duty (*e*).

And now by the stat. 9 Geo. 4, c. 32, s. 3, on prosecutions for forging or uttering any deed, &c., or for being accessary before or after the fact to any such offence, if the same be a felony, or for aiding, abetting, or counselling the commission of such offence, if the same be a misdemeanor, no person shall be deemed to be an incompetent witness by reason of any interest which such person may have or be supposed to have in respect of such deed, &c.

Agent need not be called.

Another question arises, whether, when the person whose writing is forged *may* be called, he *must* be called; it seems now to be settled that he need not, although the point has been much discussed, and even decided differently (*f*). But upon indictments for the forging of bank-notes, it has been held that the supposed signature of the bank clerk may be disproved by any person acquainted with his hand-writing, without calling him (*g*). The objection that secondary evidence is substituted for the best does not apply in this case, since there is not such a distinction between one man's knowledge of his own hand-writing, and the knowledge of another on the same subject, as constitutes (*h*) the former evidence of a superior degree to the latter.

This rule, as to the incompetency of a witness, did not extend to civil proceedings, for there the result did not occasion the destruction of the instrument, as in prosecutions for forgery (*i*). In a late case, upon the trial of an action against an agent for negligence in transacting the purchase of an annuity, the supposed surety was admitted to prove that the deed which purported to have been executed by him was a forgery (*k*).

FORMER CONVICTION.

By the stat. 6 & 7 W. 4, c. 111, which recites that doubts had been entertained whether the practice under the stat. 7 & 8 Geo. 4, c. 28, s. 11, as to charging the jury at the same time to inquire of the principal offence and previous conviction, was consistent with a fair and impartial inquiry, it is enacted that on the trial of a prisoner for any subsequent felony, it shall

(*a*) *Usher's Case*, East's P. C. 999. *Testick's Case*, Ibid. 1000; 12 Mod. 338.

(*b*) *R.* v. *Wells*, B. N. P. 289. *Dean's Case*, 12 Vin. Ab. 23.

(*c*) *Coogan's Case*, 2 Leach, 503. *R.* v. *Sterling*, East's P. C. 1003. *R.* v. *Murphy*.

(*d*) *R.* v. *Akehurst*, Leach, 178. *Dr. Dodd's Case*.

(*e*) *R.* v. *Abraham Newland*, East's P. C. 1001.

(*f*) *Captain Smith's Case*, East's P. C. 1000.

(*g*) *Hughes's Case*, *cor.* Le Blanc, East's P. C. 1000. *M'Guire's Case*, Ibid.

(*h*) Vide Vol. I. tit. BEST EVIDENCE.

(*i*) But yet the Court, it seems, have the power of impounding forged deeds proved to be forged in civil cases.

(*k*) *Hunter* v. *King*, *cor.* Holroyd, J. Guildhall Sitt. after Mich. Term, 1 Geo. 4, and afterwards by the Court of K. B.; 4 B. & A. 200.

not be lawful to charge the jury to inquire concerning such previous conviction, until they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and that the sending of such statement to the jury, as part of the indictment, shall be deferred until after such finding. Provided nevertheless, that if, upon the trial of any person for any such subsequent felony, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the former indictment and conviction of such person for the previous felony before such (any) verdict shall have been returned; and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning such subsequent felony (*l*).

FRAUD.

Effect of fraud.

FRAUD is an extrinsic collateral act which vitiates all transactions, even the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal (*m*).

As to civil suits.

In civil suits all strangers may falsify for covin, either fines, or real or feigned recoveries, and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas (*n*).

In criminal proceedings, if an offender be convicted of felony on confession, or be outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser whose conveyance would be affected as it stands; and even after a conviction by verdict he may traverse the time (*o*).

In the proceedings of the Ecclesiastical Court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked, and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the Court gave judgment against it.

In the more modern cases, the question seems to have been, whether the parties should be admitted to prove collusion, not seeming to doubt but that strangers might (*p*).

(*l*) It appears that this amendment in the criminal law, evidently so essential a one to the fair administration of justice, was occasioned by the remarks of Parke, B. in summing up to the jury in *Jefferson's Case*, 2 Lewin's C. 187. In some of the earlier cases under the stat. 7 & 8 G. 4, c. 28, s. 11, the reading and proof of the charge of the previous felony were deferred till after the verdict on the principal charge.

(*m*) A fraudulent representation will avoid a bond founded on that representation; *secus*, of a representation merely erroneous. *Nash* v. *Palmer*, 5 M. & S. 374. But strong evidence is necessary in order to avoid an instrument, (*e. g.*) a lease, after long lapse of time. *Chandos* v. *Brownlow*, 2 Ridg. P. C. 317.

(*n*) See tit. FINE; and *supra*, Vol. I.

(*o*) Vol. I. tit. JUDGMENTS.

(*p*) Vide *supra*, Vol. I. tit. JUDGMENTS. A party cannot rescind his own act on the ground of fraud. *Jones* v. *Yates*, 9 B. & C. 512. Nor avail himself of his own wrong. *Williams* v. *Gardiner*, 11 Moore, 142. Where a party had been elected into a corporate office, and a rule *nisi* for a *mandamus* had been obtained, calling upon him to take upon himself the office; held, that he could not allege, as a ground of excuse, his own disability in not having received the sacrament within a year before his election. *R.* v. *Walker*, 6 M. & S. 277.

So that collusion, being a matter extrinsic of the case, may be imputed by a stranger, and tried by a jury, and determined in the courts of temporal jurisdiction.

And as fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which have been in fact as much exposed, to be practised upon for sinister purposes, as the Courts of Westminster-hall (*q*).

Where fraud depends upon the intention of a party, the existence of that intention is usually a matter of fact, which must be found by a jury (*r*), who are to decide on questions of *mala fides*. In some instances it results by inference of law, from the particular circumstances of the case, as found by the jury (*s*).

A secret trust to evade the statute of mortmain may be proved by extrinsic evidence (*t*).

Fraud is never to be presumed where not expressly found (*u*).

Proof that a deed was prepared in the office of a respectable solicitor is not evidence to show the fairness of the transaction, where fraud is alleged.

FRAUDS, STATUTE OF; 29 Car. II. c. 3.

THE provisions of this celebrated statute seem to operate principally as rules of evidence, calculated for the exclusion of perjury, by requiring, in particular cases, some more satisfactory and convincing evidence than mere oral testimony affords; they dispense with no evidence of consideration which was requisite previous to the statute (*x*); they give no efficacy to written contracts which they did not possess before.

It would be inconsistent with the object of the present treatise to enter

Where the defendant had proposed a person to be accepted as tenant in his stead, who proved to be insolvent, and whom the defendant knew had compounded with his creditors; held to be such a fraud that he still remained liable for the rent. *Bruce* v. *Ruler*, 2 M. & Ry. 3. A party to the suit in the Ecclesiastical Court cannot be admitted to show that the sentence has been fraudulently obtained. See *Prudham* v. *Phillips*, Ambl. 763. So one who has conveyed an estate in order to confer a colourable qualification to kill game cannot be admitted to allege his own fraud to defeat the conveyance. *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367. See *Hawe* v. *Leader*, Cro. J. 270; *Doe* v. *Banks*, 4 B. & A. 401, *supra*.

(*q*) The above is part of the judgment of L. C. J. De Grey, in the *Duchess of Kingston's Case*, St. Tr., in which the Judges came to the following resolutions:—First, that a sentence in a spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy; but, secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

(*r*) See tit. BANKRUPTCY.—COIN.—DECEIT.—FRAUDULENT CONVEYANCE.—FORGERY.—INTENTION. As to fraud on the insolvent law, see 4 B. & Ad. 555.

(*s*) See tit. BANKRUPTCY, 154; and see the observations of Buller, J., *Estwick* v. *Caillaud*, 5 T. R. 420

(*t*) See the authorities, 2 Powell on Devises, by Jarman, 29.

(*u*) Hawkins, P. C. b. 2, c. 49, s. 11.

(*x*) *Rann* v. *Hughes*, 7 T. R 350; 4 Bro. P. C. 27. *Barrel* v. *Trussel*, 4 Taunt. 121. Neither do they make it necessary to allege in a declaration that the promise is evidenced as the statute requires; but in a plea it is otherwise, if the agreement pleaded can have no effect unless it be in writing. Com. Dig. *Action on the Case*, F. 3. *Case* v. *Barber*, Ray. 450. The defence, no contract in writing, need not, it seems, be specially pleaded. *Buttermere* v. *Hayes*, 5 M. & W. 456; 7 Dowl. 489. *Jones* v. *Flint*, 2 P. & D. 594. See *Eastwood* v. *Kenyon*, 3 P. & D. 376.

into a discussion of the different clauses of this statute; little more is proposed than to refer briefly to the decisions upon the subject.

Sec. 1. Creation of estates, &c.

By sec. 1. "It is enacted, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of *leases or estates at will only.*"

Sec. 2. Exception as to leases.

Sec. 2. "Except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised."

It has been held, that the purchase of a standing crop of mowing grass is not within the first section (*y*), and that it does not apply to a parol agreement for an easement for seven years in the lands of another, such as a right of way or privilege of stacking coals (*z*).

But in the late case of *Hewlins* v. *Shippam* (*a*), it was held that a freehold easement in the land of another cannot be created without deed; and that although a parol demise might be an excuse for a trespass, until it was countermanded, yet that a right and title to such an easement, as to have passage for water, could not be created without deed.

"*Shall have the force and effect of leases or estates at will only.*"—Notwithstanding these words, where a tenant has held for two or three years under a parol demise for twenty-one years, he is to be considered a tenant from year to year (*b*), the year's tenancy commencing on the same day of the

(*y*) *Crosby* v. *Wadsworth*, 6 East, 610. But it is within the 4th section. Ibid.

(*z*) *Wood* v. *Lake*, Say. 3. *Webb* v. *Paternoster*, Palm. 71. Note, in the former case the party, in addition to the liberty of stacking hay, was also to have the use of the close, which distinguishes it from the latter case; and see note (*a*).

(*a*) 5 B. & C. 221. And although a freehold right was claimed in that case, the reasons given by the Court, and the authorities cited, seem to extend equally to licences for a mere definite term. See *Monk* v. *Baxter*, Cro. J. 574; *Rumsey* v. *Rawsun*, 1 Vent. 18; *Hoskins* v. *Robins*, 2 Vent. 123; *Harrison* v. *Parker*, 6 East, 754; *Fentiman* v. *Smith*, 4 East, 107. And the Court observed, that the objection that the right lay in grant, and therefore could not pass without deed, was not taken in the cases of *Webb* v. *Paternoster*, Palm. 71; *Wood* v. *Lake*, Sayer, 3, or *Taylor* v. *Waters*, 7 Taunt. 374. It is indeed to be observed that the first of these cases was decided before the Statute of Frauds was passed, and that the interest in the case of *Wood* v. *Lake* amounted to a lease, inasmuch as the party was to have the *sole* use of that part of the land on which he was to stack his coals. In the case of *Winter* v. *Brockwell*, 8 East, 308, the defendant put up the sky-light on his own land, and all that the Court decided was, that as the plaintiff had consented to the obstruction, he could not afterwards revoke it without reimbursing the defendant's expenses. In *Fentiman* v. *Smith*, 4 East, 107, where the plaintiff claimed to have passage for water by a tunnel over the plaintiff's land, Ld. Ellenborough held distinctly that "the title to have the water flowing in the tunnel could not pass by parol licence without deed." A parol licence to use an easement must at all events be express. *Bridges* v. *Blanchard*, 1 Ad. & Ell. 536. *Qu.* whether an easement to admit light without interruption from the owner of land adjoining the house of another may be without deed. *Ib.* And if so, whether it is countermandable. *Ib.* The taking tolls of a market without deed, does not confer a settlement. *R.* v. *Chipping Norton*, 5 East, 239. Per Ld. Ellenborough, no interest passes by the parol demise.

(*b*) *Clayton* v. *Blakey*, 8 T. R. 3. But note, that he had held for several years, and been treated as a yearly tenant. See Watkins's Principles of Conveyancing, 4th ed. 6, and his observations on the marginal note in the case of *Clayton* v. *Blakey*, 8 T. R. 3. See *Richardson* v. *Gifford*, 1 Ad. & Ell. 52; *infra*, tit. WASTE. *Semble*, that under an agreement for a tenancy exceeding three years, void for want of signature, the tenant is for the first year

year with the parol lease. Where there was a parol agreement for a lease for seven years, the tenant to enter at Lady-day, and quit at Candlemas, it was held, that the landlord could not put an end to the tenancy except at Candlemas, for the tenants in such cases are considered to be tenants from year to year; and although by the Statute of Frauds, the agreement be void as to the duration of the lease, it governs the terms on which the tenancy subsists in other respects (*c*). A parol lease for three years, to commence *in futuro*, is not good (*d*).

Where a party enters under a mere agreement for a future lease, he is a tenant at will only; if he pay a yearly rent he becomes a tenant from year to year, such tenancy being determinable on the execution of the lease according to the agreement. And though no rent be paid, the relation of landlord and tenant subsists, the party having entered with a view to a lease, and not with a view to a purchase.

Sec. 3. Assignments, surrenders of existing estates, and interests.

Sec. 3. enacts, "That no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be *assigned, granted* or *surrendered*, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

Assignments.

The statute has been held to extend to a parol *assignment* of a lease from year to year (*e*), and to surrenders of tenancies from year to year (*f*); and therefore a mere parol agreement between a landlord and tenant to determine the tenancy in the middle of a quarter is not binding (*g*).

The mere cancelling of a lease is not a sufficient surrender within this clause (*h*), but a surrender of a lease by deed may be effected by writing without deed, as where a mortgagee wrote upon the mortgage deed a receipt for principal and interest, adding, "I do release and discharge the within premises from the term of 500 years." (*i*).

Surrender by operation of law.

Or by act and operation of law.—The taking a new lease by parol is by operation of law a surrender of the old one (*k*), although it be by deed (*l*), provided it be a good one, and pass an interest according to the contract and intention of the parties, for otherwise the acceptance of it is no implied surrender of the old one (*m*). Where *A.* by parol, let a house to *B.* who

tenant at will, and afterwards from year to year, subject to stipulations.

(*c*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471. See Watkins's Elements of Conveyancing, 4; Hargrave's Notes to Co. Litt. 55; 4 Taunt. 128; where it was held that a letting without restriction as to time, creates a tenancy at will. See also Evans's Stat. vol. 1, p. 234.

(*d*) *Rawlins* v. *Turner*, 1 Ld. Raym. 736.

(*e*) *Botting* v. *Martin*, 1 Camp. 317, *cor.* Sir A. M'Donald, C. B.

(*f*) 2 Camp. 103; 2 Starkie's C. 379. And see *Magennis* v. *M'Cullough*, Gilb. Eq. C. 236.

(*g*) *Thomson* v. *Wilson*, 2 Starkie's C. 379. *Mollett* v. *Brayne*, 2 Camp. C. 103; *Johnstone* v. *Huddlestone*, 4 B. & C. 922; where an occupation took place under a new lease, under the mistaken idea that it was a good and valid lease.

(*h*) *Roe* v. *The Archbishop of York*, 6 East, 86.

(*i*) *Farmer* v. *Rogers*, 2 Wilson, 26.

(*k*) See 1 Will. Saund. 236, b. The principle on which the taking a new lease amounts to a surrender of the old one is this, that without it the intention of the parties cannot be effectuated. See Shepherd's Touchstone, tit. Surrender. If a sole tenant assent to occupy and does occupy jointly with another, that puts an end to the former tenancy. *Hamerton* v. *Stead*, 3 B. & C. 478; and see *Mellow* v. *May*, Moore, 636.

(*l*) Ibid.; and see *Thomas* v. *Cooke*, 2 Starkie's C. 410.

(*m*) *Wilson* v. *Sewell*, 4 Burr. 1980; *Davison* v. *Stanley*, Ibid. 2210; 1 Will. Saund. 236, b. and the cases there cited.

underlet it to *C.*, and then *A.*, with *B.*'s assent, accepted *C.* as his tenant and received rent from him, it was held that the substitution involved a surrender; for it was made with the assent of *B.*, which could not be without a surrender of the former lease (*n*). So where it was agreed between the landlord and tenant, that another tenant should be substituted for him, which was done, it was held that the first tenancy was thereby determined (*o*). Where the landlord having had a dispute with his tenant, told him that he might quit when he pleased, and the tenant accordingly quitted in the middle of the quarter, it was held that the landlord was entitled to recover in an action for use and occupation for the whole quarter (*p*). But where the landlord accepted from his tenant the key of the demised house in the middle of the quarter, it was held that the former could not recover in respect of any subsequent rent (*q*). The mere fact of a lease being found in a cancelled state, in the possession of the lessor, does not show a surrender in law, or conclusively show a determination of the lease (*r*).

Surrender by operation of law.

Sec. 4.—No *action* shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (*s*), or whereby to charge the defendant upon any special promise to answer for the *debt*, *default*, or *miscarriage* of another person, or to charge any person upon any agreement made upon consideration of *marriage*, or

Sec. 4. Executory promises and agreements.

(*n*) *Thomas* v. *Cooke*, 2 Starkie's C. 408, *cor.* Abbott, J. and afterwards by the Court of K. B. 2 B. & A. 119. So where the tenant took lodgings for a year, paid for one quarter, and for the interval between that time and the time of re-letting by the lessor; for the letting to another dispenses with the necessity for a surrender. *Walls* v. *Atcheson*, 3 Bing. 462. In the case of *Lloyd* v. *Crispie*, cited ib. by Parke, J., it was held, that where the lessor had consented to the introduction of another occupier he had no claim on the lessee, who was under covenant not to assign without license.

(*o*) *Stone* v. *Whiting*, 2 Starkie's C. 235, *cor.* Holroyd, J. And see *Whitehead* v. *Clifton*, 5 Taunt. 518; *Harding* v. *Crathorn*, 1 Esp. C. 57; *infra*, USE & OCCUPATION.

(*p*) *Mollett* v. *Brayne*, 2 Camp. 103, *cor.* Ld. Ellenborough, and afterwards by the Court of K. B. A lessee grants a lease for eleven years, covenanting to pay for tillages, &c. at the end of the term; a quarrel taking place during the term, the tenant says that he will go; the landlord says, "You may;" the tenant replies, "I shall expect to be paid for what I have laid out;" the landlord says nothing; the tenant quits: held that the landlord was entitled to a verdict, on a plea of set-off of the rent, to an action for work and labour; the tenancy not having, under the circumstances, been determined. *Whitaker* v. *Barker*, York Sum. Ass. 1832, *cor.* Parke, J. Held also, that the tenant, deserting the premises, was not entitled to the compensation for tillages, &c. stipulated for in the lease. Held also, that if the tenant had been entitled to a compensation on quitting, he might deduct it from the claim for rent set off, though not mentioned in his particulars. But note that Parke, J. intimated doubts whether such reduction was in strictness allowable.

(*q*) *Whitehead* v. *Clifford*, 5 Taunt. 518.

(*r*) A lease had been duly executed, and once in the lessee's possession, and the lease began to operate, but was afterwards found in the lessor's possession in a cancelled state; held, that as there was no surrender by operation of law, nor any ground for presuming that there had been any note in writing within the statute of frauds, the lease was to be considered as still in operation. *Doe* v. *Thomas*, 9 B. & C. 299. The plaintiff in trespass for seizing goods was the assignee of an under-lease granted by *G.*, one of the defendants, and no rent had been paid; the original lease to *G.* had also come by assignment to the other defendant, who had obtained a new lease from the lessors, and cancelled the old one; held that upon the general issue pleaded under the 11 G. 2, c. 19, s. 19, the defendant might justify as for a distress for the rent due in *G.*'s right, without showing any express recognition of the act by him, and that the notice having been given in the name of the other defendant, did not preclude the defendants from availing themselves of the title under *G.* in their defence to the action. Upon the construction of the stat. of frauds, the cancellation of the original lease was not of itself a surrender of such lease. *Wootley* v. *Gregory*, 2 Y. & J. 536.

(*s*) See *Rann* v. *Hughes*, 7 T. R. 350. A mere promise in writing without consideration will not bind the executor.

Sec. 4. upon any contract or *sale of lands*, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of *one year* from the making thereof, unless the *agreement* upon which such action shall be brought, or some *memorandum* or *note thereof*, shall be in *writing*, and *signed* by the party to be *charged* therewith, or some other person thereunto by him lawfully authorized."

Money paid on an executed consideration.

No action shall be brought.—The statute does not apply where an action is brought to recover money paid on an executed consideration for the use of the plaintiff, although by the operation of the statute the money could not have been recovered from the party who paid it. *A.* being the tenant of *B.* and restrained from assigning without the consent of *B.*, agreed to pay to *B.* 40*l.* out of 100*l.* to be paid to him by another tenant for the goodwill, if *B.*'s consent to the substitution could be obtained. The new tenant was cognizant of the agreement, took possession, and paid the money to *A.* who promised to pay the 40*l.* to *B.*; it was held that *B.* might recover the 40*l.* from *A.* as money had and received to the use of *B.* (*t*), for the consideration was *past*, and the statute out of the question, but it would have been otherwise if the new tenant had not paid the money, and the action had been brought against him (*u*).

Admission.

If the party admit that he has made an agreement which is binding under the statute, the admission renders the proofs prescribed by the statute unnecessary; as where he has paid money into court upon a count charging him with an agreement which could not have been proved, except through the medium of written evidence (*x*).

But if the party merely admit the fact that an agreement was made, but do not admit that an agreement was made in a manner which would be binding under the statute, the admission will not dispense with the statutory proof. If a party, in his answer in Chancery, admit the agreement generally, without insisting upon the statute, the Court will hold it to be good (*y*); but if the defendant merely admit an agreement in fact, and insist that it is void under the statute, the Court will not enforce it (*z*). So if a parol agreement be stated in a court of law, a demurrer would admit the agreement, and yet still advantage might be taken of the statute (*a*).

Debt of another.

Or to charge the defendant upon any special promise to answer for the *debt, default* (*b*), or *miscarriage* of any other person.

Where, therefore, there is no debt or default of another, the case is not within the statute. Where one brings an action against another for an assault, and the defendant, in consideration that the plaintiff will withdraw the record, undertakes to pay a sum of money and costs, he is liable (*c*), for

(*t*) *Griffith* v. *Young*, 12 East, 513.

(*u*) Per Le Blanc, J., 12 East, 513.

(*x*) *Middleton* v. *Brewer*, Peake's C. 15.

(*y*) Prec. in Chanc. 208. 374. 353; 2 H. Bl. 66.

(*z*) *Rondeau* v. *Wyatt*, 2 H. Bl. 66.

(*a*) 2 H. B. 68. By Ld. Loughborough, in delivering the judgment of the Court. This is to be understood of a demurrer to a plea which ought to show that the agreement was valid under the statute. An agreement void as to part, by the Statute of Frauds, from being verbal, is void in toto. *Chater* v. *Beckett*, 7 T. R. 201. Hence, an agreement for the sale of lands and chattels, if void as to the land by the Statute of Frauds, is void in toto. *Cork* v. *Tombs*, 2 Anst. 420. *Lea* v. *Barber*, Id. 425, n. And per Abbott, C. J., in *Mayfield* v. *Wadsley*, 3 B. & C. 361.

(*b*) Where the plaintiff, on a verbal promise of indemnity, consented to become bail, it was held to be a promise to answer for the debt or default of another within the Statute of Frauds. *Green* v. *Cresswell*, 2 P. & D. 430.

(*c*) *Read* v. *Nash*, 1 Wils. 305. This was on demurrer to the declaration, which did not allege that any assault had been committed. And see Burr. 1890, where Wilmot, J. observed, that it was not a promise to pay the debt of another person; the defendant was himself originally liable. See also *Stephens* v. *Squire*, 5 Mod. 205.

Sec. 4. Debt of another.

this is an *original promise*, and it does not appear that there has been any default or miscarriage of any other person. So where the plaintiff, at the request of the defendant, advanced a sum of money to pay workmen in the garden of the defendant's infant grandson, the case was held to be without the statute, the money having been advanced on the defendant's credit, for the infant was not liable (*d*); so where the defendant buys goods at an auction without naming his principal (*e*); so where the plaintiff, at the request of the defendant, discharged his debtor out of custody, charged in execution on a *ca. sa.* (*f*).

Question to whom the credit was given.

It is a question for the jury, whether the credit, before the debt was incurred, was given to the defendant, or to another as the principal, taking into their consideration the amount of the debt, the situation of the parties, and all the other circumstances of the case (*g*); if upon notice given by the defendant to the plaintiff to produce his books, it appear that the credit was not originally given to the defendant, but to another, it is strong but not conclusive (*h*) evidence against the plaintiff (*i*), that the defendant was but a surety. Where the vendor refuses to deliver goods on the credit of *A. B.* and the defendant undertakes absolutely to pay the amount, the promise need not be in writing, for this is in effect a sale to the defendant as principal, not to *A. B.*, to whom no credit was given.

So where the defendant is under a legal obligation to pay for a benefit received by another, the promise need not be in writing, as where an overseer promises to pay an apothecary for the cure of a pauper (*k*); but where it appears that another than the defendant is liable as the principal, the case is within the statute, unless the defendant bind himself upon an express promise, founded upon a new consideration, to pay the debt.

Where the person to whom the goods are furnished is liable, credit having been originally given to him (*l*), another is not liable without a note in writing. As where the promise is to see another paid for goods, or for labour supplied to a third person; as, to see a surgeon paid if he would cure *J. S.* of a wound (*m*). A promise to see the plaintiff paid amounts to a promise to pay (*n*); as where the defendant said, "You must supply my mother-in-law with bread, and I will see you paid" (*o*). In such cases the very form of the promise seems to imply the intention of the defendant to render himself liable as surety only, and points out the principal. So an undertaking by the defendant, that if the plaintiff would lend his gelding to *J. S.*, the latter would re-deliver it, is within the statute (*p*). And so it was held where the defendant said, "I will pay you if *J. S.* will not;" and the

(*d*) *Harris* v. *Huntbach*, 1 Burr. 373.

(*e*) *Simon* v. *Motivos*, 3 Burr. 1921.

(*f*) *Goodman* v. *Chase*, 1 B. & A. 297; for as between the plaintiff and his former debtor, the debt was satisfied.

(*g*) 1 B. & P. 158. Where a boy was placed in a school by his mother, and application was made to his uncle, who said it was quite right that the application should be made to him, for that he was answerable, that he could not conveniently pay then, but that when the next schooling became due he would pay altogether: it was held that it was properly left to the jury whether the original credit was not given to him. *Darnall* v. *Trott*, 2 C. & P. 82.

(*h*) *Keate* v. *Temple*, 1 B. & P. 158.

(*i*) *Croft* v. *Smallwood*, 1 Esp. C. 121. See *Legge* v. *Gibson*, Selw. 828, n.

(*k*) B. N. P. 281. And see 3 B. & P. 250; 4 M. & S. 275; 1 B. & A. 404.

(*l*) *Matson* v. *Wharam*, 2 T. R. 80. *Anderson* v. *Hayman*, 1 H. B. 120. *Lexington* v. *Clarke*, 2 Vent. 223.

(*m*) *Watkins* v. *Perkins*, Ld. Raym. 224. *Robinson* v. *Pulsford*, 1 Vent. 23; 2 Keb. 563.

(*n*) *Robinson* v. *Pulsford*, 1 Vent. 23; 2 Keb. 563.

(*o*) 2 T. R. 80; Cowp. 227.

(*p*) *Buckmyre* v. *Darnall*, Ld. Raym. 1085; Salk. 27; 6 Mod. 248.

Sec. 4. Debt of another.

goods were *afterwards* delivered (*q*). Where *A.*, falsely pretending that he was authorized by *B.* to order goods on his credit to be delivered to *C.*, promised to see the vendor paid, it was held that he was not liable, either on his promise, or for goods sold, but that he would be liable in an action on the case for the deceit (*r*). An undertaking to guarantee the payment of a note is within the statute (*s*).

A promise to pay the debt of another is not within the statute, unless the promise be made to the party to whom the other is answerable (*t*).

New consideration.

But next, any person may bind himself by an express parol promise, founded upon a new consideration, to pay the amount of another person's debt. As where *A.* having a lien upon policies of insurance in his hands, delivers them up to an agent of the owner, on an agreement that the defendant, the agent, will pay the amount of a bill drawn by his principal, and accepted by *A.* for the accommodation of the principal (*u*). The principle of this and similar cases seems to be very clear. *A.* had a right to retain the policies, and if the defendant had personally undertaken to pay him a sum of money in consideration of his giving up the policies, the doing so being a relinquishment of an advantage by the plaintiff, would have been a good consideration to enforce the payment of the money; but if the relinquishment would have been a good consideration to support a promise to pay money, why should it not be equally sufficient to support any other promise? If a promise by the defendant to pay 20 *l.* (the amount of the bill) would have been binding, why should not the promise to pay the amount of the bill specifically, be also binding? So where the plaintiff had a lien on goods for a debt due from *A. B.*, and the defendant, in consideration that the plaintiff would relinquish his lien, promised to pay the debt, it was held that the case was not within the statute (*x*). So where the plaintiff distrained for rent, and the defendant, an auctioneer, being in possession of the goods, and about to sell them for the benefit of the creditors, by virtue of a bill of sale made by the tenant, promised to pay the debt (*y*). So a promise to execute a bail-bond is not within the statute (*z*). So if *A.* be

(*q*) *Jones* v. *Cooper*, Cowp. 227. But see *Mawbray* v. *Cunningham*, Cowp. 228.

(*r*) *Thomson* v. *Bond*, 1 Camp. 4.

(*s*) *Ex parte Adney*, Cowp. 460.

(*t*) *Eastwood* v. *Kenyon*, 3 P. & D. 276. Such a defence need not be specially pleaded, *Ibid.*

(*u*) *Castling* v. *Aubert*, 2 East, 325. And see *Houlditch* v. *Milne*, 3 Esp. C. 87. *Barrell* v. *Trussell*, 4 Taunt. 117.

The plaintiff, an occupier of lands, at the request of the defendant resisted a suit by the vicar for tithes, upon a promise to pay him all costs which might be paid by him, held not to be within the statute; and to be available for the costs antecedently incurred. A payment of the costs by the plaintiff's attorney to the vicar is a payment by his agent, and it is immaterial in what way the latter settled this account with his principal; it is no objection, therefore, that the plaintiff had only paid him by giving him a promissory note for the amount. *Adams* v. *Dansey*, 6 Bing. 506. See ASSUMPSIT. *Money paid.*

So where the plaintiff, at the request of the defendant, became a co-surety with him in an indemnity-bond to a third person, the defendant undertaking to save the plaintiff harmless. *Thomas* v. *Cook*, 8 B. & C. 728. An auctioneer employed to sell goods on premises in respect of which rent is in arrear, the landlord applies for rent, saying, "It is better so to apply than to distrain," the auctioneer says, "You shall be paid, my clerk shall bring you the money," an action lies. *Bampton* v. *Paulin*, 4 Bing. 264. See *Thomas* v. *Williams*, 10 B. & C. 664.

(*x*) *Houlditch* v. *Milne*, 3 Esp. C. 86. *Williams* v. *Leper*, 2 Wils. 308. See *Keate* v. *Temple*, 1 B. & P. 158.

(*y*) *Williams* v. *Leper*, 3 Burr. 1886; 2 Wils. 308. *Castling* v. *Aubert*, 2 East, 325. 330. *Bampton* v. *Paulin*, 4 Bing. 264.

(*z*) *Jarmain* v. *Algar*, 1 R. & M. 348.

Sec. 4. Now consideration.

indebted to *B.*, assigns a debt due from *C.*, which the latter promises to pay to *B.* (*a*).

Where an accommodation acceptor defends an action at the request of the drawer, the case is not within the statute, and he may recover the costs as money paid to the use of the defendant (*b*). So if *J. S.* agree, in consideration of the asignment of a debt due to the plaintiff, to pay him 10 *s.* in the pound, the case is not within the statute (*c*).

But a promise to pay the debt of another, in consideration of *forbearance* to sue that other, has been held to be within the statute (*d*).

Where *A.* had wrongfully occasioned the death of *B.*'s horse, and *C.* promised to pay the damages, in consideration that *B.* would not sue *A.*, it was held, that the case was within both the intention of the statute, which was to prevent the commission of fraudulent practices by the means of perjury, and also within the words of the statute, inasmuch as the terms *miscarriage* and *default* applied to tortious acts, from which duties resulted independent of any contract (*e*), and the case was distinguished from that of *Read* v. *Nash* (*f*), because it did not appear that the defendant in the former action had ever been guilty of an assault, or been liable in damages.

A parol promise to pay the debt of another, and also to do some other thing, is void altogether, since the plaintiff cannot separate the two parts of the contract (*g*).

Promise to marry.

On any agreement made in consideration of marriage.—It seems to be fully settled that mutual promises to marry are not within the statute (*h*). Where a father promised his daughter 3,000 *l.* and died before her marriage, leaving her 2,000 *l.* only, and afterwards the husband hearing of the letter filed his bill to obtain the other 1,000 *l.*, it was dismissed, because the marriage was not contracted in *expectation* of 3,000 *l.* (*i*).

For the sale of lands.

Contract or sale of lands, &c.—The main distinction between this branch of the 4th section and the 1st section, is, that the 1st section relates to the actual creation of interests in lands, the *fourth* to executory contracts for the creation of such interests. A sale by auction is within this clause (*k*).

Interest in lands.

Lands, tenements or hereditaments, or any interest in or concerning them.—It has been held that a contract for the purchase of a growing crop of grass,

(*a*) Where a debtor of the plaintiffs, being arrested by them, executed an assignment of monies due to him from the defendants, who were partners in three several firms in London, Buenos Ayres, and Chili, a written notice of which assignment was sent to the partners carrying on the business in London, who promised that they would pay when they received the money, after a prior claim had been paid, and said that a notice to Chili would have made no difference: held, that such promise was not within the Statute of Frauds, as an undertaking to pay the debt of another; and that the admission by one partner was competent evidence to charge the others, and his promise binding upon them. *Lacy* v. *M'Neile*, 4 D. & R. 7.

(*b*) *Howes* v. *Martin*, 1 Esp. 162. But it has been held that a promise by the indorser of a dishonoured note to indemnify the holder, if he will sue the drawer, is within the statute. *Winckworth* v. *Mills*, 2 Esp. 484, *tam. qu.*; and see *Reade* v. *Nash*, 1 Wils. 305.

(*c*) *Anstey* v. *Marden*, 1 N. R. 124.

(*d*) *Rothery* v. *Curry*, B. N. P. 281. *Fish* v. *Hutchinson*, 2 Wils. 94; Ld. Raym. 1087; but see above, 477.

(*e*) *Kirkham* v. *Marter*, 2 B. & A. 613.

(*f*) 1 Wils. 305.

(*g*) *Chater* v. *Beckett*, 7 T. R. 201. *Thomas* v. *Williams*, 10 B. & C. 664. A promise by an auctioneer, about to sell the tenant's goods, made to a landlord to pay rent not then due, is void by the statute, Ibid.

(*h*) B. N. P. 280. *Harrison* v. *Cage*, Ld. Raym. 386; 1 Salk. 24. *Cocke* v. *Baker*, Str. 34, *contra*. *Philpot* v. *Wallett*, Skinn. 24; 3 Lev. 65.

(*i*) *Ayliff* v. *Tracy*, 2 P. Wms. 45.

(*k*) *Walker* v. *Constable*, 2 Esp. C. 659; 1 B. & P. 306. *Stansfield* v. *Johnson*, 1 Esp. C. 102.

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to be mown and made into hay by the vendor (*l*), and conferring a right to make a profit of the surface of the land, or for the sale of growing turnips, their maturity not being stated (*m*), or of growing trees for hop-poles (*n*), or for the abatement of the tenant's rent (*o*), for the grant of a rent-charge, or of a right of common, or to take lodgings (*p*), is within the statute.

But that a sale of mature potatoes, to be got immediately (*q*) (the contract merely conferring an easement, or right to come upon the land to carry away the potatoes); a contract for all the potatoes growing on certain land, to be dug and carried away by the purchaser, the potatoes alone being the subject-matter of the sale (*r*); a sale of timber growing (*s*); an agreement by *A.*, the owner of land, that *B.* should cultivate it, yielding to *A.* a moiety of the crops (*t*); a parol contract for an easement, such as a liberty to nail

(*l*) *Crosby* v. *Wadsworth*, 6 East, 602. Where a corporation were empowered to sell the aftermath of premises by writing; held, that their agent writing down the name of the highest bidder as purchaser, and his giving a promissory note for the price, could not be considered a sale in writing. *Symonds* v. *Ball*, 8 T. R. 151.

(*m*) *Emmerson* v. *Heelis*, 2 Taunt. 38. But *qu.* and see *Warwick* v. *Bruce*, 2 M. & S. 205. And see also *Waddington* v. *Bristow*, and 2 B. & P. 99.

(*n*) *Teal* v. *Auty*, 2 B. & B. 99.

(*o*) *O'Connor* v. *Spaight*, 1 Scho. & Lef. 306.

(*p*) Where upon an agreement by parol to take lodgings "for two or three years," to enter on a future day, before which the defendant upon inspecting declined taking them, and never entered; it was held, first, that it was an agreement for an interest in land within the statute, and, secondly, that use and occupation could not be maintained. The declaration contained two special counts, besides the counts for use and occupation; the first, upon an executory consideration, stating the demise to have been for two years, which could not therefore be supported, as being an untrue averment; the second stated, that in consideration that the plaintiff had demised, the defendant promised to enter and become tenant upon the terms stated, but there was no promise to pay the rent; and held, that as the plaintiff could only recover damages for the refusal to enter and become tenant, the relation of landlord and tenant never having been created, the plaintiff was precluded by the statute from recovering damages for breach of the agreement, there being no memorandum in writing. The effect of the statute upon parol leases is, that where valid as leases, the party may have a remedy upon them *quoad* leases, but not to sue for damages for not taking possession. *Edge* v. *Strafford*, 1 C. & J. 391.

(*q*) *Parker* v. *Staniland*, 11 East, 362.

(*r*) *Warwick* v. *Bruce*, 2 M. & S. 205. So where the contract was for a field of potatoes growing, the seller being to raise them from the ground at the request of the purchaser; for they are within the description of emblements, and are to be deemed chattels. *Evans* v. *Roberts*, 5 B. & C. 829; 8 D. & R. 611. A bargain between an occupier of a farm and one who succeeds him, for growing crops of wheat for a specific sum, the former telling the latter that if he does not take the wheat he shall not have the farm, is not a contract for land within the statute; per Bayley & Holroyd, Js. But per Littledale, J. if the giving up of the land was part of the consideration, it is a contract within the statute. *Mayfield* v. *Wadsley*, 3 B. & C. 357. Where there is a contract for land, and distinct contracts at specific sums for the dead stock, and the purchaser takes possession, an action lies for goods sold and delivered. Ibid. And crops agreed to be taken by an incoming of an outgoing tenant may be recovered under a count for goods bargained and sold; per Bayley & Holroyd, Js. Ibid. A contract by parol to purchase, at 2*s.* per sack, potatoes, growing (June), to have them at digging-time (October), and to find diggers, is not a contract for an interest in land within the statute. *Sainsbury* v. *Matthews*, 4 M. & W. 343. Where the defendant agreed by parol in August for a crop of growing corn, and the profit of the stubble afterwards, some potatoes growing, and whatever lay grass was in the fields, but the plaintiff was to have liberty for his cattle to run with the defendant's; the latter was to harvest the corn, and dig the potatoes, but the plaintiff to pay the tithes; held, that the introduction of the lay grass into the contract, as a matter of purchase and sale, although *per se* it might be taken to be an interest in land, yet it being consistent with an agisting by the owner of the vendor's cattle, and of the possession of the land still remaining with the former, the objection founded on the statute ought not to prevail. *Jones* v. *Flint*, 2 P. & D. 594.

(*s*) Per Treby J. 1 Ld. Raym. 182.

(*t*) *Poulter* v. *Killingbeck*, 1 B. & P. 397. And an appraisement of the value having been made for both parties, it was held that *A.* might recover for *goods sold and delivered.*

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the framework of a sky-light against a wall (*u*), or to stack coals in a yard, or use a way over the land of another (*x*), is not within the statute.

A parol agreement that an arbitrator shall determine between the parties whether a lease shall be granted, is within the statute (*y*). It seems to be now settled that an equitable mortgage, by the deposit of title deeds, is not within the statute (*z*). Neither is a collateral agreement by a lessee to pay a per centage on money laid out by the landlord on the premises (*a*).

It has frequently been held in equity, that a part performance takes the case out of the statute (*b*). Where the tenant agreed to pay the landlord 40*l.* out of 100*l.* for the good-will of the farm if he would receive another tenant, it was held that the defendant having received the 100*l.* was liable at law (*c*); so where the plaintiff let land in consideration of receiving half the crop, and the crop was appraised by mutual consent, it was held (*d*) that the statute was out of the question; so in equity, where the party has been put into possession (*e*), especially if he has incurred expense (*f*); or a man, upon promise of a lease, has laid out money in improvements (*g*); or a lessee enters and builds (*h*), but the permitting one already in possession to continue in possession is no part-performance of an agreement for a further lease (*i*). Where the bill stated it to be a part of the agreement that the contract should be reduced into writing, and in consequence of the agreement the party was put to expense, it was held that the bill would lie for the sum laid out, and an action at law was directed, and also that the agreement should be admitted (*k*). Where the act would not prejudice the party in case the agreement were not to be enforced, it is not to be considered as a part-performance (*l*). So where the act has been done with another view, and not with an intention to carry the agreement into effect (*m*); or where it is merely ancillary to the contract (*n*). An estate was sold at twenty-five years,

(*u*) *Winter* v. *Brockwell*, 8 East, 310, n.; 11 East, 366.

(*x*) *Wood* v. *Lake*, Say, 3. *Webb* v. *Paternoster*. But as to these cases, see *Hewlins* v. *Shippam*, *supra*, 473.

(*y*) *Walters* v. *Morgan*, 2 Cox's Chan. Ca. 369.

(*z*) *Russel* v. *Russel*, 1 Bro. Ch. 269. This is a matter of daily occurrence. 11 Ves. 403, 404, n.; 12 Ves. 197; 1 Evans's St. 235.

(*a*) *Hoby* v. *Roebuck*, 7 Taunt. 157. *A.* in 1792, grants a lease of a theatre to *B.* —*B.* covenanting not to grant rights of admission, except two hundred and fifty free admissions, without the consent of *A.*; and in case of any of the covenants being broken, the lease to be void. *B.* then assigns his interest to trustees, to receive the profits and pay the debts, &c. who leave *B.* in the management and direction of the concern; in the course of which, in 1799, *B.* grants a ticket of admission to *C.* for twenty-one years. In 1800, the trustees take possession of the theatre, but suffer *C.* to exercise his privilege of admission till 1814, when the ticket is stopped, on the ground that *B.* had no right to make such a grant: held that this was not an interest in land, but a license to *C.* to enjoy the privilege of admission; and therefore that it was not necessary that it should pass by deed, or that *B.* should have been authorized by the trustees in writing to make such a grant. *Taylor* v. *Waters*, 2 Marshall, 551; 7 Taunt. 374.

(*b*) *Griffith* v. *Young*, 12 East, 513. *Crosby* v. *Wadsworth*, 6 East, 602. *Ld. Aylesford's Case*, Str. 783. And this, it has been said, is on the ground of fraud. 1 Bro. C. C. 413. 417; 1 Ves. 221; Buller, J. (in *Brodie* v. *Paul*, 1 Ves. jun. 133), intimated an opinion that the same rule prevailed at law as in equity on this subject; but a contrary opinion was expressed by Ld. Eldon, in *Cooth* v. *Jackson*, 6 Ves. 29. See *Teal* v. *Auty*, 2 B. & B. 99, where the contract was for growing trees, which the defendant (the vendee) cut down and took away; and held that he might recover, the agreement being executed. See also above, 99.

(*c*) *Griffith* v. *Young*, 12 East, 513..

(*d*) *Poulter* v. *Killingbeck*, 1 B. & P. 397. And see 6 East, 612.

(*e*) *Pyke* v. *Williams*, 2 Vern. 445.

(*f*) 9 Mod. 37; Freem. 281. *Foxcroft* v. *Lister*, 2 Vern. 456. *Hoyd* v. *Buckland*, 2 Freem. 269.

(*g*) 1 Vern. 151; Prec. Ch. 561.

(*h*) 9 Mod. 37.

(*i*) *Smith* v. *Turner*, Prec. in Ch. 561.

(*k*) 1 Vern. 159.

(*l*) *Gunter* v. *Holme*, Amb. 586.

(*m*) Ibid.

(*n*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559.

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purchase, the tithes and timber to be taken at a valuation: it was held that the making the valuation and sending the abstract, did not amount to a part-performance (*o*). The receipt of earnest will not take the case out of the statute (*p*). Where *A.* articled for an estate in his own name, and *B.* alleged that the estate had been bought for him, but there was no written agreement or part-payment between them, it was held, that *B.* could not prove the fact by parol evidence (*q*).

Within one year.

Upon any agreement that is not to be performed within the space of one year, &c.—It has been held, that cases depending upon contingencies, which may or may not happen within the year, as upon the return of a ship, marriage, or death, the case is not within the statute (*r*), although the event does not in fact happen within the year (*s*). But where it appears to be the intention of the parties, that the agreement shall not be performed within the year, the case is within the statute (*t*), although part be performed within the year (*u*).

Agreement.

Unless the agreement, &c.—The term *agreement* comprehends *contracting parties*, a *consideration*, and a *promise*. Hence it is necessary that the names of the contracting parties should be stated (*x*).

Consideration.

The *consideration.*—A *promise* in writing to pay the debt of another, without specifying the consideration for the promise, has been held to be insufficient (*y*).

(*o*) *Whitbread* v. *Brookhurst*, 1 Bro. C. C. 404.

(*p*) Prec. in Chan. 560.

(*q*) *Bartlett* v. *Pickersgill*, 32 & 33 Geo. 2, in Chan. cited *R.* v. *Boston*, 4 East, 577.

(*r*) Salk. 289. Per Wilmot, J. 3 Burr. 1281. *Peter* v. *Compton*, Skinn. 353. Lord Raym. 317. *Fenton* v. *Emblers*, 3 Burr. 1278; where, in consideration that the plaintiff would become housekeeper to the defendant's testator, and take upon herself the care and management of his family, the testator undertook to pay her certain wages, and leave her an annuity. So where, in consideration that the plaintiff would not sue his debtor in his lifetime, the latter promised that his executor should pay him a stipulated sum. *Wells* v. *Horton*, 4 Bing. 40.

(*s*) Ibid. Lord Holt was of opinion that the contract could not be refused after the expiration of the year. Lord Raym. 317.

(*t*) According to the resolution of the Judges, in *Peter* v. *Compton*, Skinn. 353. A contract for the hire of a carriage for five years at so much per annum, is a contract not to be performed within a year, although by the custom the hirer was entitled to annul it at any time upon the terms of paying a year's hire. *Birch* v. *E. of Liverpool*, 9 B. & C. 392; and see *R.* v. *Hurstmonceaux*, 7 B. & C. 551.

(*u*) *Boydell* v. *Drummond*, 11 East, 142. *Bracegirdle* v. *Heald*, 1 B. & A. 722. Where the contract was for a year's service, to commence on a future day; part-performance in such case does not take it out of the statute. *Ib.*

(*x*) See the cases below, under the 17th section, and *Champion* v. *Plummer*, 1 N. R. 252; and the cases *infra*, note (*y*), and 483, note (*e*).

(*y*) *Wain* v. *Warlters*, 5 East, 10. The promise in that case was thus: "I will engage to pay you (the plaintiff), by half-past four this day, fifty-six pounds and expenses, or bill to that amount on Hall. J. W." The consideration was the forbearance to sue Hall. See *Egerton* v. *Mathews*, 6 East, 307. *Stadt* v. *Lill*, 9 East, 348. As to the case of *Wain* v. *Warlters*, which has excited so much legal discussion, see Lord Eldon's observations, *Ex parte Minet*, 14 Ves. 159. *Ex parte Gordon*, 15 Ves. 286. "To the amount of 100*l.* consider me as security on *J. C.*'s account" (signed and dated.) Held not a sufficient memorandum of an agreement to pay for the default of *J. C.* *Jenkins* v. *Reynolds*, 3 B. & B. 14. An engagement, in consideration of staying proceedings on a bill of exchange against *W. B.*, in these terms, "Mr. *W.* will engage to pay the bill drawn by *W. P.* in favour of *S. S.*" is insufficient. *Saunders* v. *Wakefield*, 4 B. & A. 595; see also *Goodman* v. *Chase*, 1 B. & A. 297; *Jenkins* v. *Reynolds*, 3 B. & B. 14. An engagement "to pay you on *T. L.*'s account, 50*l.* at the expiration of the usual credit, on the event of any deficiency on his part so to do," is insufficient. *Atkinson* v. *Carter*, 2 Ch. 403. *Pace* v. *Maule*, 1 Bing. 216. *Boehm* v. *Campbell*, 3 Moore, 15. *Stead* v. *Liddiard*, 1 Bing. 196; *infra*, 483. A promise by a third person to pay, if the creditor would not (as he was about to do) sell goods transferred by the debtor for the demand, and which was not shown to have

Where the defendant wrote a letter to the mortgagee of premises, stating that he had agreed to dispose of them, it was held to be insufficient, since it did not specify the terms of sale, or the sums, or number of houses (*z*). So an agreement for a lease at a certain rent, which did not specify the term (*a*), was held to be insufficient. But it is sufficient if the consideration appear by necessary inference and implication (*b*), or by reference to an agreement between the principal and the plaintiff indorsed on the other side of the paper (*c*). A letter written by the defendant to the plaintiff's attorney, requesting the plaintiff to give indulgence to a third person till a future day, when he (the defendant) would see the plaintiff paid, was held to be sufficient, although it did not specify the sum, which was allowed to be proved by parol evidence (*d*). Agreement.

A guarantee in writing, to pay for goods to be delivered by the vendor to a third person, sufficiently expresses the consideration (*e*).

So a memorandum, signed by the defendant, by which he agrees to give so much for goods, is sufficient; for the consideration is to be inferred from the agreement, viz. the sale and delivery of goods (*f*).

Or some memorandum or note thereof.—Under this section, as well as the 17th, the terms of the contract may be collected from several distinct papers, provided they be connected by reference from one to another; but it is not sufficient to connect them by mere extrinsic oral testimony (*g*). Thus, an agreement for a lease which does not specify any definite term, and which has no reference to an advertisement which does express the term, cannot be connected with it by oral evidence (*h*); and a letter, referring to some agreement generally, but without specifying the terms of it, is not sufficient (*i*). Note or memorandum.

been merely a mortgage, is not within the statute. *Barrell* v. *Trussell*, 4 Taunt. 117. "I hereby guarantee the present account of Miss *H. M.*, due to *S. & Co.*, of 112 *l.*, and what she may contract from this date," is sufficient under the statute of frauds. *Russell* v. *Moseley*, 3 B. & B. 211. So where the terms were, "I agree to be security to you for *J. C.*, late in the employ of *J. P.*, for whatever you may entrust him with while in your employ, to the amount of 50 *l.*" *Newbury* v. *Armstrong*, 6 Bing. 201. See further *Cole* v. *Dyer*, 9 Law Journal; *Ryder* v. *Curtis*, 8 D. & R. 62. *Shortrede* v. *Cheek*, 1 Ad. & Ell. 57.

(*z*) *Seagood* v. *Meale*, Pr. Ch. 560; 9 Ves. 250. 252; 11 Ves. 555.

(*a*) *Clinan* v. *Cooke*, 1 Scho. & Lef. 22.

(*b*) Per Lawrence, J. 6 East, 368.

(*c*) *Stead* v. *Liddiard*, 1 Bing. 196.

(*d*) *Bateman* v. *Phillips*, 15 East, 270. The letter was addressed to the plaintiff's attorney, and ran thus, "The bearer *D. W.* has a sum of money to receive from a client of mine, some day this next week; I trust that you will give him indulgence till that day, when I undertake to see you paid."

(*e*) *Stadt* v. *Lill*, 9 East, 348; 6 Esp. 89. In the following case the guarantee was held to be sufficient:—A letter stating that *J. S.* having accepted a bill drawn on him by the plaintiff for 1,026 *l.* he gave his guarantee for the due payment of the same in case it should be dishonoured by the acceptor. *Boehm* v. *Campbell*, 3 Moore, 15. "I hand you drafts drawn by *W.* and accepted by *B.* and indorsed by C.; should the bills not be honoured when due, I promise to see that they do so." *Morris* v. *Stacy*, Holt's C. 153. "*L.* having given his acceptance for freight (stating the particulars), I engage to be accountable to you should it not be paid when due." *Pace* v. *Marsh*, 1 Bing. 216. A consideration is sufficiently expressed in a guarantee in this form.—"I guarantee the payment of any goods which *A.* delivers to *B.*" *Stadt* v. *Lill*, 9 East, 348. "I hereby guarantee the present account of Miss *H. Moseley*, due to *Shortridge & Co.*, South Shields, and what she may contract from this date." *Russell* v. *Moseley*, 3 B. & B. 211.

(*f*) *Egerton* v. *Mathews*, 6 East, 307. Note, this was on the construction of the 17th sec.

(*g*) *Tawney* v. *Crowther*, 1 Bro. Ch. C. 161. 318.

(*h*) *Clinan* v. *Cooke*, Sch. & Lef. 22. Evans on the Stat. vol. 1, p. 237. *Seagood* v. *Meale*, Prec. in Chan. 560. *Clerk* v. *Wright*, 1 Atk. 12. *Whaley* v. *Bagenal*, 1 Bro. P.C. 345.

(*i*) Ibid. 1 Ves. jun. 326.

Note or memorandum.

Thus a reference in an agreement to such parts of another paper as have been read to the party, is insufficient (*k*).

And it is not essential that a note or memorandum of the agreement should have been delivered to the other party. A letter written by a man to his own agent, setting forth the terms of the agreement, has been held to be sufficient (*l*). So where the father wrote a letter to a friend of the plaintiff's, agreeing to give 500 *l.* to his daughter on her marriage, to be charged upon his land (*m*); but where the father wrote a letter to the daughter, after an agreement with the intended husband, in which he stated his agreement to leave her 3,000 *l.*, and that the matter was to be fully concluded the next day, was held to be a mere communication, and not binding, the husband having married the daughter in ignorance of the letter (*n*).

A proposal, by letter when acceded to by parol, is sufficient (*o*), although it be afterwards retracted and again agreed to by parol (*p*).

Where the defendant had written letters to different people, in which he stated that he had agreed to sell an estate to the plaintiff at twenty-one years' purchase, upon a bill filed for a specific performance, the plea of the statute was allowed (*q*); and, in general, a mere written statement of the party to be bound, of the terms of an agreement, will not be sufficient, unless it be either regularly signed as an agreement, or unless it appear that the party considered the agreement as complete. Thus, the writing instructions for a deed, unless the party subscribe or insert his name, so as to give authenticity to the document, is not binding (*r*). So where the counsel for a lady took down in writing a minute of the father's and intended husband's proposals for a settlement, and gave them to a clerk to prepare the deeds, and before they were drawn the father died, a bill for specific performance was dismissed, since there was no act of the party to indicate that he considered the agreement to be complete, and the neglect to sign it

(*k*) *Brodie* v. *St. Paul*, 1 Ves. jun.; and Evans on the Stat. vol. 1, p. 237, where the cases on this subject are collected. And see *Kain* v. *Old*, 2 B. & C. 627.

(*l*) Per Lord Hardwicke, 3 Atk. 503; 2 Ch. Rep. 147; 1 Vern. 110.

(*m*) *Moore* v. *Hart*, 2 Ch. R. 284; 1 Vern. 210.

(*n*) *Aylyffe* v. *Tracy*, 2 P. Wms. 65.

(*o*) *Coleman* v. *Upcot*, 5 Vin. 527.

(*p*) *Bird* v. *Blosse*, 2 Vent. 361. It has been said, that a proposal by letter, at first refused, but afterwards assented to, is binding. *Hodgson* v. *Hutchinson*, 5 Vin. 522; but see observations, 1 Evans's Stat. p. 230, n. 13. The defendant by letter agreed to take fixtures at an appraisement, and named *S.* as his appraiser; the plaintiff's appraiser and *S.* having met, but disagreeing, appointed an umpire, who completed the valuation; but the defendant, under pretext that he had not authorized such umpirage, refused to take the goods until after they had been removed, when he gave notice that he was ready to pay the amount *as settled* by the appraisers: held, that taking the correspondence and inventory and appraisement together, it amounted to a sufficient agreement within the statute; and that, considering the whole correspondence as taken together to form the contract, the whole was admissible, a stamp being affixed to the original letter. *Hemming* v. *Perry*, 2 M. & P. 375. It is sufficient to satisfy the statute if the agreement be in the form of a letter, signed by the party sought to be charged with it, though not signed by the plaintiffs seeking to enforce it; but where it does not contain the statement of all the terms, so as to require something more than a simple assent of the other party, it is not an agreement in writing within the statute. Where the proposed time of payment was to depend upon an act to be done by the other, at a time which he was to fix; held, that as it required him to supply a further term of the agreement, viz. that time, which had not been supplied in writing, the entire agreement was not in writing, and therefore no agreement within the statute. *Boys* v. *Ayherst*, 6 Mad. 316.

(*q*) *Whaley* v. *Baganal*, 6 Bro. C. C. 45. *Qu.* on what ground?

(*r*) *Stokes* v. *Moore*, 1 Cox's P. Wms. 771, n.

formally was evidence to show that it was left open to further consideration (*s*). Note or memorandum.

So general instructions for an agreement to be afterwards executed are not binding (*t*).

Signed by the party.—A signature by the party as a witness to a deed which contains the agreement, or which refers to it, is a sufficient signature within the statute (*u*); but it is essential to prove that the witness knew that the instrument contained the agreement, or referred to it (*x*). An agreement for the sale of a house, beginning, "I, *A. B.*," &c. in the handwriting of the vendor, but signed by the vendee only, is sufficient to bind the vendor (*y*). It is immaterial in what part of the instrument the signature is contained (*z*), whether at the beginning or end. The perusing and altering the draft of an intended lease is not a sufficient signature (*a*). Signature.

It is not essential that the signature should be upon the agreement itself; it is sufficient if it be indorsed on the draft of a lease, as a notification of the assent of the party to the terms of the lease, or if it be written in a letter or a memorandum which refers to the agreement (*b*).

Signed by the *party to be charged*.—It is sufficient if the agreement be signed by the party charged by it in the particular action, although it has not been signed by the other contracting party (*c*); for the writing is not the contract, but merely the evidence of it (*d*). The decisions on the corresponding clause in the 17th section are applicable to this clause (*e*). By party to be charged.

Or some other person thereunto by him lawfully authorized.—Proof of an oral authority is sufficient (*f*). So it is sufficient if the authority of the agent has been subsequently recognized (*g*). An auctioneer is the agent of the vendor under this section, as he is under the 17th; and his receipt for the deposit will be a sufficient memorandum of the contract, provided that it sufficiently express the terms, or virtually include them, by reference to other documents (*h*). It has been held that he is not an agent whose sig- Or other person lawfully authorized.

(*s*) *Bawdes* v. *Amherst*, Prac. Ch. 402. But see 3 Atk. 503.

(*t*) 2 Bro. C. C. 569.

(*u*) 1 Wils. 118; 1 Ves. 6; 3 Atk. 502.

(*x*) Ibid. Per Lord Hardwicke; and see the observations of Sir D. Evans, Evans on the Stat. vol. 1, p. 236.

(*y*) *Knight* v. *Crockford*, 1 Esp. C. 190. *Lemayne* v. *Stanley*, 3 Lev. 1. *Allen* v. *Bennett*, 3 Taunt. 169. *Welford* v. *Beezley*, 1 Wils. 118.

(*z*) *Ogilvie* v. *Foljambe*, 3 Merivale, 62. *Selby* v. *Selby*, Ibid. 6. *Knight* v. *Crockford*, 1 Esp. C. 189. *Right* d. *Cater* v. *Price*, 1 Dougl. 241. *Johnson* v. *Dodgson*, 2 M. & W. 653. But *qu.* whether the mere mention of the name of the defendant in the body of the testament, although it be drawn by himself, be sufficient. See *Stokes* v. *Moore*, 1 P. Wms. 790; 1 Cox's Cases, 222. Sugd. V. & P. 89. The signing by a party as a witness is sufficient, if he be cognizant of the contents. *Welford* v. *Beazley*, 3 Atk. 503. *Harding* v. *Crethorn*, 1 Esp. C. 58. But *qu.* and see the doubt expressed in *Gosbell* v. *Archer*, 4 N. & M. 485. Where the auctioneer's clerk signed the contract, "Witness, T. N." it was held not to be a signing by the agent of the party. But where a *principal* or *party to be bound* signs as a witness, which he cannot be, he cannot be understood to sign otherwise than as a principal. Per Lord Eldon in *Coles* v. *Trecothick*, 9 Ves. 234.

(*a*) *Hawkins* v. *Holmes*, 1 P. Wms. 770.

(*b*) *Shippey* v. *Derrison*, 5 Esp. C. 101. *Blagden* v. *Bradbear*, 12 Ves. 466.

(*c*) 3 Bro. C. C. 161. 318; Str. 236; 1 P. Wms. 618. *Hutton* v. *Gray*, 2 Ch. C. 64. *Seton* v. *Slade*, 7 Ves. 265; *vide etiam*, *Martin* v. *Mitchell*, 2 J. & W. 426; see 12 Ves. 107; *Westam* v. *Russell*, 3 V. & B. 192. *Semble, contra*, *Lawrenceson* v. *Butler*, 1 Sch. & Lef. 20. And see *Wheeler* v. *Collier*, M. & M. 125. *Laythorp* v. *Bryant*, 2 Bing. N. C. 735.

(*d*) See Evans on the Stat. vol. 1, p. 236.

(*e*) *Infra*, 492.

(*f*) *Coles* v. *Trecothick*, 9 Ves. 234. 250. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. *Aliter*, under the 1st and 3d sections.

(*g*) *Maclean* v. *Dunn*, 4 Bing. 722. *Gosbell* v. *Archer*, 4 N. & M. 492.

(*h*) 7 East, 569. *Blagden* v. *Bradbear*, 12 Ves. 471.

nature will bind the vendee (*i*), but this opinion seems to have been completely overruled in the subsequent cases of *Emmerson* v. *Heelis* (*k*), and *White* v. *Proctor* (*l*), which are consistent with the decisions upon the corresponding clause in the 17th section.

By agent.

Where, upon an agreement to sell a house for an annuity, both parties instructed one attorney, who made minutes of his instructions, as follows, "Mr. *B.* agrees to convey the house in consideration of a rent of 40 *l.* per annum; Mr. *W.* to take the stock at a fair appraisement;" a bill filed by *W.* for a specific performance was dismissed (*m*).

The clerk of an agent has not, in general, an authority to sign for the principal, although it may be sufficient in particular cases where the principal has assented (*n*). Where trustees were authorized to sell at the request of *A. B.*, it was held that their general consent did not constitute *A. B.* their agent, so as to enable him to make a contract (*o*). One of the parties cannot be agent for the other (*p*).

Sec. 17.

Sec. 17 (*q*).—No contract for the sale of any *goods, wares, and merchandizes*, for the price of 10 *l.*, or upwards, shall be allowed to be good, except the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or in part of payment, or that *some note or memorandum* in writing of the said bargain be made and signed by the *parties to be charged* by such contract, or their *agents* thereunto lawfully authorized.

Goods, wares, &c.

For the Sale of any Goods, Wares, and Merchandizes (*r*).—It seems that a

(*i*) *Stansfield* v. *Johnson*, 1 Esp. C. 102. See Lord Eldon's observations in *Coles* v. *Trecothick*, 9 Ves. 234; those of Sir W. Grant, *Buckmaster* v. *Harrop*, 7 Ves. 341; and *Higginson* v. *Clowes*, 15 Ves. 516; and of Lord Erskine, 13 Ves. 456.

(*k*) 2 Taunt. 38. See the observations of Mansfield, C. J. in this case.

(*l*) 4 Taunt. 209.

(*m*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559.

(*n*) *Coles* v. *Trecothick*, 9 Ves. 234. 250. Where an agent is authorized to sell at a particular price, a sale by his clerk in his absence without special authority is not binding. *Coles* v. *Trecothick*, 9 Ves. 234. *Henderson* v. *Barnewall*, 1 Y. & J. 380.

(*o*) *Mortlock* v. *Buller*, 10 Ves. 292.

(*p*) *Wright* v. *Dannah*, 2 Camp. 203. *Farebrother* v. *Simmons*, 5 B. & A. 333, which was decided on the 17th section; and therefore where the action is brought by an auctioneer, his signature is not sufficient. *Ibid.*

(*q*) For the decisions under the 5th section as to *wills*, see the title WILL.

(*r*) Upon a parol agreement that the plaintiff should furnish seed to the defendant, which he was to sow and harvest, and sell the crop at so much per bushel, Winchester measure; held, that it was to be deemed a contract for the sale of goods, and as it exceeded 10 *l.* was not binding, for want of a memorandum in writing. And it seems that since the 5 Geo. 4, c. 74, a contract for sale by Winchester measure is not valid. *Watts* v. *Friend*, 10 B. & C. 440. The defendant agreed by parol to purchase ash trees, which the plaintiff was felling, at 1 *s.* 6 *d.* per foot, but did not take them away, objecting that they were faulty and unsound; the plaintiff's attorney required him to pay for the timber he had purchased at that price, to which the defendant replied, by letter, that he bought the timber to be sound and good, that the plaintiff "promised to make it so, and now denies it, and which I have some doubts whether it is so or not; he told me I should not have any without all, so we agreed on these terms, and I expected him to sell to somebody else:" held, first that it was not a contract for the sale of any interest in lands, but for the sale of goods, wares, and merchandize, within the 17th section of the statute; 2d, that as the defendant's letter did not recognize the absolute contract stated in the plaintiff's attorney's letter, but a conditional one, and which might be denied by the plaintiff, there was not a sufficient note in writing to satisfy the stat.; and, lastly, that there being nothing to show that the defendant had divested himself of his right to object to the quality of the goods, or the seller to have lost his lien for the price, there was not a part acceptance or receipt of the goods into the defendant's possession to satisfy the statute and bind him. *Smith* v. *Surman*, 9 B. & C. 561. The words do not extend to shares in a banking company. *Humble* v. *Mitchell*, 3 P. & D. 141.

sale of stock is within the statute, although this has been doubted; since there can be no actual delivery or acceptance of the goods; and in one instance all the Judges were divided in opinion upon this point (*s*); but in two subsequent cases in equity the Court expressed an opinion such a sale was within the statute, and said that it had been so determined in other cases (*t*). In the case of *Simon* v. *Motivos*, Lord Mansfield, and Wilmot and Yates, Justices, expressed a doubt whether sales by *auction* were within the statute, on account of the great publicity with which such sales are attended (*u*). The words of the statute, however, are so plain and so general that it may be worthy of great consideration, whether the Courts would be warranted in overruling its application to sales by auction, on the ground, not that there is no danger of perjury, but because there may (and that is contingent) be less in such cases than in most others. The same reasons would apply with equal force to many other cases, such as sales in markets and fairs. It is also to be observed, that sales by auction of lands have been held to be within the 4th section of the same Act (*x*). Where the thing contracted for did not exist at the time of the contract, but was to be so constituted by the application of subsequent labour, and was consequently incapable of delivery or acceptance at the time of agreement, the contract was held not to be within this section of the statute, although the materials to be employed did exist at the time of contract. Thus a contract for a chariot to be made (*y*), or for the purchase of a quantity of oak pins, to be cut out of slabs and delivered to the buyer (*z*); or for a quantity of corn to be thrashed out (*a*), was not within the statute. But now, by the st. 9 Geo. 4, c. 14, s. 7, the former enactments are to take effect, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The former statute was held to extend to the sale of things which exist *in solido* at the time of the sale, although the contract were but executory (*b*), and although the goods were to be subsequently delivered at a different place (*c*).

Goods, wares, &c.

Sales by auction.

Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which at the time was not prepared and in a state capable of immediate delivery; held, that this was a contract for the sale of goods within the statute (*d*).

A contract to procure goods and carry them is not within the statute, for it is not a contract of sale (*e*).

A contract for the sale of shares in a canal navigation, or other public

(*s*) *Pickering* v. *Appleby*, 2 P. Wms. 307.

(*t*) Prec. Chan. 533; and see Ca. T. King, 41.

(*u*) In *Simon* v. *Motivos*, 1 Bl. 599. But the case was not decided upon that ground.

(*x*) See Lord Ellenborough's observations upon this point, in *Hinde* v. *Whitehouse*; and see *Heyman* v. *Neale*, 2 Camp. 337; 12 Ves. jun. 466. This is now so settled; *Kenworthy* v. *Scholefield*, 2 B. & C. 945.

(*y*) *Towers* v. *Osborne*, Str. 506.

(*z*) *Groves* v. *Buck*, 3 M. & S. 178.

(*a*) *Clayton* v. *Andrews*, 4 Bur. 2101.

(*b*) *Alexander* v. *Comber*, 1 H. B. 20. *Rondeau* v. *Wyatt*, 2 H. B. 63. *Cooper* v. *Elston*, 7 T. R. 14. Although the principle has in previous cases been laid down to that extent. See Str. 406; 2 Bur. 2101.

(*c*) *Cooper* v. *Elston*, 7 T. R. 14.

(*d*) *Garbutt* v. *Watson*, 5 B. & A. 613. So an agreement to furnish chimney-pieces at certain prices, and "to finish them in a tradesmanlike manner," was held to be a contract for the sale of goods requiring no stamp, and something remaining to be done before delivery made no difference. *Hughes* v. *Breeds*, 2 C. & P. 159.

(*e*) *Cobbold* v. *Caston*, 1 Bing. 399.

undertaking, need not be in writing, not being within the statute of frauds (*f*).

In order to constitute an acceptance within this clause, there must be such an actual parting with the possession as devests the vendor of his lien.

Where a party purchased several articles in a shop at separate prices, and some were severed from the bulk and marked by him; it was held, that the whole purchase was an entire contract, and being above 10 *l.* was within the statute, and no sufficient transfer and acceptance to bring it within the exception in the 17th clause, and that to satisfy the exception there must be an actual transfer and acceptance of the goods, or part thereof (*g*).

Part for acceptance.

Shall accept part of the goods so sold, and actually receive the same.—The sale of a mare for 20 *l.* to be returned if in foal, and part of the price to be paid back, is an entire and conditional contract, and the acceptance in the first instance takes the case out of the statute (*h*). Where the goods are ponderous, a constructive delivery is sufficient; as where the vendor delivers to the vendee the key of the place where the goods are deposited (*i*); or the muniments of a ship (*k*); or the vendee comes the next day and sees the goods weighed off (*l*); or sells part of the commodity sold to another, who removes it (*m*).

But an actual delivery and acceptance of part of the goods takes the case out of the statute; as where the vendee, having purchased a quantity of balsam of Peru for 200 *l.*, sent an agent with baskets for part of it, which was delivered (*n*). And if the purchaser take a sample, which is to be considered as part of the commodity contracted for, and not as a mere specimen, it is a part-acceptance within the statute (*o*).

Where goods were ordered by parol at 11 *s.* per pound, and were sent to the vendee, who opened the bale, but sent them back with a letter, alleging that they were not worth 6 *s.* per pound, it was held to be no acceptance (*p*).

(*f*) *Latham* v. *Barber*, 6 T. R. 67.

(*g*) *Baldney* v. *Parker*, 3 B. & C. 37; 3 D. & R. 220. Where goods were made to defendant's order, and he took away some part; held that it was not a sufficient acceptance of the goods within the statute, and that the plaintiff could not recover on the count for goods sold and delivered. *Thompson* v. *Maceroni*, 3 B. & Cr. 1; 4 D. & R. 619. The traveller of *A.* & Co. in London, having called upon *B.* in the country for orders, *B.* gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye, at a certain price; the traveller said the price was too low, but that he would write to his principals, and if *B.* did not hear from them in one or two days, he might consider that his offer was accepted. *A.* & Co. never wrote to *B.* but sent all the goods; held, that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within 29 Car. 2, c. 3, s. 17. *Price* v. *Lea*, 1 B. & C. 156. See *Hodgson* v. *Le Bret*, 1 Camp. 233. *Anderson* v. *Scott*, n. Ibid. In the latter case, the plaintiff having selected several pipes of wine in the defendant's cellar, and agreed for the purchase, cut off the spills or pegs by which the wine is tasted, and the defendant's clerk marked the plaintiff's initials on the casks; held to be a sufficient delivery. Where a joint order is given for several classes of goods, the acceptance of one class is a part-acceptance of the whole. *Elliott* v. *Thomas*, 3 M. & W. 170.

(*h*) *Williams* v. *Burgess*, 2 P. & D. 422

(*i*) *Searle* v. *Keeves*, 2 Esp. C. 598. *Peckerley* v. *Appleby*, Com. 354. *Colt* v. *Nethersoll*, 2 P. Wms. 308.

(*k*) 1 Atk. 171.

(*l*) *Simon* v. *Motivos*, 3 Burr. 1921; 1 Bl. 598.

(*m*) *Chaplin* v. *Rogers*, 1 East, 192.

(*n*) *Descard* v. *Bond*, *cor.* Lord Hardwicke, 7 Geo. 2. But where goods of the value of 144 *l.* are made to order, and remain in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter takes away, this is no acceptance of the residue. *Thompson* v. *Maceroni*, 3 B. & C. 1.

(*o*) *Hinde* v. *Whitehouse*, 7 East, 558. *Klinitz* v. *Surrey*, 5 Esp. C. 267. *Talver* v. *West*, Holt's C. 178. *Cooper* v. *Elston*, 7 T. R. 14.

(*p*) *Kent* v. *Huskisson*, 3 B. & P. 233.

Whether there has been an acceptance or not by the vendee, is in many instances a question of fact for the jury; the sale by the vendee of part of the commodity sold, is evidence of an acceptance for their consideration (*q*). Proof of acceptance.

A delivery to an agent (*r*) appointed by the vendee, as, for instance, a carrier, has been held to be an acceptance within the statute; although by requiring an *acceptance* of the goods, as well as an *actual receipt* of them, the Legislature seems to have intended some actual assent by the principal beyond that constructive assent which may be inferred from mere delivery to an agent (*s*). But in later cases this doctrine has been overruled; and the rule is, that so long as the buyer continues to have a right to object either to the quantity or quality of the goods, there can be no acceptance of the goods (*t*); and that so long as the seller retains a lien on the goods, there can be no receiving of them within the statute by the vendee (*u*). A dealer in London, in the habit of delivering goods at a wharf in London, delivered a parcel at the wharf on a parol order, and the goods having been lost, it was held that the vendee could not recover (*x*). Again, where a verbal order was given to the agent of the vendor for goods, which were to remain in the possession of the vendor till called for, and the agent measured the goods, and set them apart, it was held that there was no acceptance within the statute (*y*).

(*q*) *Chaplin* v. *Rogers*, 1 East, 192.

(*r*) Where the purchaser of two horses desired the vendor to keep them in his possession at livery, and the vendee in consequence removed them from one stable into another; it was held that the vendor himself might be considered as the agent of the vendee. *Elmore* v. *Stone*, 1 Taunt. 458. Where, upon the sale of a hogshead of wine in the London Dock warehouses, a delivery order only was given, but no contract in writing; held, that although the London Dock Company might be bound, when required, to hold the goods on account of the vendee, yet having originally held it as the agents of the vendors, there could be no acceptance by the vendee until the company accepted the order for delivery, and thereby assented to hold the wine as agents of the vendee. *Bentall* v. *Burn*, 3 B. & Cr. 423; 5 D. & R. 284.

A. agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the expiration of that time *A.* rode the horse, and gave directions as to its treatment, &c.; but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away, and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away; held, that there was no acceptance of the horse within the meaning of the Statute of Frauds. *Tempest* v. *Fitzgerald*, 3 B. & A. 680. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for twenty days, without any charge to the vendee; at that time the horse was sent to grass by the direction of vendee, and, by his desire, entered as the horse of one of the vendors. Held, that there was no acceptance of the horse by the vendee. *Carter* v. *Toussaint*, 5 B. & A. 855. Where a vendee verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares (then in vendor's possession, constituting part of a larger quantity in bulk), to remain in vendor's possession till called for, and the agent on his return home measured the twelve bushels, and set them apart for the vendor; held, that this did not amount to an acceptance by the latter, so as to take the case out of the statute. *Howe* v. *Palmer* 3 B. & A. 321.

(*s*) *Hart* v. *Sattley*, 3 Camp. 528, where it was held at Nisi Prius, that a delivery on a parol order to a carrier who had been in the habit of carrying goods from the vendor to the vendee, was a delivery to the vendee. See also *Dutton* v. *Solomonson*, 3 B. & P. 583; *Dawes* v. *Peck*, 8 T. R. 330.

(*t*) *Howe* v. *Palmer*, 3 B. & A. 321; *infra*, note (*y*); *Hanson* v. *Armitage*, 5 B. & A. 557.

(*u*) *Baldney* v. *Parker*, 3 B. & C. 37; *supra*, 488. *Carter* v. *Toussaint*, 5 B. & A. 855; *supra*, note (*r*). And see *Tempest* v. *Fitzgerald*, 3 B. & A. 680; *supra*, note (*r*).

(*x*) *Hanson* v. *Armitage*, 5 B. & A. 557.

(*y*) *Howe* v. *Palmer*, 3 B. & A. 321. And see *Astey* v. *Emery*, 4 M. & S. 262. *Anderson* v. *Hodgson*, 5 Price, 630. Where goods bought abroad were delivered at a foreign port on board a ship chartered by the purchaser, it was held to be no accept-

Proof of acceptance.

In order to satisfy the statute there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession as owner (*z*).

Where the law can pronounce on the facts of the case, whether they constitute an acceptance within the statute, the question is of course a question of law (*a*); but in other cases the question of law may depend upon the conclusion of the jury, whether there has or not been a delivery and acceptance in point of fact (*b*).

The detaining goods sent for approval, beyond a reasonable time, affords a presumption of acceptance (*c*).

Earnest.

Or giving something in earnest to bind the bargain, or in part payment.—The putting a shilling into the hand of the servant of the vendor, which is immediately returned, is not sufficient (*d*).

Note or memorandum.

Some note or memorandum.—It is sufficient if a contract can be collected from several different and separate documents, if they can be sufficiently connected (*e*). A bill of parcels, in which the vendor's name is printed, may be connected with a subsequent letter written by the vendor to the vendee (*f*). So an order for goods, written and signed by the vendor in a

ance. *Acebal* v. *Levy*, 10 Bing, 376; 4 M. & S. 217.

(*z*) Per C. *Phillips* v. *Bistolli*, 2 B. & C. 513. Bulk samples were sent by coach pursuant to contract, the defendant returned them as not answering the samples by which he bought; the jury found that they did answer the samples, but the Court held that there was no acceptance. *Johnson* v. *Dodgson*, 2 M. & W. 653. The use of more than was necessary for ascertaining the quality of goods does not amount to an acceptance. *Elliott* v. *Thomas*, 3 M. & W. 170.

Where the defendant ordered a machine to be made without stipulation as to price, and paid money on account when he saw it finished, admitted that it was made to order, requested the plaintiff to send it home, and afterwards (the maker having refused to deliver the machine without receiving the full amount, and having directed his attorney to proceed) said that he would endeavour to arrange if they would give him time, it was held to be a sufficient acceptance to enable the plaintiffs to recover for goods bargained and sold. *Elliott* v. *Pybus*, 10 Bing. 512; 4 M. & S. 389.

A. employed *B.* to make a waggon, and *before it was finished* employed a workman to fix upon it some iron-work and a tilt, and it was held that this did not amount to an acceptance. *Maberly* v. *Sheppard*, 10 Bing. 99. But per Tindal, C. J., it might have been otherwise if, at the time, the waggon had been finished.

(*a*) *Vide* Vol. I. tit. LAW AND FACT.

(*b*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597. Where an article was sold at an auction, by the conditions of which the purchaser was to pay 30 *per cent.* on the price, on being declared the highest bidder, and the residue before the goods were removed, and an article was knocked down to *A.* as the highest bidder, and delivered to him immediately, and after it had remained in his hands for a few minutes, he said he had mistaken the price, and refused to keep it, it was held to be a question of fact for the jury whether there had been a delivery by the seller, and an acceptance by the buyer, with intent to transfer the right of possession. *Phillips* v. *Bistolli*, 2 B. & C. 511. *Chaplin* v. *Rogers*, 1 East, 194. On an action for goods sold and delivered, the defendant, after a parol purchase of a stack of hay, sold part of it to a third person, by whom it was taken away without the vendor's approbation; it was left by Hotham, B. to the jury, to say whether there had been an acceptance by the defendant. After a verdict for the plaintiff, on a motion for a new trial, one ground of which was that the Judge had left matter of law as a fact for the jury, a new trial was refused; and Lord Kenyon and the rest of the Court held that the specific finding by the jury, that there was an acceptance, put an end to the question of law. But what constitutes an acceptance is frequently a question of law. Thus in *Hinde* v. *Whitehouse* (7 East, 558) it was held, that the accepting of samples of sugar delivered as part of the property purchased at an auction, was a sufficient acceptance in point of law.

(*c*) *Coleman* v. *Gibson*, 1 Mo. & R. 168.

(*d*) *Blenkinsop* v. *Clayton*. 7 Taunt. 597.

(*e*) *Infra*, 493.

(*f*) *Saunderson* v. *Jackson*, 2 B. & P. 238; *supra*, 483. The purchaser of a hundred sacks of good English seconds flour, at 45 *s.* a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100

book of the vendee's, but not naming the latter, may be connected with a letter written by the vendor to his agent, mentioning the name of the vendee (*g*); but where the letter, subsequently written by the vendee, recognized the order, but at the same time insisted that the terms of it had not been performed, inasmuch as the goods had not been delivered in time, it was held that it could not establish a previous defective memorandum (*h*). And it was held that parol evidence was inadmissible to show that there had been no stipulation as to time (*i*). Note or memorandum.

A material alteration of a written agreement by an oral one, substituting another day as the last of a period within which goods were to be delivered, is not binding (*k*).

If the said bargain be made or signed.—It has been held, that the word *bargain*, as used in this clause, does not render so strict a statement of the constituent and essential members of the contract necessary, as the word *agreement* does under the fourth section: a memorandum is sufficient to bind the defendant as the vendee, although it does not express the *consideration* for the promise (*l*), except by implication from the promise itself; but the note must express the names of both the contracting parties, and the price (*m*); and therefore a note signed by the vendor of goods, but not mentioning the buyer's name, is insufficient (*n*). Bargain.

sacks of good English seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make it into saleable bread; the sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. *L.* and *L.* consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount;" held, that a jury was warranted in concluding that the contract mentioned in the vendor's answer was the same as that particularized in the purchaser's letter, and that therefore the two writings constituted a sufficient memorandum of the contract, under the 17th sect. of the statute. *Cobbold* v. *Caston*, 1 Bing. 399. And see *Jackson* v. *Lowe*, *infra*, note (*m*).

(*g*) *Allen* v. *Bennet*, 3 Taunt. 169.

(*h*) *Cooper* v. *Smith*, 15 East, 103. So where the letter stated the goods had not arrived, and that if they did not arrive in a few days, the defendant (the alleged vendee) must get some elsewhere. *Richards* v. *Porter*, 6 B. & C. 437. See *Jackson* v. *Porter*, 1 Bing. 9.

(*i*) *Cooper* v. *Smith*, 15 East, 103.

(*k*) *Stead* v. *Dawber*, 2 P. & D. 447. Where the written contract stated a time and place for the delivery of goods, held that an alteration as to the time, to be binding, must be in writing. *Marshall* v. *Lynn*, 6 M. & W. 109; overruling *Cuff* v. *Penn*, 1 M. & Selw. 21.

(*l*) *Egerton* v. *Matthews*, 6 East, 307. But there the consideration did appear by necessary inference. *Vide supra*, 483.

(*m*) A memorandum given by the buyer assenting to take a horse if it turned out to be of the age represented, but which was silent as to price; held insufficient. *Elmore* v. *Kingscote*, 5 B. & C. 583. In the case of *Kain* v. *Old*, 2 B. & C. 627, which was one of contract for the sale of a ship, the Court seem to have been of opinion that the contract was imperfect, because it did not mention the price, and that the defect was not supplied by any extrinsic proof; for though the bill of sale mentioned the price, it did not mention any previous contract or agreement. In an action by the vendee of goods against the vendor, for breach of contract, a letter written by the plaintiff stating the terms of the contract, coupled with an answer written by the defendant's attorney, insisting that the contract has been performed *pro tanto*, is sufficient evidence of the contract. *Jackson* v. *Lowe*, 1 Bing. 9.

It seems, however, that the rule as to price is subject to this distinction and question, viz.: whether the omission be according to the intention of the parties to stipulate for a reasonable price, or be an imperfection in the statement of the contract, which in the latter case would be insufficient, whilst in the former, an intention to contract for a reasonable price may be presumed. *Hoadley* v. *M'Laine*, 10 Bing. 482; 4 M. & S. 340. In *Acebal* v. *Levy*, 10 Bing. 382, a further distinction was made in the latter case, between an *executed* and an *executory* contract; this, however, does not seem to be warranted by *Hoadley* v. *M'Laine*.

(*n*) *Champion* v. *Plummer*, 1 N. R. 252; *vide supra*, 483.

Signed by the parties.

Made or signed (o) by the parties.—A bill of parcels, in which the vendor's name is *printed*, is, it seems, a sufficient making or signing to bind the vendor (*p*), as a signing by him. But at all events a letter subsequently written to the vendee, admitting a contract, may be connected with the bill of parcels, to take the case out of the statute (*q*). So in *Schneider* v. *Norris* (*r*), where the name of the vendor (the defendant) in the bill of parcels was *printed*, but the defendant had written the vendee's name upon it, it was held to be a sufficient signature. An agreement, beginning "I, *A. B.* agree to sell," although not otherwise signed by the party, is sufficient to bind the vendor (*s*).

Signature.

By the parties *to be charged.*—It is sufficient if the memorandum be signed by the defendant, the vendor; though it was not signed by the plaintiff, the vendee; and although it could not have been enforced against the latter (*t*).

A memorandum signed only with the initials of the vendor, the name of the vendor nowhere appearing, is not sufficient (*u*).

By agent.

Or their agents thereunto lawfully authorized.—A broker is an agent for both parties, and they are bound by the contract which he makes, of which the bought-and-sold notes and his book are evidence (*v*). The authority of an agent who makes a contract in writing may be conferred (*x*) or ratified (*y*) orally.

In the case of sales by auction, it seems to be now settled that the auctioneer is an agent lawfully authorized by the buyer to sign a contract for him (*z*), though it is otherwise where the auctioneer himself brings the action (*a*). The authority in such case is given by bidding aloud; and where the name of the purchaser of different lots is written by the auctioneer opposite to the different articles for which the purchaser is the highest bidder, on the sale-bill, the memorandum is sufficient to satisfy the

(*o*) A signature in pencil is, it seems, sufficient. *Geary* v. *Physic*, 5 B. & C. 234. Note, that that was the case of an indorsement of a bill of exchange.

(*p*) *Saunderson* v. *Jackson*, 2 B. & P. 238. Note, in this case a letter referring to the contract was afterwards written by the vendor to the vendee; and note also, that the vendee's name appeared in the bill of parcels. See 1 N. R. 154.

(*q*) Ibid. In *Schneider* v. *Norris*, 2 M. & S. 286, Dampier, J. intimated that in the case of *Saunderson* v. *Jackson*, the case was taken out of the operation of the statute by the subsequent letter only.

(*r*) 2 M. & S. 286.

(*s*) *Knight* v. *Crockford*, 1 Esp. C. 190.

(*t*) *Allen* v. *Bennett*, 3 Taunt. 169; *supra*, 485.

(*u*) *Jacob* v. *Kirk*, 2 M. & R. 221.

(*v*) *Heyman* v. *Neale*, 2 Camp. 337; *Rucker* v. *Cammeyer*, 1 Esp. C. 105. Copies of an unsigned entry in the broker's book delivered to each party, held sufficient. *Goom* v. *Aflalo*, 6 B. & Cr. 117. Vide *infra*, 493, and tit. VENDOR AND VENDEE.

(*x*) *Acebal* v. *Levy*, 10 Bing. 378.

(*y*) *Maclean* v. *Dunn*, 4 Bing. 722.

(*z*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Simon* v. *Motivos*, 1 Bl. 599; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Phillimore* v. *Barry*, 1 Camp. 513. But where it was agreed between the owner of goods and his creditor that the price of goods bought by the latter should be set against the debt, it was held that the creditor was not bound by the printed conditions of sale, that purchasers should pay part of the price at the sale, and the rest on delivery. *Bartlett* v. *Purnell*, 4 Ad. & Ell. 792. It is sufficient if the agent's name appear in the contract; as where the auctioneer signs the name of an agent employed to purchase lands. *Kemesy* v. *Proctor*, 1 J. & W. 350; *White* v. *Proctor*, 4 Taunt. 209.

(*a*) Where an auctioneer wrote down the defendant's name, by his authority, opposite to the lot purchased; held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. *Farebrother* v. *Simmons*, 5 B. & A. 333.

statute (*b*). So where the auctioneer wrote the initials of the agent of the buyer's name, together with the prices, opposite to the lots purchased, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase (*c*). But where the auctioneer signs the name of a buyer on a mere catalogue of the goods, which is neither connected with, nor refers to the conditions of sale, which are read at the time of sale, it seems that this is not a memorandum of a contract of sale according to those conditions (*d*). A broker is the agent of both parties. Where regular bought-and-sold notes have been made out, they are the proper evidence of the contract (*e*). And the bought note alone is evidence of the contract for the purchaser (*f*). If the bought-and-sold notes materially differ (*g*), there is no contract (*h*). If no bought-and-sold notes have been made out, the broker's book signed by him will be evidence of the contract (*i*). By agent.

Where both the parties had agreed that *A. B.*, a broker, should manage a sale between them, for which they were in treaty, and the vendee some days afterwards informed *A. B.* that he had made the bargain, and desired him to put down the terms, which *A. B.* accordingly did, and then sent a sale-note to the vendor, and the vendee did not return the note, but in a conversation with *A. B.* some days afterwards regretted that she had sold the goods, it was held to be evidence to the jury of authority from the vendor to *A. B.* (*k*). But although the owner has authorized a broker to sell, and the latter has made a verbal contract with the vendee, the owner may revoke his authority to the broker at any time before the sale-note is made out (*l*).

Where the agent of the vendor wrote the note in the vendor's order-book, in the presence of the vendee, although he afterwards, at the desire of the vendee, the defendant, read it over to him, it was held that the signature was not sufficient (*m*); and it has been held, that one of the contracting parties could not be considered as the agent of the other, although the other overlooked him, and gave him directions as to the terms (*n*). Where the traveller of the vendor having, at a customer's request, signed his own name to the memorandum of the items ordered in his own book, it was held that, in the absence of any evidence of his being the agent of the vendor, it was not sufficient to bind him (*o*).

Where the defendant, a foreigner, carried on business in this country by an agent, who transacted the business in his own name, it was held, that the defendant having authorized the agent to deal for him in that name, it did not lie in his mouth to deny that the agent's name inserted by the

(*b*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Simon* v. *Motivos*, 1 Bl. 599.

(*c*) *Phillimore* v. *Barry*, 1 Camp. 513.

(*d*) *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 2 B. & C. 945. And see *Utterton* v. *Robins*, 1 A. & E. 423.

(*e*) *Thornton* v. *Meux*, M. & M. 43; *Goom* v. *Aflalo*, 6 B. & C. 117.

(*f*) *Hawes* v. *Forster*, 1 M. & R. 368. If the vendor insists on a variance he must produce the sold-note. But see *Smith* v. *Sparrow*, 2 C. & P. 544.

(*g*) Where the broker in the bought and-sold notes described the sellers' firm as *A.*, *B.* and *C.*, but the firm had in fact unknown to the broker been changed to *A.*, *D.* and *E.*, it was held that the latter might sue, the defendant suffering no prejudice by the mistake, and there being some evidence to show that the defendant recognized the subsistence of the contract. *Michael* v. *Lapage*, Holt's C. 253.

(*h*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Thornton* v. *Meux*, M. & M. 43; *Bold* v. *Rayner*, 1 M. & W. 343.

(*i*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Henderson* v. *Barnwall*, 1 Y. & J. 387.

(*k*) *Chapman* v. *Partridge*, 5 Esp. C. 256. Cor. Mansfield, C. J.

(*l*) *Farmer* v. *Robinson*, 2 Camp. 339, n.

(*m*) *Cooper* v. *Smith*, 15 East, 103.

(*n*) *Wright* v. *Dannah*, 2 Camp. 303.

(*o*) *Graham* v. *Musson*, 5 Bing. N. C. 603.

By agent.

broker in the sold-note was his own name of business, and that the statute, therefore, was sufficiently complied with; and that he remained liable on the agent's contracts until notice given to the world of his revocation of the authority (*p*).

It was held also, that it was not competent to him to show that in the particular trade, by custom, a party may reject the undisclosed principal, and look to the agent for the completion of the contract (*q*).

FRAUDULENT CONVEYANCE.

ACCORDING to the general rule of law, a man may not only dispose of his own property as he chooses, where there are no claims which ought in justice to be satisfied out of it, but even where such claims exist he may still elect which of his creditors he will satisfy in preference to others, who have not by any legal process acquired any lien (*r*) upon such property, or he may dispose of it by way of exchange or sale.

Thus far the law permits; but it would be contrary to the first principles of natural justice and considerations of policy and convenience to allow a debtor to defeat just claims, either by any voluntary transfer of his property by way of gift, or on a secret trust for his own use. And therefore the question between an execution creditor and one who claims as assignee from the debtor, usually is, whether the transfer was fraudulent as against creditors or purchasers. Fraud in such cases may be either an inference of law from the facts, or it may be a conclusion of fact for the jury.

Question of law, when.

Where the fraud can be collected from the instrument itself, or from the deed coupled with extrinsic circumstances, without any finding by the jury as to the intention of the party transferring, it is a question of law arising upon the facts; but when it depends on the real intention of the parties, that intention is a question of fact for the jury.

A voluntary conveyance of land without valuable consideration is fraudulent and void, as against a subsequent purchaser, under the stat. 27 Eliz. c. 4, without any finding of a fraudulent intention (*s*), and though he had notice of the prior conveyance.

But the question under the stat. 13 Eliz. c. 5 (*t*), is usually one of fact for

(*p*) *Trueman* v. *Loder*, 3 P. & D. 267.

(*q*) *Ibid.*

(*r*) See *Holbird* v. *Anderson*, 5 T. R. 236; *Estwicke* v. *Caillaud*, 5 T. R. 420; *Nunn* v. *Wilsmore*, 8 T. R. 521; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Meux* v. *Howell*, 4 East, 1.

(*s*) *Doe* d. *Otley* v. *Manning*, 9 East, 59, where the authorities on this subject are collected; and see *House* v. *Bullock*, 5 Co. 60. But although a purchaser for value may defeat a mere voluntary settlement, even where the purchaser had notice; yet it may be a question whether, considering the inadequacy of the price paid, the second conveyance was not in effect also a voluntary settlement contrived for the purpose of getting rid of the first. *Doe* d. *Parry* v. *James*, 16 East, 212. In 1772, a fourth part of an advowson was conveyed in consideration of 20 *s.*; held, that it was not to be deemed a mere formal sum, but that, coupled with "faithful service," might have been at the time an adequate consideration, and must prevail against a subsequent purchaser. *Gully* v. *Bp. of Exeter*, 5 Bing. 171; and 2 M. & P. 266. A party tenant for life, with power of jointuring, executed a settlement to trustees, vesting in them a term for securing pin-money to the wife for his life, and a jointure after his death, and by a separate deed covenanted not to sell or encumber the premises, or that if he should, or attempted to do so, that then the trustees might receive the rents, &c., and apply them for the maintenance of the wife and children, as they should think fit; the tenant for life afterwards granted certain redeemable annuities for valuable consideration, charged upon the same premises; held, that as against such incumbrances, the covenant was fraudulent and void. *Phipps* v. *Ld. Ennismore*, 4 Russ. 131.

(*t*) This stat. recites, that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions,

the jury, who are to decide on the question of intention, whether the act was a *bonâ fide* transaction, or was a trick and contrivance to defraud creditors.

Proof of fraud, continuing possession.

It has been held, that the absolute transfer of personal chattels without a delivery of possession, is not merely *evidence* of fraud, but is actually void for fraud (*u*); and therefore where a *creditor* took an absolute bill of sale of the debtor's goods, but left the debtor in possession, and after his death took possession of his goods, it was held that he was liable as executor *de son tort* (*x*). So if the possession taken be merely colourable, as where a creditor took possession on the 4th of April of the goods of a publican under a bill of sale, and the person in possession allowed the publican to serve out liquors and receive money as usual till the next day, when the goods were seized under an execution (*y*). So where the vendor remains jointly in possession with the servant of the vendee, the assignment is fraudulent and void against creditors (*z*). This however is a legal presumption, which is not absolutely conclusive as to fraud. The law is exceedingly jealous in cases where, notwithstanding an absolute sale, the former owner is permitted to retain the possession, especially where the transaction is of a secret nature. And justly so; for as, in the ordinary course of such dealings, a change of possession accompanies the transfer, the deviation naturally induces a suspicion of some improper practice or contrivance. And in the next place, such secret dealings are eminently calculated to deceive creditors, who are induced to give credit or to sue by the visible possession of property. Still the law does not prohibit a purchaser from permitting the owner from retaining possession; and in strictness it seems that such a transaction, though it may furnish strong evidence, yet still is not conclusive as to fraud. In the case of *Latimer* v. *Batson* (*a*), the goods of the Duke

have been contrived of malice, fraud, covin, collusion, &c. to delay, hinder or defraud, creditors and others of their just and lawful actions, suits, debts, accounts, damages, &c. enacts that every feoffment, &c. of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution made for any intent or purpose before declared and expressed, shall be, as against that person, his heirs, successors, executors, &c. whose actions, suits, &c. are or might be in anywise disturbed, hindered, delayed or defrauded, *utterly void*. By sec. 6, the Act is not to extend to any estate or interest in lands, &c. on good consideration, and *bonâ fide* lawfully conveyed to any person, &c. not having *notice* of such covin, &c. A conveyance not fraudulent within this statute, may yet be void in case of bankruptcy. *Semble*, that a fraudulent assignment within the meaning of the statute 13 Eliz. c. 5, in reality is none at all; a mere formal transfer, executed not to give the alienee the property, but only to induce a belief that it is vested in him, that he may hold it in trust for the debtor. *Pickstock* v. *Lyster*, 3 M. & S. 371. In all cases, however, the question of fraud must be decided by reference to the motives of the party making the deed or assignment. *Nunn* v. *Wilsmore*, 8 T. R. 521. A secret transfer is always a badge of fraud. *Mace* v. *Cammell*, Lofft, 782. A conveyance by a bill of sale is good against the party executing it, and against his assignees, although it be void as to third persons. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*u*) *Edwards* v. *Harben*, 2 T. R. 587. *Bamford* v. *Baron*, cited in the note. *Reid* v. *Blades*, 5 Taunt. 212; where it was held that a conveyance of chattels, unaccompanied by possession, was void, although the same instrument contained a valid mortgage of leasehold buildings in which the chattels were situated.

(*x*) *Edwards* v. *Harben*, 2 T. R. 587.

(*y*) *Paget* v. *Perchard*, 1 Esp. C. 205.

(*z*) *Wordall* v. *Smith*, 1 Camp. 333, per Lord Ellenborough. To defeat the execution by a bill of sale there must appear to have been a *bonâ fide* substantial change of possession. It is a mere mockery to put in another person to take possession conjointly with the former owner of the goods; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors. And see *Cadogan* v. *Kennet*, Cowp. 432. *Jarman* v. *Woollaton*, 3 T. R. 618. *Darley* v. *Smith*, 8 T. R. 82.

(*a*) 4 B. & C. 652. So in the case of *Eastwood* v. *Brown*, 1 Ry. & M. 312,

Fraudulent conveyance, continuance of possession.

of Marlborough were sold by the sheriff under an execution to the judgment creditor, who sold the goods to the plaintiff, who put a man into possession; the goods remained in the Duke's mansion, and were used by him as before the execution, but the circumstance of the execution was notorious in the neighbourhood; the sheriff again seized the goods under an execution against the goods of the Duke at the suit of another creditor. On an action brought against the sheriff, it was left by the learned Judge to the jury to say whether the sale to *B.* was a *bonâ fide* sale, for money paid by the plaintiff, and that if it was, he was entitled to the verdict, but that if the money was in reality paid by the Duke, and the sale to the plaintiff was colourable, they should find for the defendant. The jury found for the plaintiff; and the Court afterwards held that the jury were properly directed to give their verdict for the plaintiff, or the defendant, as they should find that the transaction was fair or fraudulent.

In *Twyne*'s case (*b*) the continuance of the vendor's possession was considered to be merely evidence of fraud. There, *A.* being indebted to *B.* and also to *C.* who brought his action, made a secret conveyance of his goods to *B.*, but continued in possession, and the conveyance was held to be fraudulent within the Act (*c*): 1st, because the gift was general; 2dly, because the donor continued in possession of the goods and used them as his own; and 3dly, because it was made pending the writ (*d*): and in the law of *Nisi Prius* (*e*) it is laid down that the donor's continuance in possession is not always a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes the bill of sale of them for securing the money (*f*). Great stress is always laid on the notoriety of the circumstances under which the party retains the possession: where it is known that he is not the real owner, his possession cannot mislead (*g*).

In the case of *Kidd* v. *Rawlinson* (*h*), *K., the plaintiff*, bought the goods

where there was an assignment of property without any change of possession, Abbott, L. C. J. left it to the jury to say whether it was done with intent to defeat or delay creditors.

(*b*) 3 Rep. 80.

(*c*) 13 Eliz. c. 5.

(*d*) B. N. P. 258. And it was said that it was not within the proviso of the Act; for although made on good consideration, it was not made *bonâ fide*.

(*e*) B. N. P. 258, cites Ca. R. B. 287.

(*f*) *Meggot* v. *Mills*, 1 Ld. Raym. 286; where Ld. Holt said, that if the goods had been assigned to any other creditor, the keeping possession of them would have made the bill of sale fraudulent as to other creditors; but that since the agreement was originally made for securing the money lent, it was good and honest.

(*g*) *Latimer* v. *Batson*, 4 B. & C. 652; *Leonard* v. *Baker*, 1 M. & S. 251. *Watkins* v. *Birch*, 4 Taunt. 823. In the case of *Jezeph* v. *Ingram*, 8 Taunt. 838, the sheriff having seized the property of *Newman*, a farmer, under a *fi. fa.*, *Dunk*, a creditor of *Newman*'s, advanced upwards of 400*l.* for *Newman*, to liberate the goods, and took an assignment from *Newman* of the lease and stock, to enable him to take possession of the farm, and discharge the sum advanced. *Newman* continued to reside on the premises, but *Dunk* managed the farm, and it was notorious in the neighbourhood that he had the management, though *Newman* continued to do some joint acts of ownership. In an action against the sheriff for a false return at the suit of a subsequent judgment creditor after a verdict for the plaintiff, Gibbs, C. J., on a motion for a new trial, admitted the general principle contended for by the plaintiff, that if a man sell goods and continue in possession, the sale is void, but thought the present case was distinguishable. A new trial was granted, and evidence was given that *Dunk* had paid all rates and taxes for the farm; had purchased stock; that *Newman*, as well as *Dunk*, had attended the markets; given orders respecting the cultivation of the farm; paid rents and taxes, and managed the business, but that *Dunk* had received all the proceeds, though he had not made all the payments: the jury, with the approbation of Dallas, J., found a verdict for the defendant, against which the plaintiff did not move.

(*h*) 2 B. & P. 59, cor. Lord Eldon. So if the goods of *A.* be sold under a *fi. fa.* to

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of *A.* from the sheriff, who sold publicly under an execution against *A.* (*K.* not being a creditor), and afterwards allowed *A.* (being a publican, to remain in possession, and afterwards *A.* made a bill of sale of the goods to *R., the defendant,* who took possession; the jury negatived any intention on the part of the plaintiff to defeat any execution by any creditor of *A.*, and the Court afterwards held that the plaintiff was entitled to recover. The case was distinguished from *Twyne's* by two circumstances, the notoriety and *publicity* of the sale, and the fact that *K.* the purchaser was not a *creditor*; and it was assimilated to the case in Buller's *Nisi Prius*, above referred to, and said that *K.* might be considered to have lent the money to *A.* and to have taken the bill of sale as a security.

It is to be observed, also, that there is another circumstance in the above case (which does not appear to have been adverted to) which very materially distinguishes it from *Twyne's*, viz. that the sale was not made by the party himself, but by the sheriff. The object of the statute was to prevent covinous and fraudulent sales by the owner to the prejudice of creditors, and not, as it seems, to sales made by a third person, as a sheriff under an execution, or a landlord under a distress, without proof of some fraud or collusion on the part of the owner, which in effect makes such a sale his own act. Where the sale is made *bonâ fide* by a third person, the subsequent possession by the debtor will not render it fraudulent, for the Act was not intended to prevent the legal owner of goods from allowing another person to keep possession of them.

Where a trustee, under an assignment by a tenant, for the benefit of creditors, bought the goods of the tenant out of the trust funds, under a sale by the landlord on a distress for rent, and afterwards allowed the tenant to continue in possession, it was held, in the absence of any evidence that the sale was colourable and fraudulent, that the goods were protected from an execution by a judgment creditor; and Lord Ellenborough said that the doctrine of possession did not apply to a case of conveyance, not by the party himself, but by a third person (*i*).

But a possession by the vendor, which *follows* and accompanies the deed, where the sale is not to take place immediately, but at a future specified time, or on a particular condition, does not avoid the transfer (*k*). But in

B. bonâ fide on a valuable consideration, and *B.* permit *A.* to remain in possession, on condition that he shall deliver over to *B.* the product from the sale of goods, the possession will not render the execution fraudulent; and on a subsequent bankruptcy the goods will not pass to the assignees of *A.* (*Cole* v. *Davies*, 1 Ld. Raym. 724.) So where a creditor took the goods of the debtor, who had confessed a judgment, in execution, and bought them at a public auction, and then let them to the debtor for rent actually paid. *Watkins* v. *Birch*, 4 Taunt. 823. And a bill of sale, although unaccompanied by possession, is valid against a creditor with whose knowledge and assent it was given. *Brown* v. *Parry*, 1 Taunt. 381.

(*i*) *Guthrie* v. *Wood*, 1 Starkie's C. 367. So, where the goods of a debtor were sold publicly by trustees under an assignment for the benefit of creditors, and the son of the wife of the debtor purchased the goods, and removed part, but left the rest in the possession of his mother, and for her accommodation, it was held that these were protected against an execution by a judgment-creditor, who had notice of the assignment. *Leonard* v. *Baker*, 1 M. & S. 251.

(*k*) Per Curiam, *Edwards* v. *Harben*, 2 T. R. 587; where the distinction between possession on an absolute sale, and possession under a conditional sale, was considered as having been long and decidedly established. And *Stone* v. *Grubham*, 2 Bulstrode, 218, was referred to, and *Bucknal* v. *Roiston*, Pr. in Ch. 287; and also the following cases, *Ld. Cadogan* v. *Kennett*, Cowp. 432, *Haslington* v. *Gill*, Trin. 24 Geo. 3, B. R., were cited to show that the bill of sale is not fraudulent for want of possession, where possession has *followed* the deed, although there was no immediate possession by the assignee. See also *Estwick* v. *Caillaud*, 5 T. R. 420; *Manton* v. *Moor*, 7 T. R. 67; and *supra*, tit. BANKRUPTCY.

Fraudulent conveyance, continuance of possession.

such cases, although the want of possession may cease to be a badge and evidence of fraud, yet the transaction is still liable to be impeached by other evidence of fraud, and it is particularly open to the inquiry, whether the interposing a delay between the execution of the transfer, and the time of taking possession, may not be part of the fraudulent contrivance.

It has been said that no conveyance shall be deemed to be fraudulent under the above statute, unless it can be proved that the party conveying the goods was indebted at the time of the conveyance, or nearly so (*l*), although there have been decisions to the contrary (*m*); for there would be a difficulty in showing that the object of the conveyance was to delay the creditor. Still it seems, that if a conveyance could be proved to have been made with a view to defraud a future creditor, it would be void under the statute (*n*).

An assignment by a defendant, pending the plaintiff's suit, of all his effects, for the benefit of his creditors, under which possession is immediately taken, is not fraudulent (*o*), although made to delay the plaintiff's execution; neither is it fraudulent to confess a judgment to one creditor in order to defeat the pending execution of another creditor (*p*), for a debtor, as well as an executor, may give preference to a particular creditor (*q*).

A conveyance is binding as to a party, though cancelled for fraud on one not a party (*r*).

FRIENDLY SOCIETY (*s*).

Friendly society, proof of Rules.

By the stat. 33 G. 3, c. 54, s. 13, all the rules, orders and regulations from time to time made by any such society in the manner directed by the Act, shall be forthwith entered into a book or books to be kept by one or more of the members of such society, to be appointed for that purpose, and shall be signed by the said members, and that such rules, orders and regulations, so entered and signed, shall be deemed original orders, and shall be received in evidence as such.

It seems that upon an indictment for not obeying an order of two justices

(*l*) B. N. P. 257. *Waller* v. *Burrows*, in Canc. 1745. *Taylor* v. *Jones*, 1743, Ibid. And see *Lush* v. *Wilkinson*, 5 Ves. 384; where, on a bill against the widow, by one who became a creditor subsequent to the settlement, Ld. Alvanley intimated that the proof of a single antecedent debt would not do, and that it must depend upon this, whether the husband was in insolvent circumstances at the time. And see *Russell* v. *Hammond*, 1 Atk. 15. *Middlecome* v. *Marlow*, 2 Atk. 220. *Ld. Townsend* v. *Wyndham*, 2 Ves. J. 10. In *Hungerford* v. *Earle*, 2 Vern. 216, the question as to the validity of a settlement against subsequent creditors was ordered to be tried at law. But see *White* v. *Hussey*, Prec. in Chan. 14.

(*m*) Both by Sir J. Jekyl and Fortescue, M. R., B. N. P. 257.

(*n*) See *Estwick* v. *Caillaud*, 5 T. R. 420. As to conveyances made to defraud a purchaser, see the stat. 27 Eliz. c. 4, and the notes, Evans's St. Vol. I. p. 382, *& sequent*.

(*o*) *Pickstock* v. *Lyster*, 3 M. & S. 371. See also *Meux* v. *Howell*, 4 East, 1.

(*p*) *Holbird* v. *Anderson*, 5 T. R. 4

(*q*) Ibid. and see *Tolputt* v. *Wells*, 1 M. & S. 395. *Estwick* v. *Caillaud*, 5 T. R. 424. *Stilman* v. *Ashdown*, 2 Atk. 477.

(*r*) 1 Madd. Ch. 345.

(*s*) See the st. 32 Geo. 3, c. 54, s. 13; 49 Geo. 3, c. 125; 59 Geo. 3, c. 128; 10 Geo. 4, c. 56; 3 & 4 Vict. c. 73. Those societies alone are contemplated by the Friendly Society Act, 33 Geo. 3, c. 54, whose objects are confined to the charitable relief and maintenance of their old, sick, and infirm members. *Rex* v. *Justices of Staffordshire*, 12 East, 280. Where the members have long ceased to act under their rules, held that they become dissolved, and the Court no longer has jurisdiction under the 33 Geo. 3, c. 54. *Norrish, Ex parte*, 1 Jac. (CH.) 162. As to actions on bonds given to such societies by innkeepers, and the construction of such bonds, see *Wyberg* v. *Ainsley*, 1 M. & Y. 669. An advance by the society of money to the highest bidder was held not to be usurious, although the interest exceeded the legal rate. *Silver* v. *Barnes*, 6 Bing. N. C. 180.

under 33 Geo. 3, c. 54, s. 15, commanding the defendants, as stewards and principal officers of a friendly society, to restore *A. B.* as a member, it must be shown, that by the constitution of the society, the defendants have the power to restore him (*t*).

Upon an indictment for disobedience of an order of justices to re-admit a party into a friendly society, reciting that it had appeared to the said justices that the rules had been enrolled; it was held, that as the justices would have had no authority, under the 33 Geo. 3, c. 54, s. 52, to make the order, unless the rules had been enrolled at the sessions, it was necessary to substantiate that fact by legal proof, and that the recital in the order was not, as against the defendants, legal evidence of that fact (*u*).

A bond given to the treasurer of a friendly society is good as at common law, though the rules have not been confirmed at the sessions, as required by the stat. 33 G. 3, c. 54 (*v*).

But plaintiffs cannot sue as stewards or trustees where they have been appointed under new rules, which have not been confirmed at the sessions (*x*).

By the rules, a medical attendant was to be entitled to a certain allowance for each member, and there was a clause that all disputes, &c. were to be settled by a committee, subject to an appeal to two justices; the plaintiff, the medical attendant, having been dismissed by the committee, another was appointed against his consent, and without any meeting of the members at large, but the majority of the members approved of him and still were attended by him: disputes having arisen as to the payment of the plaintiff's successor, upon reference to the justices they recommended a general meeting which was accordingly held, at which the plaintiff was by a large majority declared to be the surgeon; held, that the dismissal having been without authority, and the proceeding of the committee not *bonâ fide* for the investigation of any grievance, the plaintiff was entitled to recover from the treasurer the allowance received from the members for his services, notwithstanding he had paid it over to a wrong person (*y*).

GAME.

Information for using, &c.

Upon an information under the stat. 1 & 2 W. 4, c. 32, s. 23 (*z*), for using

(*t*) *R.* v. *Inge*, 2 Smith, 56; but see *R.* v. *Gash*, 1 Starkie's C. 441. The jurisdiction of the justices, under 33 Geo. 3, c. 54, s. 15, is confined strictly to the subject-matter of the *complaint* by the party aggrieved; where, therefore, the complaint against the stewards stated only the refusing relief to which the complainant was entitled, and the justices had awarded that the stewards should pay the sum due, with costs; and further that the party should be continued a member of the society: held, that the latter part of such order was illegal and void; and that an indictment, alleging that he had been expelled the society as well as deprived of relief, and that being aggrieved *thereby* he made complaint *thereof*, &c. was not supported in evidence by production of the order reciting the complaint and summons to answer one ground of complaint only; and the defendants entitled to an acquittal on this ground. *R.* v. *Soper*, 3 B. & C. 857; 5 D. & R. 669.

(*u*) *R.* v. *Gilkes*, 8 B. & C. 439; and now see 10 Geo. 4, c. 56.

(*v*) *Jones* v. *Wollam*, 5 B. & A. 769. See *Cartridge* v. *Griffiths*, 1 B. & A. 37; *infra*, tit. VARIANCE.

(*x*) *Batty* v. *Townrow*, 4 Camp. 5.

(*y*) *Garner* v. *Shelly*, 5 Bing. 477.

(*z*) The stat. 1 & 2 W. 4, c. 32, s. 23, enacts, that if any person shall kill or take any game *, or use any dog, gun, net, or other engine or instrument for the killing or taking of game, such person not being authorized so to do for want of a game certificate, he shall, on conviction before two justices, forfeit for every offence such sum of money not exceeding 5 *l.* as to the said justices shall seem meet, together with the costs of the conviction.

* If several join in the act of killing a hare, but one penalty can be recovered (*R.* v.

any dog (*a*), gun or other engine or instrument (*b*), for the purpose of searching for or killing or taking of game without a certificate, the proofs relate, 1st, to the keeping or using of the dog or instrument as alleged; 2ndly, within the county, &c.; 3dly, by an uncertificated person (*c*); and, 4thly, the commencement of the proceedings within due time (*d*).—1st, Whether the defendant *used* a dog or instrument for the destruction of game, is a question of fact depending on the acts done, and the *intention* (*e*) of the agent as collected from his declarations and conduct.

Proof of keeping a dog, &c. to kill game.

It is not necessary to prove an *using* in the very act of destroying game; the walking about with a gun, with the *intent* to kill game, is an using of it for the purpose (*f*). The intent, of which the magistrate ought to be satisfied in order to convict, is a fact to be presumed and inferred from the conduct of the defendant, and all the circumstances of the particular case. It is enough, if, upon the face of the conviction, such reasonable and *primâ facie* evidence of the intent appear as would have been sufficient in an action to have been left to a jury (*g*). This is sufficient to *support* the conviction; but to warrant the magistrate in convicting, the evidence ought to be such as to satisfy his conscience of the intent of the party to pursue *game* (*h*).

Evidence that the defendant, being an unqualified person, went out to course hares with one who was qualified, and that he took an active part in the sport, beating the bushes to find a hare, and in afterwards securing a hare which had been killed, was held to be insufficient evidence of an using by the defendant, under the stat. 5 Anne, c. 14; for he did not use dogs himself (*i*), they were not under his control. But it seems that if an unqua-

(*a*) It was held that a hound was not within the stat. 5 Ann. c. 14; *Hooker* v. *Wilks*, 2 Str. 1126; nor within the stat. 22 & 23 C. 2, c. 25, s. 3; and therefore that a gamekeeper could not seize a hound within the manor. *Grant* v. *Hulton*, 1 B. & A. 134.

(*b*) The word engine applies to any instrument by which game may be destroyed. *R* v. *Filer*, Str. 496. *Reason* v. *Lisle*, 2 Com. 576. Where an engine may be kept for either of two purposes, the one lawful, the other unlawful, the presumption will be in favour of the legal purpose. *Wingfield* v. *Stentford*, 1 Wils. 315.

(*c*) See the st. 28 G. 3, c. 50, s. 2; 52 G. 3, c. 93, s. 1. 10. 12, 13.

(*d*) By sec. 41, the prosecution for every offence punishable upon a summary conviction, shall be commenced within three calendar months after the commission of the offence.

(*e*) An accidental killing of game is not penal; *Molton* v. *Cheesely*, 1 Esp. C. 123; but it was penal to take away the game so killed. Ibid. The mere keeping of a dog or instrument, though with intent to use it for the destruction of game, is not penal under the late Act.

(*f*) *R.* v. *King*, Sess. C. 88, per Parker, C. J. See also *Hebden* v. *Hentey*, 1 Ch. 607.

(*g*) *R.* v. *Davis*, 6 T. R. 177.

(*h*) See Mr. Christian's observations, in his Game Laws, 157, 158.

(*i*) *Lewis* v. *Taylor*, 16 East, 49, overruling a case said to have been ruled by Lawrence, J., Stafford. Lent Ass. 1804. And see *R.* v. *Taylor*, 15 East, 462; where it was held that a groom attending his qualified master whilst he used dogs for killing game, and pursuing it by his master's command, was not liable to the penalties of the stat. And see *R.* v. *Newman & others*, Loft's R. 178, and *Molton* v. *Rogers*, 4 Esp. C. 217; where Lord Ellenborough gave his opinion that an unqualified person joining in the sport with the owner of the dogs who was qualified, was not liable to the penalty.

Bleasdale, 4 T. R. 809; *Hardyman* v. *Whitacre*, B. N. P. 189; 2 East, 573, in note); but if the acts be several and distinct, as if each use a gun, or set a snare, each is subject to a distinct penalty (Christian's G. L. 161). It has even been held, that if a person kill several hares in the same day, he forfeits but one penalty (*R.* v. *Matthews*, 10 Mod. 26; and per Ld. Kenyon, in *R.* v. *Lovet*, 7 T. R. 153; *Marriott* v. *Shaw*, Com. 274; *R.* v. *Blaney*, And. 240); but he may be convicted at the same time in several penalties, in respect of so many offences committed on several days. *R.* v. *Swallow*, 8 T. R. 284. *See* below, tit. JUSTICES.

lified person had used his own greyhound for the purpose of sporting, although in company with a qualified person, the case would have admitted of a different consideration (*k*). If an unqualified person sought to protect himself by the qualification of another, it was incumbent upon him to give strict proof of the qualification (*l*). The same principles would probably be applied to the case of an uncertificated person under the late Act (*m*).

The plaintiff may rely on any offence committed by the defendant within three months before the commencement of the action, although the fact was not then known to the plaintiff (*n*).

County, parish, &c.

2dly, *Within the county, &c.*—If a man, standing in one parish or county, shoot at game in another, he uses the gun in the district in which he stands (*o*).

The late Act, s. 37, enacts, that every penalty and forfeiture for any offence against that Act, the application of which has not otherwise been provided for, shall be paid to some one of the overseers of the poor, or to some other officer, as the convicting justice or justices may direct, of the parish, township or place in which such offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding or division, in which such parish, township or place shall be situate, whether the same shall or shall not contribute to such general rate. But that no inhabitant of such county, riding or division, shall be deemed an incompetent witness in any proceeding under the Act, by reason of the application of such penalty or forfeiture to the use of the said general rate.

Want of certificate.

3dly, *The want of a certificate.*—After proof has been given of the keeping or using, &c. it lies on the defendant to prove his certificate. The late stat. s. 42, expressly provides, that it shall not be necessary, in any proceeding against any person under that Act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence, but that the party seeking to avail himself of any such certificate shall be bound to prove the same (*p*).

As gamekeeper.

If the defendant justify killing game as a gamekeeper, he must produce and prove his deputation from the lord of the manor (*q*), and show that he is the lord of such manor (*r*). Where the defendant proved a deputation to

(*k*) Per Ld. Ellenborough, *Lewis* v. *Taylor*, 16 East, 49. But though an unqualified person bring his own dogs into the field, the penalty does not attach if he brought them as a loan to the qualified person. Ibid. Where the defendant, alleged to have been acting as the steward of a qualified person sporting himself, used the gun and killed game, held, that such could not be deemed the act of the master, and that he was properly convicted. *Ex parte Sylvester*, 9 B. & C. 61.

(*l*) *Clarke* v. *Broughton*, 3 Camp. C. 328.

(*m*) By the stat. 54 G. 3, c. 141, such of the duties in the schedule of the Act 52 G. 3, c. 93, as relate to persons assisting or intending to aid and assist in taking or killing of any game, woodcock, snipe, quail, landrail, or coney, shall cease and determine, provided the assistance is given to another who has obtained his certificate, and then use his own dog, gun, or other engine, and who shall act by virtue of any deputation or appointment.

(*n*) *Rushworth* v. *Craven*, 1 M. & Y. 417.

(*o*) *R.* v. *Alsop*, 1 Show. 339. See tit. PENAL ACTION.

(*p*) So in actions, and even informations before justices, under the stat. of Anne, for using a gun, &c. without qualification, it was held to be unnecessary to negative the qualification by evidence.

(*q*) See the stat. 22 & 23 C. 2, s. 25, 9 Anne, c. 25, s. 1, and 48 G. 3, c. 93, repealed by the stat. 1 & 2 W. 4, c. 32; and the provision of the latter statute as to gamekeepers, *infra*, 505. Although the gamekeeper be appointed by one who is not in fact lord of the manor, yet if he be considered such, the gamekeeper will not be personally liable to penalties. *Smyth* v. *Jefferies*, 9 Price, 257. *Hunt* v. *Andrews*, 3 B. & A. 341.

(*r*) *Calcraft* v. *Gibbs*, 4 T. R. 681.

kill game for the use of the lord of the manor, it was held, that it might be presumed that the game which he killed was intended for the use of the lord, there being no evidence to the contrary (*s*).

Title to the manor.

The Courts will not allow the title to a manor to be tried in an action for penalties, although the parties consent to do so (*t*). It is sufficient, therefore, to show a colourable title as lord of a manor, as by proof of seisin in fact, and the exercise of manorial rights (*u*), the appointment of gamekeepers from time to time, the enrolment of their deputations with the clerk of the peace, and the grant of certificates to such gamekeepers. And for this purpose the enrolment books of deputations kept in the office of the clerk of the peace are admissible in evidence, without the production and proof of the deputations themselves (*x*). So the holding of manor courts (*y*), and acts of cutting down timber on the wastes (*z*), are admissible in evidence for the purpose of establishing the title to the manor. But it is no defence that the defendant acted as gamekeeper under a *bonâ fide* belief that his principal was really entitled to the manor, there being no ground for the claim (*a*). And evidence of the real title to the manor is admissible, in order to negative the evidence of a colourable title (*b*), and, as is said, to show that the claimant *knew* that he had no real title (*c*); and for this purpose it is competent to the plaintiff to show, by the enrolment book of the deputations, kept in the office of the deputy clerk of the peace, that manorial rights had been long exercised by the party, and his ancestors, who were legally entitled to the manor.

The boundaries of a manor cannot be tried in an action for penalties (*d*).

Within due time.

4thly, *Within due time.*—That is, within three calendar months, by sec. 41 of the late Act. In the case of an information under the stat. 5 Anne, c. 14, it was necessary that the conviction should be within three months. As to proof of the commencement of a prosecution for penalties, see tit. TIME.

Hawkins v. *Bailey*; *Blunt* v. *Grimes*, cited ibid. A college may appoint a gamekeeper under their seal. *Spurrier* v. *Vale*, 10 East, 413.

(*s*) *Spurrier* v. *Vale*, 10 East, 413; *i. e.* in an action for sporting without a qualification. The defendant had a deputation under New College, Oxford, was a gardener, and lived in the house of a stranger to the manor.

(*t*) *Blunt* v. *Grimes*, 4 T. R. 682. *Calcraft* v. *Gibbs*, Ibid. 681.

(*u*) Ibid. Evidence of reputation alone is not sufficient. *Rushworth* v. *Craven*, 1 M. & Y. 417. Neither is the mere production of a deed, not enrolled (though in a register county), a sufficient foundation for such evidence. Ib.

(*x*) *Hunt* v. *Andrews*, 3 B. & A. 341. For the Act of Parliament directs a certificate to be made upon a stamp, and it is the duty of the officer to keep a list of the certificates granted; and as it is his duty to register deputations, the register is a public document made by an authorized officer. Ibid. And it seems that they are not evidence merely to show that such enrolments were made, but also to show that those who caused them to be made exercised rights as lords of the manor. Ibid. per Bayley, J. See *Kinnersley* v. *Orpe*, Doug. 56.

(*y*) But a court is a matter of distinct grant, and does not necessarily belong to a lord of a manor. 3 B. & A. 348.

(*z*) But the felling of timber is a right belonging to the owner of the soil, and not to the lord of the manor. Per Abbott, C. J. 3 B. & A. 347.

(*a*) *Calcraft* v. *Gibbs*, 4 T. R. 681; 5 T. R. 19. Mr. Roebuck had purchased from the plaintiff (lord of the manor of Northfleet) an estate called Ingress, lying within the manor, and it had been agreed that Mr. Roebuck should have the deputation, and two certificates had been granted to the defendant as the gamekeeper of Mr. Roebuck.

(*b*) *Hunt* v. *Andrews*, 3 B. & A. 341.

(*c*) Ibid.

(*d*) It appeared that the defendant, as gamekeeper to Sir R. Hoare, of his manor of Brixton, had constantly shot over the place where the pheasant was killed. No evidence having been given to show that the place was out of the manor, Buller, J. nonsuited the plaintiff, saying, that he would not in such an action try the boundaries of a manor. *Hawkins* v. *Bailey*, 4 T. R. 681, in the note.

Information for buying or selling, &c.

The stat. 1 & 2 W. 4, c. 32, s. 4, enacts, that if any person (though licensed to deal in game as the Act directs) shall buy or sell, or knowingly (*f*) have in his house, shop, stall, possession or control, any bird of game after the expiration of ten days, one inclusive and the other exclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively; or if any person, not being licensed to deal in game by virtue of that Act, shall buy or sell any kind of game after the expiration of ten days, one inclusive, the other exclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively, or shall knowingly have in his house, possession or control, any bird of game (except birds of game kept in a mew or breeding place,) after the expiration of forty days, one exclusive, the other inclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game as aforesaid, he shall forfeit for every head of game, &c. such sum not exceeding 1*l.* as to the convicting justices shall seem meet, together with the costs of conviction.

It was held under the stat. 9 Anne, c. 25, s. 2 (now repealed), that a mere possession of game by an unqualified person might be explained by evidence to be a lawful possession, for otherwise no case could be stated in which an unqualified person could innocently come in contact with game. And therefore, where the defendant, being a carpenter, employed by the lord of a manor, and having directions from him to detect poachers, took a hare from the dog, which the plaintiff had killed in coursing on the master's manor, and carried it to his master's steward, according to his directions, notwithstanding the claim made by the plaintiff, it was held that this was not an unlawful possession within the statute, being rather for the protection of game than a breach of the laws for preserving it (*g*). "It might as well be said (observed Lord Ellenborough), that if a qualified person, returning home with a bag of game, were to fall from his horse, another could not lawfully take up the bag in order to assist the owner; or, that if a person seized an offender, who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the Acts of Parliament made for protecting the King's stores."

Proof as to costs.

With a view to costs (*h*) it is frequently necessary to prove, as alleged, that

(*f*) Under the former statute, knowledge of the fact of possession was held to be immaterial. *R.* v. *Marsh*, 3 B. & C. 719. Possession by the servant of a carrier was deemed to be a possession by the carrier, in the absence of proof of fraud on the part of the servant. Ib. In *R.* v. *Turner*, 2 M. & S. 206, possession by a carrier was held to be presumptive evidence that he knew the game to be there.

(*g*) *Warneford* v. *Kendall*, 10 East, 18. In the case of *Molton* v. *Cheeseley*, 1 Esp. C. 124, where, according to the report, the defendant's dog killed a pheasant by accident, and the defendant took it away, Mr. J. Buller held that the taking away the pheasant constituted an unlawful possession, so as to subject the defendant to a penalty. The report of the case is very short, and the decision itself does not appear to be inconsistent with the principles laid down in the case of *Warneford* v. *Kendall*; for although the accidental killing of the bird by the defendant's dog was no offence in the defendant, yet his subsequent possession of the game might either be lawful, as for the purpose of conveying it to the lord of the manor on whose land it was killed, or unlawful, as if he took it for the purpose of sale; and (*semble*) it was incumbent on the defendant to explain his subsequent possession of the game.

Where the servant of a qualified person set a trap for killing hares, in the presence and by the orders of his master, and was seen in the possession of a hare, which he was conveying to his master, the Court held that the action was improperly brought against the servant, the taking and possession being that of the master. *Walker* v. *Mills*, 2 B. & B. 1.

(*h*) Under the stat. 4 & 5 Will. 3, c. 23,

Proof as to costs.

the trespass was wilful and malicious, or that the defendant is an inferior tradesman (*i*), apprentice (not being in company with his master, duly qualified), or dissolute person (*k*).

Trespass.

Trespass lies for breaking the plaintiff's close, and taking his game there (*l*). The right of property in game is in the owner of the land, so long as the game abides there (*m*). So, though the defendant does not enter on the plaintiff's land, but knowingly and maliciously fires a gun on his own land with intent to prevent ducks from coming to the plaintiff's decoy, an action on the case lies (*n*).

Although the general rule be that the owner of a dog is not liable for any mischief which the animal commits, unless he be aware of his mischievous propensities, yet if the owner be a trespasser, he is responsible for such mischief independently of the fact of knowledge (*o*). As where the defendants, trespassing on the plaintiff's field, with dogs and guns, their dogs, contrary to their will, killed a deer of the plaintiff's (*p*).

Free warren.

A right of free warren is an exclusive privilege to the owner of the soil to take beasts and fowls of warren (*q*) within the privileged place created by the King's grant or prescription (*r*). The right may be created and exist

s. 10, which, in case of a wilful trespass, by such person coming on the land to hunt hares, &c. gives the plaintiff full costs of suit. The stat. 1 & 2 W. 4, c. 32, s. 40, declares it shall not preclude actions of trespass for damages under former Acts.

(*i*) It would not be easy to frame terms more ambiguous and indefinite than those which are used in the making of this statute. In the case of *Buxton* v. *Mingay*, 2 Wils. 70, the Judges were divided upon the question, whether a surgeon and apothecary, not being qualified to kill game, came within these words. See Com. 26.

(*k*) In *Pallant* v. *Roll*, 2 Bl. R. 900, it was held, that a huntsman going out with the hounds of his master (a qualified person) by his order, was not a dissolute person. In Mr. Christian's G. L., Lord Ellenborough is reported to have said that he should direct the jury to find that the defendant was a dissolute person, if he came to kill game for the purpose of selling it; or if he was drunk or abusive; or if, being questioned where he lived, or what was his name, he gave a false account of himself.

(*l*) *Sutton* v. *Moody*, 1 Ld. Ray. 250. In an action of trespass against the huntsman of the Berkeley Hunt, it was held that the jury were to give damages, not only in respect of his own individual trespass, but for the whole damage done by the concourse of people who attended him. *Hume* v. *Oldacre*, 1 Starkie's C. 351.

(*m*) If *A.* start a hare in the land of *B.* and hunt it and kill it there, the property continues all the while in *B.*; but if *A.* start a hare in the ground of *B.* and hunt it into the ground of *C.* and kill it there, the property is in *A.* the hunter; but *A.* is liable in an action of trespass for hunting in the grounds of *B.* as well as of *C.* But if *A.* start a hare in a forest or warren of *B.* and hunt it into the ground of *C.*, and there kills it, the property remains all the while in *B.*, the proprietor of the warren, because the privilege continues. Per Holt, C. J., in *Sutton* v. *Moody*, 1 Ld. Ray. 258, upon the authority of 12 H. 8, 9; and in the case of *Sutton* v. *Moody*, judgment was given for the plaintiff, in an action for breaking and entering his close and taking his conies, because he had a property by the possession; and see *Pollexfen* v. *Ashford*, 1 Vent. 122, cited by Holt, C. J., as in point. But *qu.* as to the second position of the learned Judge, for this would be to allow *A.*, a mere trespasser, to profit by his own wrong; see *Keble* v. *Hickringill*, 11 Mod. 74, and Christian on the Game Laws, 104. By the stat. 1 & 2 W. 4, c. 32, s. 7, the landlord under existing leases (with certain exceptions) is entitled to the game. By s. 30, provision is made for the seizure of game in possession of any person found on any land, &c. in search or pursuit of game, and having in his possession game which shall appear to have been recently killed, after demand made by the party entitled to kill the game on such land.

(*n*) *Keble* v. *Hickringill*, 11 Mod. 74; and see *Carrington* v. *Taylor*, 11 East, 571.

(*o*) *Beckwith* v. *Shoredike*, 4 Burr. 2092.

(*p*) *Ibid.*

(*q*) *i. e.* the hare, pheasant, coney and partridge. 1 Inst. 233. Manwood, 362.

(*r*) See 1 Inst. 233. A grant is made of a crown manor and hundred, with all its rights and other things to the said manor and hundred belonging, and also to have free-warren in all their demesne lands in the manor, hundred, &c., although within the King's forest; held, that the term *demesne lands* applied only to the lands of the manor which the lord either actually

alieno solo (*s*). The evidence relating to proof of such a right is seldom direct by the production of the grant itself, but is usually established by evidence of enjoyment and usage (*t*). And it seems that a non-user of the right for twenty years would afford *primâ facie* evidence of an extinguishment of the right, especially where it was claimed in the land of another. Free warren.

An exception in a conveyance of free liberty of hawking and hunting upon the premises, to a party (not the party conveying) and the heirs of his body, and his and their friends, servants and followers, though it may not be good as a reservation, yet being sealed with the seals of the parties, operates as a grant to the party and his heirs (*u*). But such a grant of the liberty to hawk and hunt does not give liberty to shoot feathered game (*x*).

A defendant cannot justify the killing a dog in pursuit of game on his the defendant's premises, unless he can show that the hare was put in such peril as to render the destruction of the dog necessary for the preservation of the hare (*y*). But it seems to be one of the privileges of a free warren and a park, that the owners or their servants may kill dogs which enter the warren or park and chase the game (*z*). Justification, killing dogs, &c.

A man cannot justify the digging in another's land in order to destroy a badger (*a*); and though it has been held that a man might justify the riding over another man's land in *following* a fox which could not otherwise be killed (*b*), yet in a later case (*c*) Lord Ellenborough, C. J. is said to have ruled, that if the jury thought, from the evidence, that the defendant pursued the fox for his own pleasure and amusement, and that the good of the public was not his sole and governing motive, they ought to find for the plaintiff. Trespass.

By the stat. 1 & 2 Will. 4, c. 32, s. 13, any lord of a manor (*d*), lordship or royalty, or any steward of the Crown of any manor, lordship or royalty (*e*) appertaining to his Majesty, by writing under hand and seal, or in the case of a body corporate, under the seal of such body corporate, may appoint one or more gamekeepers to preserve or kill game (*f*) for the use of such lord

or potentially might have in *propriis manibus*, and that such grant conferred the right of free-warren in such demesne lands and other tenemental lands held in fee of the King or other lord, within the limits mentioned in the grant, but not in any lands of the Crown whilst in the occupation of the Crown. *Attorney-general* v. *Parsons*, 2 C. & J. 279.

(*s*) Year Books, 3 H. 6, f. 28. 34 H. 6, f. 34. 5 H. 7, f. 10. Bur. Ab. tit. WARR. pl. 9. *Lord Dacre* v. *Tebb*, 2 Bl. R. 1151.

(*t*) See tit. PRESCRIPTION. Or in the King's lands. *Morris* v. *Dimes*, 1 Ad. & Ell. 654. *Qu.* whether it passes as appurtenant to a manor. *Ib.*

(*u*) *Moore* v. *Lord Plymouth*, 7 Taunt. 614; S. C. not S. P. 3 B. & A. 16. See 3 Buls. 66.

(*x*) Ibid. and see Manw. c. 18, s. 10.

(*y*) *Vere* v. *Lord Cawdor*, 11 East, 568. *Janson* v. *Brown*, 1 Camp. 41; and see *Wright* v. *Ramscott*, 1 Saund. 84. *Athil* v. *Corbet*, Cro. J. 463.

(*z*) *Wadhurst* v. *Damure*, Cro. J. 45. Christian on the Game Laws, 265.

(*a*) *Gedge* v. *Mine*, 2 Buls. 60.

(*b*) *Gundry* v. *Feltham*, 1 T. R. 334.

(*c*) *Earl of Essex* v. *Capel*, Hertford Summ. Ass. 1809. Christian on the Game Laws, 114.

(*d*) The lord of a manor cannot depute to another the power of appointing a gamekeeper. *Calcraft* v. *Gibbs*, 4 T. R. 631; 5 T. R. 19. Such a power is a mere emanation from the manor, and inseparable from it. Per Lord Kenyon, 5 T. R. 20.

(*e*) Other royalty means such as is *ejusdem generis* with a manor; and therefore it seems that the lord of a hundred or wapentake cannot, as such, appoint a gamekeeper. *Lord Aylesbury* v. *Pattison*, Doug. 28. *Bowkey* v. *Williams*, Lutw. 484.

(*f*) Where a gamekeeper kills game within a manor, it will be presumed that the act was done for the use of his principal. *Sparrow* v. *Vale*, 10 East, 413. A deputation granted and enrolled prior to the Act's taking effect, does not entitle a defendant to the privileges conferred with notice of action and giving evidence under the general issue. *Bush* v. *Green*, 4 Bing. N. C. 41.

or steward; and to authorize such gamekeepers, within the said limits, to seize and take (*g*), for the use (*h*) of such lord or steward, all such dogs (*i*), nets, and other engines and instruments for the killing of game (*k*), as shall be used within the said limits, by any person not authorized to kill game for want of a certificate (*l*).

Indictment.

Under an indictment on the stat. 57 Geo. 3, c. 90 (*m*), against several, for being found armed at night in a wood, which they had entered with intent (*n*) to kill game, it appeared that the prisoners were shooting in the wood at night, and the flash of one of their guns was seen by a keeper who was on the watch for them, but before they were seen they had abandoned their guns in the wood, and were creeping away on their knees; and it was held by the Judges, on a case reserved, that the statute applied, although they had not then arms in their possession, or within their reach when they were discovered (*o*). So it is sufficient if the prisoner be *discovered* in the wood,

(*g*) Such seizure is a ministerial act, and need not be done by the gamekeeper himself, but may be done by another under his *immediate direction*. *Bird* v. *Dale*, 7 Taunt. 570. But not under a general authority. *Ib.*

(*h*) The dog or engine seized becomes the property of the person having authority to seize it, and may be destroyed. *Kingsnorth* v. *Bretton*, 5 Taunt. 416.

(*i*) The former statute, which authorized the seizure of dogs, &c. kept for the destruction of game, did not authorize the seizure of any dog such as was not prohibited from being kept, *e.g.* a hound. *Grant* v. *Hulton*, 1 B. & A. 134; and see *Hooker* v. *Wilkes*, Bl. 1126, where it was held that a hound was not within the statute 5 Anne, c. 14, because it was not mentioned there.

(*k*) The repealed statute 5 Anne, c. 14, authorized the lord of a manor to take game from unqualified persons, which he could not do before. *Bird* v. *Dale*, 7 Taunt. 560; 1 Moore, 290. The present statute does not extend to *game*, except in cases within sec. 36.

(*l*) The lord of a manor cannot seize the gun of a gamekeeper of another lord, although he be upon the manor of the first without authority. *Rogers* v. *Carter*, 2 Wils. 387. Where a lord of a manor is also a justice of the peace, he is entitled to a month's notice of an action brought against him for taking away a gun from the house of an unqualified person, for it will be presumed that he acted as a justice. *Briggs* v. *Evelyn*, 2 H. B. 114. Under the stat. 5 Anne, c. 14, before seizure of game on the land of an unqualified person, the justice, &c. was bound to exercise his judgment, whether the person possessing the game be qualified or not; afterwards he may seize by the hands of another. See *Bird* v. *Dale*, 7 Taunt. 566. Where a magistrate convicts an unqualified person for killing game under the stat., and causes his dog to be brought for the purpose of seizing it, he may order the dog to be killed without any formal adjudication of seizure. *Kingsnorth* v. *Bretton*, 5 Taunt. 416. The demand by a gamekeeper of the certificate need not be made on the land, but it must be made immediately after the party has left it, so as to make it one transaction; and it is not necessary the party demanding should produce his own; and if the other refuses he does so at his peril, if the party demanding it be duly authorized; and if the party refuses to give his name, it is unnecessary to go on, and ask in what place, if any, he is assessed: held also, that the conviction reciting it was sufficient evidence of the information. *Scarth* v. *Gardener*, 3 C. & P. 438; *cor.* Tenterden, L. C. J.

(*m*) This statute is repealed by the stat. 9 Geo. 4, c. 60, which (sec. 6) makes an unlawful entry by three or more armed persons into any land, &c., for the purpose of taking or destroying game or rabbits, a transportable misdemeanor. By sec. 1 of the same Act, the unlawful taking or destruction of game or rabbits by night is also a misdemeanor punishable by imprisonment; and in case of conviction for a third offence, by transportation. By stat. 1 & 2 W. 4, c. 32, s. 30, trespass on another's land in search of game or woodcocks, &c., subjects to a fine of not exceeding 5 *l.* As to apprehension of poachers by gamekeepers, see 9 Geo. 4, c. 69, s. 1. Under the stat. 9 Geo. 4, c. 69, s. 2, a keeper may apprehend poachers, though there be three or more and armed. *R.* v. *Ball*, 1 Moody's C. C. L. 330; ib. 333. He may arrest without giving notice. *R.* v. *Payne*, ib. 378.

(*n*) It was necessary to prove the intent as to that particular close. *Barham's Case*, 1 Ry. & M. (c. c.) 150. Where the indictment charged the prisoner with being in a certain wood called Old Walk, belonging to and then in the occupation of *W.*; held, that although, if the name of the occupier were stated, it was unnecessary to give the place any name, yet that having done so, a variance in the name was fatal. *Owen & Prickett's case*, 1 Ry. & M. (c. c.) 118.

(*o*) *R.* v. *Nash & Weller*, cor. Bayley,

plantation or close, &c. although he be not *apprehended* until he has regained the highway.

If any one be armed with the knowledge of the rest, they are all within the statute (*p*); but it is otherwise where some are armed without the knowledge of the rest, for then those only who are armed are within the statute (*q*).

Competency.

An informer is not a competent witness (*r*) where he is to have any part of the penalty. Although the statute speaks of a conviction on the oath of one or more credible witnesses, a conviction on *confession* before a justice (*s*), or even upon a confession made to a third person, when proved before the justice, has been held to be a sufficient ground for conviction (*t*).

GAMING (*u*).

Proof of keeping a gaming-table.

Upon a conviction for keeping a gaming-table (*x*), the evidence was, that the defendant was the master of the house, and acting as master of a hazard-table there on the 25th of August, but no mention was made of any dice being then used; but on the 26th of August one witness saw a dice-box and dice on the table, round which many persons were assembled, the play having been discontinued on the witness's entering the room. It was held by the Court that this was evidence to warrant the convicting justices in their conclusion that the game of hazard had been played there on the latter day.

Winning more than 10 *l.* at one sitting.

Under the statute 9 Ann. c. 14, s. 5, the defendant may be convicted of winning at one sitting a less sum than that which is alleged in the indictment (*y*), and although it appear in evidence that he was paid in bills of exchange, and not in money (*z*). To lose 10 *l.* at one time is to lose it by a single stake or bet; to lose it at one sitting is to lose it in a course of play, where the company never part, though the person may not be actually gaming the whole time (*a*). Where two persons played from Monday

J. Maidstone Spring Ass. 1819. So where there was evidence to show that the defendant had been armed in the place, although he had not actually been seen there. *Worker's case*, 1 Ry. & M. C. C. 105.

(*p*) *R.* v. *Smith & Others*, Burn's J., tit. Game, Append. 225.

(*q*) *R.* v. *Johnson & Coulburne*, Ib. 226.

(*r*) *R.* v. *Stone*, Ld. Raym. 1545. *R.* v. *Blaney*, 2 Andr. 240. See the provisions of the late statute as to competency, *supra*, 501.

(*s*) 1 T. R. 320. *R.* v. *Gage*, 1 Str. 546. Saund. 262.

(*t*) Ibid.

(*u*) See Wager.—Assault.

(*x*) Under the stat. 12 G. 2, c. 28. The charge in the information was for setting up, maintaining, and keeping a certain game, to be determined by the chance of dice, called hazard. *R.* v. *Liston*, 5 T. R. 338.

(*y*) *R.* v. *Hill, Darley & others*, 1 Starkie's C. 359. And see *R.* v. *Gilham*, 6 T. R. 265; 1 Ld. Raym. 149. *R.* v. *Baynes*, Ld. Raym. 1265. A horse-race is within this stat. *Goodburn* v. *Marley*, 2 Str. 1159. Although for a legal plate. 2 Bl. 706. *Blaxton* v. *Pye*, 2 Wils. 309. So is a foot-race. 2 Wils. 30. So also, *semble*, is a wager on the game of cricket. 1 Wils. 220. A foot-race being within the 9 Anne, c. 14, where it appeared that monies were advanced by the defendant for the purpose of making good losses by betting on such a race in pursuance of previous engagements, although not paid until after the event, for securing which a mortgage was given, and subsequently the estate was valued and conveyed to a trustee for the defendant, subject to the previous mortgage; it was held, that the statute applies both to the mortgage and conveyance, and that the heir at law was entitled under the statute, and a demurrer for want of equity overruled. *Parker* v. *Alcock*, 1 Younge, 361. The 13 Geo. 2, as relates to horse-racing, is repealed by 3 & 4 Vict. c. 5. Hazard, by the 12 Geo. 2, c. 28, s. 2 & 3, and 18 Geo. 2, c. 34, s. 2, is illegal, even though it be played in private, and the players are liable to a penalty of 50 *l.* See *M'Kinnell* v. *Robinson*, 3 M. & W. 434.

(*z*) 1 Starkie's C. 359; and see above, 456.

(*a*) Per Blackstone, J., *Bones* v. *Booth*, 2 Black. R. 1226.

evening to Tuesday evening, without any interruption, except for an hour or two at dinner, it was held to be at one sitting within the statute (*b*).

Under the statute 18 Geo. 2, c. 34, s. 1, against keeping gaming-houses, persons may be witnesses although they have played, betted or staked at any of the prohibited games (*c*).

The statute 9 Ann. c. 14, s. 2 (*d*), does not absolutely avoid the contract where money is won at play (*e*); and therefore where the plaintiff lost a mare of the value of 25*l.* by tossing up, and did not bring his action until the three months were expired, it was held that he could not recover (*f*).

GENERAL ISSUE.

As to Evidence under, *see* The NEW RULES.

THE general issue shall not be taken to be a plea under statute, unless By Statute be noted in the margin. 4 Bing. N. C. 816.

GOODS SOLD AND DELIVERED.

See VENDOR AND VENDEE.

GRANT. *See* tit. DEED.—PRESUMPTION.

GUARANTY.

Proof of guaranty.

A GUARANTY in writing (*g*) must be produced, properly stamped, and proved as in other cases (*h*) according to the averments (*i*).

(*b*) 2 Bl. 1226.

(*c*) By sec. 5. See tit. INFAMY and WITNESS.

(*d*) Which enacts, that if a person, by playing at cards, or any other game, shall lose to any one person the sum or value of 10*l.*, he shall be at liberty within three months to sue for and recover the same.

(*e*) By sec. 5, persons who have lost their money at play are the only persons entitled, under the stat. 9 Ann. c. 14, s. 3, to file a bill for a discovery, and not a mere common informer in aid of a *qui tam* action. *Orme* v. *Crockford*, 13 Pri. 376; 1 M. & Y. 185.

(*f*) *Vaughan* v. *Whitcomb*, 2 N. R. 411. Nor does the statute wholly avoid a security given in respect of money won at play. Where Reilly procured a bill drawn by Duckworth, payable to the order of Duckworth, and afterwards generally indorsed by Duckworth, to be accepted by Benson, the defendant, for a gaming debt due from the defendant to Reilly, it was held that the plaintiff, a subsequent *bonâ fide* holder for value, could not recover. *Henderson* v. *Benson*, 8 Price, 283. But the statute does not preclude such *bonâ fide* holder from recovering against the drawer of a bill accepted for a gaming debt *won* by him. The proper effect to be given to the Act is to prevent the *winner*, or any one who derives title from him, from making the *loser* pay. *Edwards* v. *Dick*, 4 B. & A. 212.

(*g*) See Frauds, Statute of. The plaintiff distrained goods for rent, which he was about to sell; the defendants gave an undertaking, that if he would give up the distress, and allow them to sell them for the tenant, they would pay the rent legally due; held, that it was not a promise to answer the debt of another within the statute of frauds. *Edwards* v. *Kelly*, 6 M. & S. 204. And see *Williams* v. *Leper*, 3 Burr. 1886; *Houlditch* v. *Milne*, 3 Esp. 59; *Castling* v. *Aubert*, 2 East, 325.

(*h*) See ASSUMPSIT.—STAMP.—WRITTEN INSTRUMENT, Proof of. A sufficient consideration must appear on the face of the instrument, or by internal reference. See *Pace* v. *Marsh*, 1 Bing. 216; *Boehm* v. *Campbell*, 3 Moore, 15; and FRAUDS, STATUTE OF, *supra*. The guaranty may be

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(*i*) See tit. VARIANCE. Where the consideration was alleged to be the advance of money to *T. G.* by the plaintiff, and it appeared on the trial that the money had not been advanced by the plaintiff, but by him and his partners, who were bankers, by debiting *T. G.*, who was also their customer, with it in their books; held, that the declaration was not sustained by the proof, and a nonsuit therefore right. *Garrett* v. *Handley*, 3 B. & C. 462; 5 D. & R. 319.

In an action brought upon a guaranty, unless the instrument given in evidence as such, purport to be an absolute and conclusive engagement, the

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be connected by reference in the indorsement containing the guaranty to an agreement written on the other side of the same paper. *Stead* v. *Liddiard*, 1 Bing. 196. And where the guaranty itself does not state the consideration, it may be collected from a previous correspondence to which the guaranty refers. *Coe* v. *Duffield*, 7 Moore, 254. On a note in these terms,—"Messrs. *M.* and Co. (plaintiffs), we hereby promise that your draft on *C.* and Co. due at *M.*'s at six months on, &c. shall be paid out of the money to be received from *P.*; say —*l.*" signed "*C.* and *B.*" (defendants); held, that no sufficient consideration appearing on the face of the instrument for the promise of *C.* and *B.*, it was, as against them, void. *Morley* v. *Boothby*, 3 B. 107.

A guarantee in the terms, "I engage to pay *A. B.* for all the gas supplied at *M.*, during the time it is occupied by *N.*; and I do also engage to pay for all arrears which may be now due;" held that no sufficient consideration appearing for the latter part of the engagement, it could not be sustained, but that it might as to the former. *Wood* v. *Benson*, 2 C. & J. 94. Where an action pending between *A.* and *B.* the defendant joined with the latter in a memorandum, which, after stating the parties to the action and the amount of the debt and costs, was in the terms, "we jointly and severally undertake and agree to pay *G. C.* (the attorney of the plaintiff in the action) the debt and full costs in this action, provided, on or before the —— day of ——, the sum of —— be not paid to the said *G. C.*, at his office, as the attorney for the said plaintiff," held that the consideration for which the guarantee was given being uncertain, whether for staying the action or giving time of payment, was not sufficiently expressed to take it out of the Statute of Frauds. *Cole* v. *Dyer*, 1 C. & J. 461.

The plaintiff having given to the defendants two notes and a cognovit, the defendants by a guarantee in consideration of the money so secured to be paid to them, undertook to indemnify the plaintiff against a certain bill; held that the plaintiff might sue on the guarantee, although the notes had not been paid, the security, and not the payment, being the consideration of the guarantee. *Skin* v. *Brook*, 1 B. & Ad. 124.

"I agree to bind myself to be security to you for *J. C.*, late in the employ of *J. P.*, for whatever you may entrust him with whilst in your employ;" held that the consideration sufficiently appeared, viz. to give credit for *J. C.* prospectively, and in consideration of his being employed and entrusted. *Newbury* v. *Armstrong*, 6 Bing. 201; 1 M. & M. 389.

A letter of guarantee was given by the defendant to the plaintiff in the terms, "that *P. C.* shall faithfully and honestly discharge any duty assigned to, or trust reposed in him;" the plaintiff received him into his employ; it was held that a sufficient consideration appeared on the face of the guarantee. The plaintiff employed the party first at *B.* and afterwards at *Z.*, and upon his removal from *B.* he was indebted to the plaintiff in a large sum, and from his accounts it appeared that sums remitted whilst employed at *Z.*, were remitted as the proceeds of sales there; held that the Judge was not bound to direct the jury as matter of law, that such remittances were to be considered as in discharge of the former balance, but that he was right in leaving it to the jury under all circumstances to what account they were to be applied. *Lysaght* v. *Walker*, 1 Dow's C. 211. A guarantee in the terms, "I hereby undertake to secure you the payment of any sums of money you have or may hereafter advance to *D.* and *C.*, on their account with you;" held, 1st, that it not appearing from the terms of the instrument that the future advances were the consideration for guaranteeing the past advances, the actual consideration was left too uncertain to render the guarantee sufficient within the Statute of Frauds; 2dly, that under the general issue, the defendant might show that the consideration alleged in the declaration was not the actual one, without pleading it specially; and, lastly, that the creditor having proved against the estate of the principal to a larger amount than that covered by the guarantee, the defendant had a right to deduct the dividends from the amount claimed under the guarantee. *Raikes* v. *Todd*, 1 P. & D. 138. The defendant being attorney for a debtor to the plaintiff, remits an acceptance of his client in a letter, stating that his client had been disappointed in receiving his remittances, which the plaintiff refused to take unless the defendant would put his name to it, and he accordingly wrote on the back of the letter, "I will see the bill paid for *W.*;" the consideration sufficiently appears. *Emmott* v. *Kearns*, 5 Bing. N. C. 559; 7 Sc. 687; and 7 Dowl. 630. So where the defendant signed a memorandum in the terms, "I hereby guarantee the payment of all goods consigned to *T.*, in consideration of 2*s.* 6*d.* paid me." *Dutchman* v. *Tooth*, 5 Bing. N. C. 577. "I hereby guarantee you, Messrs. *K.* & Co., the sum of 250*l.* in case *P.* of, &c. should make default in his capacity of agent and traveller to you," sufficiently shows the consideration of a future agency, and default. *Kennaway* v. *Treleaven*, 5 M. & W. 498. The defendant being surety by deed for his bro-

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plaintiff must show that he gave notice to the defendant that he accepted it as such (*n*). Proof of a mere offer or proposal to guarantee is not sufficient; the plaintiff must also show that he has complied with the condition of the guaranty, if it be conditional, for such a claim being against a surety, is

ther for goods supplied by *M.*, whom the plaintiff succeeded in his business, by letter acknowledged his readiness to become also a like surety to the plaintiff, upon being satisfied of the solvent state of his brother; adding, "In the meantime I will hold myself responsible to you for 200*l.*, in the event of his inability to meet it; to be void when the full statement of his affairs being laid before me, and such proving satisfactory, I then enter into the security you require;" held, the letter was void as a guarantee. *Bentham* v. *Cooper*, 5 M & W. 021. A guaranty of payment of the debt of *B.* is conditioned to be void, if the party do not avail himself to the utmost of a bill held by him as a deposit; and also in case anything should prevent the defendant from receiving and retaining the proceeds of an execution he has levied on the goods of *B.*; it is not avoided by the plaintiff not putting the bill in suit against the acceptor, who was an insolvent and in prison; nor by part of the goods being withdrawn, which, being the goods of other parties, had been improperly taken in execution. *Musket* v. *Rogers*, 5 Bing. N. C. 728; and 8 Sc. 51. Where *M.* had agreed to supply timber to *W.* to complete a contract with *H.*, on *H.* signing the following undertaking, "I agree to pay *M.* for timber to house in *A. C.* out of the money that I have to pay *W.*, provided *W.*'s work is completed;" held, that it was not a collateral, but a direct undertaking to pay on the completion of the work, which being proved, the plaintiff was entitled to recover. *Dixon* v. *Hatfield*, 2 Bing. 439,

(*n*) *Mac Iver* v. *Richardson*, 1 M. & S. 557; where the defendant wrote to the plaintiff thus: "I understand that *A.* has given you an order for rigging; I can assure you that you will be safe in crediting him; indeed, I have no objection to guarantee you against any loss from giving him this credit." Held, that without notice, &c. this did not amount to a guaranty. See also *Symmons* v. *Want*, 2 Starkie's C. 371. *Gaunt* v. *Hill*, 1 Starkie's C. 10. The construction of a guaranty is of course a question of law; but it may be observed that the rule is, that the words are to be taken as strongly against the party giving the guaranty as their sense will admit. *Mason* v. *Pritchard*, 12 East, 227. A guaranty in the terms, "if you give him credit we will be responsible that his payments shall be regularly made to the extent of —— *l.*;" held that it was to be construed as such reasonable credit as the principals might agree upon, and not according to the terms of the trade. *Simpson* v. *Manley*, 2 C. & J. 12. A guaranty for any goods which the plaintiff "hath or may supply to *W. P.* to the amount of 100 *l.*" is a continuing guaranty, and extends to any goods supplied till the credit be recalled, although goods exceeding 100 *l.* in value have been supplied. A bond for advances to be made to a specified amount is not a continuing guaranty. *Kirby* v. *The Duke of Marlborough*, 2 M. & S. 18. *Secus*, where a warrant of attorney is given to secure 4,000 *l.*, and there is nothing to manifest an intention that it was given to secure an existing balance at the time. And see *Williams* v. *Rawlinson*, 1 R. & M. 233. "I agree to guarantee the payment of goods to be delivered to *J.* & *A. S.* at, &c., according to the custom of their trading with you;" the custom having been shown to be a monthly accounting, held that it was to be construed to be a continuing guarantee. *Hargreave* v. *Smee*, 6 Bing. 244. A guaranty given to a firm is determined by a change of the firm, unless the change is expressly provided for. *Dry* v. *Davy*, 2 Perr. & D. 249; and 10 Ad. & Ell. 30. "I hereby agree to be answerable to *K.* for the amount of five sacks of flour, to be delivered to *T.*, payable in one month; Nov. 18." The plaintiff accordingly, on the 19th, delivered five sacks to *T.*, and made a like delivery on the 21st; on the 24th *T.* returned part of the first delivery as of bad quality; held, that it was properly left to the jury to say whether the second delivery was under a new contract or not, and whether the whole quantity guaranteed had been furnished on the 19th; the defendant's liability began to run on the 19th, and could not be prolonged by a subsequent delivery, without evidence of express assent on his part. *Kay* v. *Groves*, 6 Bing. 276. Debt on an indemnity bond to bankers, to secure advances; the condition was, that the obligors should pay the balance already due, and such further advances as the bankers should make, "not exceeding —— *l.*;" the restrictive words in the condition do not avoid the bond, though the obligees advance beyond the sum stated. *Parker* v. *Wise*, 6 M. & S. 239. A continuing guaranty is countermandable by parol. *Brocklebank* v. *Moore*, cor. Abbott, C. J., Guild. Sitt. after Trin. 1823. See, as to guaranty of bills drawn on the credit of shipments by an agent, *Ogden* v. *Aspinall*, 7 D. & R. 637. With respect to the construction of guaranties, and conditions as to their extent in point of time and amount, see *Liverpool Water Works Company* v. *Atkinson*, 6 East, 507. *Wardens of St. Saviour, Southwark*, v. *Bostock*, 2 N. R. 175. *Hassell* v. *Long*, 2 M. & S. 363.

strictissimi juris (*o*). If the guaranty import that eighteen months' credit was to be given to the vendee, it is not sufficient to show that twelve months, credit was given, although six more have since elapsed (*p*). Where the defendant had guaranteed the plaintiff against loss, in case his, the defendant's, son became bankrupt, in order to prove the allegation that he had become bankrupt, it was held that the plaintiff was bound to prove that a commission had been actually sued out against him (*q*). Upon a contract to guarantee a bill of exchange for a given sum, the guarantee is not liable even to that amount, if a bill be given for a larger sum (*r*). Proof of guaranty.

In an action upon a guaranty of the price of goods to be paid by a bill, the notice of the non-payment of the bill must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due (*s*); but where *A.* became bound to *B.* for the honesty of *C.*, who embezzled money, it was held that *B.* might maintain an action on the guaranty, although three years had elapsed without any notice having been given by *B.* to *A.* (*t*), and although *B.* had given credit to *C.* for the amount, the jury finding that *B.* had not waived the guaranty (*u*). It is to be observed, that this case differs from that where a bill of exchange is given, the defendant being bound not merely to pay the money, in case *C.* did not pay it, but being bound absolutely to pay the deficiency (*x*). It has been held in equity, that if an obligee enlarge the time of payment to a principal, he thereby discharges the surety (*y*); but this is no defence at law (*z*). Proof of notice.

A contract to guarantee will be defeated not only by proof of any unfair and dishonest practice between the other parties, but by concealing from him any part of the contract which he ought to have known; as where the vendor and vendee secretly agree that 10 *s.* per ton beyond the market price should be paid for the goods in respect of which the guaranty is given (*a*). Fraud.

An executor, it seems, is not liable in respect of advances made after notice of the testator's death, for the death is a revocation (*b*). Discharge.

A guarantee on the sale of goods, who has paid the amount after the bankruptcy of the vendee, who had accepted a bill for the amount, need not prove any demand on the vendee as acceptor of the bill previous to the payment by him as guarantee, for the action is not on the bill itself, and

(*o*) Per Ld. Ellenborough, C. J., *Bacon* v. *Chesney*, 1 Starkie's C. 192.

(*p*) Ibid.

(*q*) *Bulkeley* v. *Lord*, 2 Starkie's C. 400.

(*r*) *Philips* v. *Astling*, 2 Taunt. 206.

(*s*) Ibid.

(*t*) *Peel* v. *Tatlock*, 1 B. & P. 419. But note, that *A.* was acquainted with the fact from another source. The jury found that *B.* had not waived the guaranty.

(*u*) Ibid.

(*x*) Ibid. per Heath, J.

(*y*) *Rees* v. *Berrington*, 2 Ves. jun. 544. 10 East, 40.

(*z*) *Trent Navigation Company* v. *Harley*, 10 East, 34. Where the bond was conditioned that the principal obligor should account and pay over from time to time all such tolls as he should collect for the obligees; the obligees had been guilty of laches in not examining their accounts for eight or nine years, and in not calling on the principal so soon as they might have done. See also *Nares* v. *Rowles*, 14 East, 510; where it was held that a bond for the collection and payment over of public duties might be put in force against one of the sureties, although he was not apprised of the default of the principal collector in not paying over the duties, nor called on to indemnify until after the dismissal of the principal from his office. And see *Oxley* v. *Young*, 2 H. B. 613; and vid. *infra*, tit. SURETY.

(*a*) *Pidcock* v. *Bishop*, 3 B. & C. 605.

(*b*) *Potts* v. *Ward*, 1 Marsh, 306; and see *Cooper* v. *Johnson*, 2 B. & A. 394. Where the obligation was, that J. Knapman shall perform an award, and the award was to pay 20 *l.* at Easter and 10 *l.* at Michaelmas, and J. K. died before Michaelmas, it was held that the obligation was forfeited by non-payment of the 10 *l.*; *Kinguel* v. *Knapman*, Cro. Eliz. 10; for the sum awarded was become a duty; *secus*, when no duty, as to make a feoffment. *Joyner* v. *Vyner*, T. Raymond, 415.

Discharge.

the insolvency of the vendee is a *primâ facie* warrant to the guarantee to pay the money previous to a demand by the vendor, who held the bill (*c*).

A guarantee will be discharged by any unauthorized extension of the credit given to the party guaranteed (*d*). Mere laches does not operate to discharge (*e*). The assignment of a chose in action cannot discharge an obligation to guarantee (*f*). A party, under a guarantee of indemnity, has no right to defend an action, and put the party guaranteeing him to useless expense, unless authorized by him; held, therefore, that he could only recover the costs of the writ (*g*).

HABEAS CORPUS. *See* SHERIFF.

HAND-WRITING.

Proof of hand-writing.

THE rules which relate to the proof of hand-writing are now so well settled in practice, upon grounds, as it seems, of general convenience, notwithstanding the doubts which formerly prevailed upon this subject, and which are still entertained as a matter of theory and speculation, as to render very few observations necessary in this place. The best evidence to prove the hand-writing in question is that of a witness who actually saw the party write it; such direct evidence can, however, seldom be procured.

(*c*) *Warrington* v. *Furbor*, 8 East, 242.

(*d*) The defendant guaranteed to see the plaintiff paid "for any porter you may send to *A.*, until you receive notice to the contrary from me;" and it appeared from the invoices that the course of the plaintiff's business was to give six months' credit, and then sometimes a bill at two months; the plaintiff having, without the knowledge of the defendant, allowed three months to elapse beyond the six, and then accepted a bill at two, virtually extending the credit to 11 months; held that the surety was exonerated. *Combe* v. *Woolf*, 8 Bing. 156. Promise to guarantee in consideration of goods being furnished to a third person on credit, in the event of his failure; the renewal by the plaintiff of a bill which had not been paid when due, is not such a failure as was contemplated by the guarantee as to discharge the surety by not having given him notice of such renewal. *Carr* v. *Browne*, 12 Moore, 62. Guaranty for the payment of coals to be delivered to *N. H.* at a credit of two months from the delivery; a dealing by delivery from day to day, and payment on the last day of the month by bill at two months, is not a dealing within the terms of the guaranty, although according to the custom of the trade, the agreement being silent as to that. *Holl* v. *Hadley*, 5 Bing. 54; and 2 M. & P. 136. The defendant guaranteed the plaintiff to the extent of —— *l.* for gold he might supply to *E.* a goldsmith, and the plaintiff discounted bills for *E.*, but not indorsed by him, supplying part of the amount in gold, which was used by *E.* in his trade; such a transaction is not within the meaning of the guaranty; it is a purchase of the bills at his own risk, and the defendant is not liable on his guaranty for the value of such gold. *Evans* v. *Whyle*, 5 Bing. 485.

(*e*) Upon an agreement in April 1825, for the purchase of timber, the defendant subscribed a guaranty for the payment according to the conditions, in the event of the principal not doing so; and after payment of part by bills, and repeated applications, a bill was given by him for the residue, which was eventually dishonoured, and he became bankrupt in December 1827, but the defendant was never informed of such application, nor of the bill being given; it was held, that mere laches in the party secured did not operate as a discharge to the surety, unless it amounted to fraud; secondly, that the Judge correctly informed the jury that, in order to discharge the debt, time must have been given under such circumstances that the plaintiff could no longer sue the original debtor. *Going* v. *Edwards*, 6 Bing. 95.

(*f*) *Parker* v. *Wise*, 6 M. & S. 239. As to the admissibility of a declaration by the party guaranteed against the party who guarantees, see tit. SURETY.

(*g*) *Gillett* v. *Rippen*, 1 M. & M. 406. The defendant as landlord, in an authority to the plaintiff to distrain certain goods, added an indemnity against all costs and charges that might arise; such indemnity only applies to cases where the distress is illegal, and which the landlord had no right to put in, and not to protect the plaintiff against the consequences of the acts of his own servants. *Draper* v. *Thompson*, 4 C. & P. 84.

And, in general, to prove the hand-writing of a person, any witness may be called who has, by sufficient means, acquired such a knowledge of the *general character* of the hand-writing of the party as will enable him to swear, to his *belief*, that the hand-writing in question is the hand-writing of that person (*h*). Belief.

This knowledge of the general character of the party's hand-writing may have been acquired from having seen him write, although but once (*i*); or if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the hand-writing from a correspondence with the party upon matters of business, or from any other transactions (*k*) between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent, directed to a particular person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be (*l*); for when letters are so written in the usual and ordinary course of business, it is reasonable to pre- Grounds of belief.

(*h*) B. N. P. 236. *Lord Ferrers* v. *Shirley*, Fitzg. 195. See the observations made on the above passage in the case of *Doe* v. *Suckermore*, 5 Ad. & Ell. 703. The defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the hand-writing of the supposed attesting witness, except from having previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court. Lord Denman, C. J., and Williams, J., were of opinion that such evidence was receivable. Per Patteson and Coleridge, Js., that it was not. It is impossible, by means of any abstract, to do justice to the very able reasoning of the learned Judges in the above interesting and important case, in which all the material cases bearing on the subject were cited and remarked upon. The question was simply whether the witness had had *sufficient means* of acquiring such a knowledge of the general character of the hand-writing of the party whose signature was disputed, to sanction his testimony. In the course of the discussion, a case was alluded to in illustration of the uncertainty as to testimony of hand-writing, which had been mentioned by Lord Eldon, in the case of *Eagleton* v. *Kingston*, 8 Ves. 473, regarding himself. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon had never attested a deed in his life.

(*i*) *Garrells* v. *Alexander*, 4 Esp. 37. A witness who has seen a party write, but has forgotten the character of the hand-writing, may refresh his memory by referring to the instrument which he saw the party write. *Burr* v. *Harper*, Holt's C. 420. Where the signature to be proved was by a mark, it was held that it might be proved by inspection by a witness who spoke to having seen the party make her mark, and to some peculiarity in it. *George* v. *Surrey*, 1 M. & M. 516. If, however, his opinion rests upon a comparison of hands, it is inadmissible. *Garrells* v. *Alexander*, 4 Esp. C 37. . As where he has merely seen the party subscribe his name to another instrument to which he is the attesting witness, and is unable to form an opinion respecting the hand-writing of the party without examining such other instrument. *Filliter* v. *Minchin*, cor. Holroyd, J., Winchester Spring Assizes, 1819.

(*k*) The plaintiff used an affidavit signed by a party, and the defendant's attorney swore that he had observed it, and formed an opinion which enabled him to state his belief as to the signature to an agreement attested by the party; held that it was evidence of hand-writing, as the plaintiff was precluded from questioning the genuineness of the former signature. (Cor. Park, J.) *Smith* v. *Sainsbury*, 5 C. & P. 196.

(*l*) Per Lord Kenyon, *Cary* v. *Pitt*, Peake's L. E. 105. If a party has received letters, and acted upon them, it is a sufficient ground for belief. *Thorpe* v. *Gisburn*, 2 C. & P. 21.

Grounds of belief.

sume that they were really written by the person by whom they purport to have been written, and that they have not been fabricated to answer a particular purpose. In such case it is obviously essential that the *identity* of the correspondent whose letters have been received, with the party whose hand-writing is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence (*m*).

In the case of *Lord Ferrers* v. *Shirley* (*n*), where the issue was upon the execution of a deed by Lord Ferrers, a witness was called to prove the hand-writing of Cottington, a subscribing witness, who was dead: he stated that his master had held an estate under the late Lord Ferrers, and that he had seen several letters appearing to have been written by Cottington, for the rent of the estate; and that his master had told him that they were the letters of Cottington, Earl Ferrers's steward. The Court, in this instance, rejected the witness, because he could not prove the identity of Cottington (*o*); but Lord Raymond said that it was not necessary in all cases that the witness should have seen the party write to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out that the party writing such letters is the same man that attested the deed, it will enable the witness to swear to that person's hand-writing, although he never saw him write. And Page, J., said, if a subscribing witness to a deed live in the West Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand by having seen the letter of such person written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great, of proving the hand-writing of such subscribing witness. The Court, in this case, rejected the testimony, not on account of the insufficiency of the evidence to prove the hand-writing to be that of the person who had written the letters demanding rent, but because the identity of that person with Cottington, the attesting witness, had not been made out.

The mere seeing the superscription of letters at the post-office, purporting to have been franked by the party, is not a sufficient foundation for this kind of evidence (*p*), for the superscription may have been forged. A witness who swears to his belief of hand-writing must form his judgment from his recollection of the general character of the hand-writing of the party, and not from any extrinsic or collateral circumstances. Mr. Caldecot was allowed to state his belief that the hand-writing was not that of Mr. Mickle,

(*m*) Where it was proposed to prove the hand-writing of the defendant (Samuel Fry), a witness was produced who stated that he had never seen the defendant, but that he had corresponded with a Samuel Fry, of Plymouth Dock, that he had so addressed his letters, and received answers from him, and had from such correspondence acquired such a knowledge of his hand-writing as enabled him to say that the letter produced was in the same hand-writing; and evidence was given *aliunde* that the defendant lived at Plymouth Dock, and that no other person of the same name resided there; it was held that the evidence was sufficient. *Harrington* v. *Fry*, 1 Ry. & M. 90. Hand-writing is well proved by a witness who has received letters from the party in answer to letters written to him by the witness, although the witness has never done any act in consequence of the receipt of such letters. *Doe* v. *Wallinger*, cor. Holroyd, J., Dorchester Spring Assizes, 1819. And see *Gould* v. *Jones*, 1 Blacks. 384.

(*n*) Fitzg. 195.

(*o*) Ibid.

(*p*) *Cary* v. *Pitt*, Peake's Ev. 105. And see *Ld. Ferrers* v. *Shirley*, Fitz. 195. And it has been held that the full signature of an acceptor is not sufficiently proved by a witness who has seen the party sign his name but once before, when he used only the initial of his Christian name. *Powell* v. *Ford*, 2 Stark. 64, Ellenborough, C. J. 1817. But this case was overruled by Lord Tenterden, C. J., in the case of *Lewis* v. *Sapio*, 1 M. & M. C. 30.

the author of the Lusiad, because he was a very correct man in making capital and small letters where such were required; and in the writing produced that correctness was not observed; for the observation arose from the character of the hand-writing itself (*q*). But in the later case of *Dacosta* v. *Pym* (*r*), the witness saying that the hand-writing was like the plaintiff's, but that he did not think it was his, because the plaintiff was too much a man of the world to sign such an account, Lord Kenyon held that the answer was improper, and that the witness ought to found his opinion upon the character of the hand-writing only. Grounds of belief.

Where the witness had never seen the defendant (who was sued as the acceptor of a bill of exchange) write his name till after the commencement of the action, and then only for the purpose of showing him the difference between his hand-writing and that of the acceptance on the bill, his testimony was held to be inadmissible (*s*).

It is also a rule that evidence by *comparison* of hands is not admissible. By comparison, is *now* meant an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person (*t*). Here it may be observed, that such evidence as is now deemed to be receivable and legal evidence of hand-writing, as distinct from evidence by comparison of hands, seems formerly to have been considered as evidence by comparison of hands, and as inadmissible, at least in criminal cases. In the case of Algernon Sydney (*u*), two of the witnesses who swore to their belief of his hand-writing had *seen* him write, and the third had paid bills purporting to have been indorsed by the defendant. Yet the prisoner in his defence insisted that nothing but *comparison* of hand-writing had been offered in evidence against him. And the statute reversing his attainder (*x*), recites that there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, but which was not proved by any one witness to have been written by him, but that the jury were directed to believe it by *comparing* it with other writings of his. And in the case of the seven Bishops (*y*), evidence by the witnesses, who swore to their belief of the defendants' hand-writing from having seen other letters which had been written by them, was also termed evidence by comparison of hands, and the Court was divided upon the question whether the evidence was sufficient. It appears, however, that at that time it was the common practice to receive such evidence in civil cases. Powell, J., in the same case observes, "In civil actions, a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman, or a correspondent, or the like, but in criminal mat- Comparison of hands.

(*q*) See *Decosta* v. *Pym*, Peake's L. E. 99. 101.

(*r*) Ibid.

(*s*) *Stranger* v. *Searle*, 1 Esp. C. 14, 15. Vide 4 Esp. C. 27.

(*t*) *Brookhard* v. *Woodley*, Peake's C. 21. *Macpherson* v. *Thoytes*, Peake's C. 20. *Stranger* v. *Searle*, Esp. C. 14. *Doe* v. *Braham*, 4 T. R. 497. *Clermont* v. *Tullidge*, 4 C. & P. 1. In *Brookhard* v. *Woodley*, a paper was produced, said to be in the hand-writing of a deceased rector; in order to prove the fact, the plaintiff's counsel offered in evidence many of the returns to the Spiritual Court, of the births and burials, made in the time of the rector, and purporting to be signed by him; but Yates, J. said, "I have no doubt to reject their evidence as not admissible. I do not know of any case where comparison of hands has been allowed to be evidence at all." *Sed vid. infra*, note (*c*); See the observations on the text, in *Doe* v. *Suckermore*, 5 Ad. & Ell. 745.

(*u*) 3 St. Tr. 802, 35 Car. 2.

(*x*) 1 W. & M. c. 7 (private).

(*y*) 4 Jac. 2, 4 St. Tr. 338.

Comparison of hands.

ters such as this, if such a proof is allowed, where is the safety of your life, or of any man's life?" (*z*).

As to the reason of the rule which excludes evidence by actual comparison, it has been said jurors may not be able to read, and are therefore incompetent to make the comparison (*a*). This does not appear to be satisfactory; for if the jurors cannot read, they may nevertheless receive the evidence of witnesses who are able to make the comparison. It has also been suggested, that if such a comparison were to be allowed, an unfair selection of specimens might be made for the purpose of comparison. This, however, would be open to inquiry and observation, and scarcely seems to be a ground for the total exclusion of such evidence; and, perhaps, after all, the most satisfactory reason is, that if such comparisons were to be allowed it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length. For in every case it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen (if the present rule were to be broken through) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent (*b*). The ordinary practice is seldom attended with inconvenience; for if the hand-writing be not that of the party, it is more easy for him to disprove it than it would be for his adversary to prove it in case it were genuine; for it must be within his own peculiar knowledge what witnesses have so intimate an acquaintance with his hand-writing as to be able to prove the forgery; but where it is genuine his adversary has the witnesses to seek for. It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of hand-writing, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention.

Notwithstanding the general rule against evidence by comparison of hands, the jury are not prohibited from comparing with the disputed signature writing in evidence before them for other purposes, and proved to be in the hand-writing of the party whose hand-writing is disputed (*c*), and which are not selected by the party for the purpose of comparison (*d*).

In some instances, where the antiquity of the writing makes it impossible

(*z*) 4 St. Tr. 338.

(*a*) *Macpherson* v. *Thoytes*, Peake's C. 20. *Brookhard* v. *Woodley*, 1b. in note.

(*b*) See the observations on this passage in *Doe* v. *Suckermore*, 5 Ad. & Ell. 703.

(*c*) Where there was contradictory evidence respecting the defendant's hand-writing, the jury were allowed to compare letters admitted to have been written by him, with the disputed signature. *Allesbrook* v. *Roach*, 1 Esp. C. 351. Cor. Kenyon, C. J. *Goodtitle* v. *Braham*, 4. T. R. 497; and see Co. Litt. 6, b. Where in an action on a breach of promise of marriage after the hand-writing of the defendant had been proved to certain letters, another was offered which was also proved to be so, but was contradicted by the defendant's witness, and the Judge submitted it with the others to the jury to compare; held that it was competent for the jury so to do. *Griffiths* v. *Williams*, 1 J. & C. 47; *R.* v. *Morgan*, 2 M. & M. 133.

(*d*) *Doe* v. *Newton*, 5 A. & E. 514. So in *Solita* v. *Yarrow*, 2 M. & M. 133, a bill drawn and indorsed by the defendant having been read in evidence, the jury were directed by Lord Tenterden to compare with it a letter purporting to have been written by the defendant, but as to which the evidence of hand-writing was contradictory. On an issue that the acceptance was not that of the defendant, held, that letters written by him relating to the transaction, and which had been read in evidence,

for any living witness to swear that he ever saw the party write, comparison of hand-writing with documents known to be in his hand-writing has been admitted (*e*).

Comparison of hands, when admissible.

In the case of *Goodtitle* d. *Revett* v. *Braham* (*f*), a clerk from the post-office who had been employed to inspect franks and detect forgeries, was admitted on a trial at bar to give his opinion, as a matter of skill and judgment whether a will was written in a natural or imitative character. He admitted in his examination that he had never detected an imitation of the hand-writing of an old person who wrote with difficulty, and who might be supposed frequently to stop; and that he judged principally by seeing whether the letters were what is called painted, or passed over by the pen a second time, which might happen to any person from a failure of ink. After giving it as his opinion that the will was not genuine, a paper was produced, admitted to have been written by the person suspected of having forged the will, and he was asked his opinion whether that paper and the will had been written by the same person, and the question was objected to, but admitted by the Court. But in the case of *Cary* v. *Pitt* (*g*),

might be handed to the jury. *Eaton* v. *Jervis*, 8 C. P. 273. The only exceptions to the rule that evidence of hand-writing by comparison is inadmissible, are cases of necessity; as where genuine documents are already in evidence in the cause, or are ancient, and can be proved in no other way. *Doe* v. *Newton*, 1 Nev. & P.; and 5 Ad. & Ell. 351; questioning *Allesbrook* v. *Roach*, 1 Esp. 351. Upon an issue whether an indorsement was the defendant's, held that the jury could not be allowed to compare other writings with that in dispute; they can only do so with documents which are otherwise in the cause. *Bromage* v. *Rice*, 7 C. & P. 548. But on the trial of an issue out of the chancery of the county palatine of Lancaster, to try whether a document purporting to have been signed by a party deceased was his genuine signature, different documents proved to be in his hand-writing, and in which he spelt his name in a different manner, were submitted to the jury for the purpose of comparison, by Gurney, B. after consultation with Alderson, J. Lancaster Spring Assizes, 1833.

(*e*) By Le Blanc, J., *Row* v. *Rawlings*, 7 East, 282. In Buller's N. P. 136, it is stated that where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish books in which was the same parson's name, was permitted to swear to the similitude of the hand-writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. In *Taylor* v. *Cooke*, 8 Price, 653, it was held that in order to authenticate the hand-writings of former rectors, writings alleged to be theirs might be compared with entries in the parish registers, purporting to be their signatures; for as it was their duty to sign them, it was to be presumed that the signatures are in their hand-writing. It has been said that in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having examined several of such signatures, that he has acquired a sufficient knowledge of the hand-writing, as to be able, without an actual comparison, to state his belief on the subject. Per Holroyd, J., in *Sparrow* v. *Farrant*, Devon Sp. Ass. 1819. But in *Doe* d. *Tilman* v. *Tarver*, 1 Ry. & M. 141, in order to prove that an account produced was in the hand-writing of Edward Haylis, steward of the manner of Areton, in the year 1727, which account had been transmitted to the present steward amongst other papers and books relating to the manor, by the representative of the late steward; Abbott, L. C. J., directed the person producing the paper to compare it with the hand-writing of Edward Haylis in other papers belonging to the manor, and said that he recollected Mr. J. Lawrence, on a trial at Worcester, directing a Mr. Benjamin Price, then accidentally in court, to compare an ancient writing with other papers purporting to be written by the same person; and to give his opinion on the identity of the writings. See also *Morewood* v. *Wood*, 14 East, 328; and see the observations on the above cases of *Sparrow* v. *Farrant*, and *Doe* v. *Tarver*, in that of *Doe* v. *Suckermore*, 5 B. & Ad. 703.

(*f*) 4 T. R. 497. Lord Kenyon mentioned a case where a decypherer had given evidence of the meaning of letters, without explaining the grounds of his art, and where the prisoner was convicted and executed. And Buller, J. said it was like the case of *Wells Harbour*, where persons of skill were allowed to give evidence of opinion.

(*g*) Peake's L. E. Append. After it has

Comparison of hands, when admissible.

Lord Kenyon refused to admit the testimony of an inspector of franks at the post-office, to prove that the hand-writing of the acceptance of a bill of exchange purporting to be the defendant's, was genuine; saying, that although such evidence had been received in the case of *Revett* v. *Braham* (*h*), yet, that in his charge to the jury he had laid no stress upon it. And in the case of the *King* v. *Cator* (*i*), an inspector was admitted to swear that the libel was written in a disguised hand, but he was not allowed to give his opinion, upon a comparison of the libel with another writing, whether they had been written by the same person.

In order to test the veracity of a witness speaking to the hand-writing of the defendant, another paper, purporting to be his writing, and not relative to the issue, cannot be put into the witness's hand, to speak to its being in the defendant's hand-writing or not (*j*).

In the case of *Gurney* v. *Langlands* (*k*), the Court held that the opinion of inspectors of franks at the post-office, whether a writing is written in a natural or imitated character, is of little weight; and refused a new trial, which was moved for on the ground that such evidence had been rejected.

An acknowledgment by a party of his hand-writing, though made pending a treaty for a compromise, is evidence against him (*l*).

To prove an acceptance to have been forged by *J. S.*, the drawee cannot give evidence of similar forgeries committed by *J. S.* (*m*).

The same rules which apply to the proof of hand-writing in civil, apply also to the case of criminal proceedings (*n*), although, formerly, the rule in criminal cases was more rigid than in civil actions (*o*).

HEIR.

Proof of heirship.

ALTHOUGH an heir against whom a will is set up is entitled to an issue, a party setting it up against him is not (*p*).

When *A.* claims to be the heir of *B.*, the fact of heirship is established by proof of the relationship, and of the failure of issue from such branches as would otherwise impede the descent (*q*). And the law not only notices the general rules of descent, but also the particular course of descent according to the custom of gavelkind and borough English (*r*). But where the course

been sworn that an acceptance is in the hand-writing of the defendant, the latter must produce another paper copied and drawn by him, and call a clerk from the post-office to state, that from comparing the two instruments, he is of opinion that the acceptance is an imitation. *Stranger* v. *Searle*, 1 Esp. 14. Kenyon, C. J. 1793.

(*h*) 4 T. R. 497.

(*i*) 4 Esp. C. 117.

(*j*) *Griffiths* v. *Ivory*, 3 P. & D. 179. And see *Doe* v. *Newton*, 5 Ad. & Ell. 514.

(*k*) 5 B. & A. 330. To prove the hand-writing of a member of parliament, the opinion of a clerk employed to inspect franks, who has never had occasion to apply to the member to verify his hand-writing, is insufficient. *Batchelor* v. *Sir John Honeywood*, 2 Esp. C. 714. Dissimilitude of hand-writing is evidence of little weight, and of none whatever when opposed by positive depositions to signature in the actual presence of witnesses. *Young* v. *Brown*, 1 Hagg. 570.

(*l*) *Waldridge* v. *Kennison*, 1 Esp. C. 143.

(*m*) *Balcetti* v. *Serani*, Peake's C. 142; *Viney* v. *Barss*, 1 Esp. C. 293; *Graft* v. *Bertie*, Peake's Ev. 103.

(*n*) *Francia's Case*, 6 St. Tr. 70. *Layer's Case*, Ibid. 275. *R.* v. *Hensey*, 1 Burr. 644. *Ld. Preston's Case*, 4 St. Tr. 446. *De la Motte's Case*, Howell's St. Tr. vol. 21, p. 810. *The Attorney General* v. *Le Merchant*, 2 T. R. 201, n. *R.* v. *Cater*, 4 Esp. C. 117.

(*o*) Per Kelynge, C. J. *Carr's Case*; and 4 St. Tr. 338.

(*p*) *Lorton* v. *Ld. Kingston*, 4 Cl. & Fl. 269.

(*q*) See PEDIGREE.

(*r*) *Supra*, tit. CUSTOM. The Crown granted the dignity of an Earl to *C.*, "*et heredibus suis masculis in perpetuum*," and the grantee died without issue; it was

of descent is peculiar to a particular manor, the local custom must be proved (*s*). And although the law of England adopts the laws of all Christian countries as to marriage, it does not adopt all the consequences of such marriages; the right of inheritance to lands is governed by the *lex loci*, and by that alone. By the general law of inheritance to socage lands, it is essential not only that the claimant should be legitimate, but that he be born during marriage (*t*). And therefore, though a child born in Scotland of unmarried parents, domiciled there, and who afterwards intermarry there, is legitimate, yet he is incapable of inheriting lands in England (*u*). Proof of heirship.

In an action of covenant (*v*) for quiet enjoyment under a lease by the defendant's ancestor, the declaration alleged that the reversion came to and vested in the defendant by assignment thereof; the defendant pleaded by his guardian, that the reversion did not come to and vest in him *modo et formâ*, &c. The plaintiff proved that the estate descended to the defendant, an infant, as heir at law to the lessor; and that a person had been employed by the defendant's mother to receive the rents, and given receipts for the same to the plaintiffs as tenants of her son, and the Court of King's Bench held that the issue was sufficiently proved (*x*).

In an action against the heir, on the bond of the ancestor (*y*), the plea of *riens per discent* admits the obligation, but it is incumbent on the plaintiff to prove assets. The substance of the issue is, whether the defendant had assets, and a variance as to the county is not material (*z*); and the plaintiff may show that the land was devised to the defendant, provided the devise does not alter the limitation, for then, according to the general rule, the heir takes by descent (*a*); and the charging the estate with debts and legacies makes no difference, if the tenure and quality of the estate be not altered (*b*). Riens per discent.

The plaintiff must prove assets according to the averment in the declara- Assets.

held that the dignity descended to the male heir of a collateral branch: the rules of construction applicable to grants of lands by the Crown, are not applicable to grants of honours. *Earl of Devon's Case*, 1 Dow. & C. 200.

(*s*) See tit. CUSTOM.

(*t*) Co. Litt. 7, b. *Hæres*, in the legal understanding of the common law, implieth, that he is *ex justis nuptiis procreatus*; and again, *hæres legitimus est quem nuptiæ demonstrant*. See *Godwin's Case*, 7 Co. 1.

(*u*) *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & C. 438. In *Gordon* v. *Gordon*, 3 Swans. 400, and in the *Strathmore Peerage Case*, it was held that the subsequent marriage of Scotch parents in England did not entitle their previous issue to Scotch titles or estates.

(*v*) Debt on the specialty of the ancestor lies at common law against the heir. Co. Litt. 209. The remedy was extended to devisees by the 3 & 4 W. & M. c. 14; to covenant by the 11 G. 4, 1 W. 4, c. 47.

(*x*) *Ibid.* And it was held that the defendant's infancy was not available in that stage of the proceeding.

(*y*) This will not lie unless the heir be expressly mentioned; *aliter*, of an executor. Co. Litt. 209, a. 2 Will. Saund. 137, b.

(*z*) B. N. P. 175; 6 Co. 47.

(*a*) 1 Ld. Raym. 728. *Reading* v. *Royston*, 1 Salk. 242. There *H.* having two daughters, one of them had a son, and died, and *H.* devised to the son in fee: and the Court agreed to the rule, that where a devise to an heir gives the same estate which would descend, the devise is unnecessary, and *nihil operatur*; but they held that in the present case the heir must take by devise, for there was not a devise to the heir, since both coparceners made but one heir. See 2 Will. Saund. 7, note (4). Where the heir takes a different estate from that which he would have taken by descent, the disposition by the will must prevail; as where the estate is devised to the heir in tail (Plow. 545), or a man devises to his two daughters (Cro. Eliz. 431); but under the stat. 3 Will. & Mary, c. 14, the devise would be fraudulent against creditors, and an action might be brought against the devisee as heir and devisee. 2 Will. Saund. 7, note (4).

(*b*) *Allam* v. *Heber*, Str. 1270. B. N. P. 175. *Clerk* v. *Smith*, 1 Salk. 241.

Assets.

tion (*c*); if he declare against the defendant as heir of the *obligor*, he must prove assets as the heir of the obligor; for if it appear that the assets have descended immediately from an intermediate person, the variance will be fatal, the descent ought to have been specially stated (*d*); as where the defendant is the heir of the *heir* of the obligor, but is charged as his heir (*e*). So where the defendant being charged as the heir of *B.*, it appeared that *B.* died seised, leaving the defendant his daughter, and that his wife was with child of a son, who was born alive, and lived for an hour; for the lands came to the defendant as heir to her brother, who was last seised (*f*). It is otherwise where the intermediate heirs were not actually *seised*, for there the defendant takes as heir of the person named (*g*). The defendant under this issue may give in evidence an extent against him, on a debt owing by his father on a bond to the King, but he must prove the bond, or an examined copy of it (*h*).

Riens per discent.

On issue joined on the plea of *riens per discent al temps del original*, the defendant at common law might show that he had aliened the lands *bonâ fide* before the commencement of the action; but the plaintiff might, under that issue, show that the lands had been aliened by covin (*i*). But under the stat. 3 & 4 Will. & Mary, c. 5, s. 6, the plaintiff to such plea may reply that the defendant had lands, &c. from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereon, it be found for the

(*c*) An allegation of assets in the county *A.* is satisfied by proof of assets in the county *B.* *Dowdale's Case*, 6 Rep. 47, a.

(*d*) *Jenk's Case*, Cro. Car. 151; Lill. Ent. 147; 2 Will. Saund. 7, note. A reversion expectant on an estate-tail is not assets to charge the heir upon the general issue *riens per discent*; but a reversion expectant on an estate for life must be pleaded specially (B. N. P. 176. *Kellow* v. *Roden*, Carth. 126). It seems that a reversion expectant on a term, or lease for years, cannot be pleaded in delay of execution (2 Will. Saund. 7, note (4). *Buckly* v. *Nightingale*, 1 Str. 665; 1 Lutw. 442; Herne, 307). Where there is a mortgage for years, the reversion in fee is legal assets, and the creditor may have judgment with a *cesset executio* until the reversion comes into possession. Where it is a mortgage in fee, the equity of redemption is not legal assets, and the heir may plead *riens per discent*. *Plunkett* v. *Penson*, 2 Atk. 294. Where in debt against the heir, on the bond of the ancestor, the defendant pleaded *non est factum* and *riens per discent*, to which the plaintiff replied, lands descended, &c.; held, that being strictly a replication within the 3 & 4 W. & M. c. 14, s. 6, the jury ought to have inquired the value of the lands found to have descended, and the verdict therefore being imperfect, a *venire de novo* was awarded. *Brown* v. *Shuker*, 1 Cr. & J. 583. As to what shall be considered as assets by the heir, see 2 Will. Saund. 7, note (4); Co. Litt. 374, b.; 3 & 4 W. 4, c. 106. In the case of a mortgage of a copyhold in fee, the equity of redemption is not legal assets, 4 Rep. 22, a. An estate *pur autre vie* of which the heir is special occupant is made assets by the stat. 29 C. 2, c. 3, s. 12.

(*e*) *Ibid.* It is sufficient to charge him generally as heir, without showing *how*. *Denham* v. *Stephenson*, 1 Salk. 355.

(*f*) 2 Roll. Ab. 709, pl. 62. *Kellow* v. *Roden*, 3 Mod. 256; Dy. 68, a.; 2 Will. Saund. 7, note (4).

(*g*) Thus, *A.* being seised in fee, bound himself and his heirs, and having two sons, *B.* and *C.*, limited the estate to himself for life, remainder to *B.* his eldest son in tail, reversion to his own right heirs. *B.* entered and died, leaving *D.*, a son, who died without issue, on whose death the estate-tail became extinct, and the reversion coming into possession, descended on *C.*, *A.*'s youngest son, who was the heir as well of *D.* as of *A.* Held, that *B.* and *D.* were seised of the estate-tail only, and that *C.* was properly charged as heir to his father, and that it was, according to the well-known rule of law, sufficient to charge the defendant as heir to him. See Co. Litt. 11, b. 15, a.; Carth, 126. *Kellow* v. *Roden*, 3 Mod. 253; 1 Show. 244; 3 Lev. 286; Bro. Disc. 14—30.

(*h*) Lord Raym. 734; B. N. P. 175. *Horne* v. *Adderley*, 1 Lord Raym. 734. B. N. P. 175. Payment of another bond to the amount of assets, must be pleaded. *Buckly* v. *Nightingale*, 1 Str. 665.

(*i*) Even before the stat. 13 Eliz. c. 5, which, in this instance, is declaratory of the common law. 1 Roll. Ab. 269; Dyer, 149; 2 Will. Saund. 7, note (4). See also *Gooch's Case*, 5 Co. 60.

plaintiff, the jury shall inquire of the value of the lands, &c. so descended (*k*); and they must, under this statute, find the gross, and not the annual value (*l*).

And by the 11 G. 4 & 1 W. 4, c. 47, s. 7 (*m*), where any action of debt or covenant upon any specialty is brought against any heir, he may plead *riens per discent* at the time of the writ brought, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the writ brought; and if upon the issue joined thereon, it be found for the plaintiff, the jury shall inquire of the value of the lands so descended, and thereupon judgment shall be given. If the jury, on issue joined on the plea of *riens per discent*, find that he has something, however small, the plaintiff is intitled to a verdict and general judgment; it is therefore in such case unnecessary to prove the amount of assets (*n*) descended.

By the stat. 11 G. 4 & 1 W. 4, ss. 2 & 3, an action of covenant lies against a devisee (*o*).

HIGHWAY (*p*).

AN indictment for the non-repair of a highway, is, I. either against the inhabitants of a parish; or, II. against the inhabitants of some other district; or, III. against an individual.

I. As against a parish, upon the plea of not guilty, it is necessary to prove, 1st, that the road in question is a *highway*, as alleged, within the parish; 2dly, that it is a *public* highway; 3dly, that it is out of *repair*. For, 1st, the liability of the parish to repair all public highways situate within it, is a matter of common-law obligation (*q*), from which the parish cannot in general discharge itself, except by a special plea, which shows that some other district, or some individual, is liable (*r*), or under some special act of parliament. Proof against a parish.

If the road be improperly described in an indictment or plea, the variance will be fatal; as where a highway leading from *A.* to *B.* and communicating with *C.* by means of a cross road, was described as a road leading from *A.* to *B.* and from thence to *C.* (*s*). But it has been held to be unnecessary to state the *termini* of the highway; and therefore a plea of justification in Variance.

(*k*) When the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can recover only to the value of the land sold as found by the jury. *Redshaw* v. *Hester*, Carth. 354; Comb. 344; 5 Mod. 119. 122. If the jury neglect to find the value, the Court will award a *venire de novo*. *Jeffrey* v. *Barrow*, 10 Mod. 18, 19. So under the late stat. 11 G. 4 & 1 W. 4, c. 47, s. 7. *Brown* v. *Shuker*, 1 C. & J. 583.

(*l*) Carth. 354.

(*m*) This sec. corresponds with sec. 5 of the stat. 3 & 4 W. & M. This may be pleaded although the heir had not aliened the lands.

(*n*) 2 Will. Saund. 7, a. (n) B. N. P. 176.

(*o*) At common law a devisee was not liable either in debt or covenant to any specialty creditor. See *Wilson* v. *Kemble*, 7 East, 128. This was partially remedied by the stat. 3 & 4 W. 3, c. 14, s. 2, which did not, however, extend to an action of covenant. It has been held that this Act does not extend to any disposition made by the obligor by *deed* in his lifetime. *Parslow* v. *Weedon*, 1 Eq. C. Ab. 140; 2 Saund. 8, (*e*).

(*p*) See the stat. 55 G. 3, c. 68; 3 G. 4, c. 126; 4 G. 4, c. 95; 7 & 8 G. 4, c. 24. As to evidence of appointing a trustee of a turnpike road, see 3 G. 4, c. 126, s. 134. Notice before commencing actions or informations, Ib. s. 103; and see 5 & 6 W. 4, c. 50.

(*q*) This common-law obligation does not extend to an extra-parochial district. *R.* v. *Kingsmoor*, 2 B. & C. 190.

(*r*) 1 Vent. 90. 183. 189; 2 T. R. 106. No agreement with others will discharge the parish (3 East, 86). Where the inhabitants of a township, bound by prescription to repair all the roads within it, were expressly exempted by an Act of Parliament from the repairing of a new road, it was held that the burthen devolved upon the parish at large. 2 T. R. 106.

(*s*) *R.* v. *Great Canfield*, 6 Esp. 136.

Variance.

trespass, stating that a public highway leading from a public highway from *A.* to *B.*, in, through, over and along the *locus in quo*, to a certain other highway (leading from *C.* to *D.*), was held to be supported by proof that it led from the road from *A.* to *B.* over the *locus in quo* into another road, *E.*, and along that road into the road from *C.* to *D.* (*t*).

Where the *terminus ad quem* was laid to be a public *highway*, and it appeared in proof that it was a public *footway*, it was held that the description was sufficient (*u*). The objection, that the description of the road in the indictment is too general, and is applicable to several other roads, cannot be taken upon the trial under the plea of not guilty, but ought to be taken by a plea in abatement (*x*).

Where a highway was alleged to be a highway for all the liege subjects, with horses, carriages, &c., it was held to be sufficient, although the way passed under an arch, and could not be used by carriages unless laden in a particular way (*y*).

Proof that it is a public highway.

2dly. That it is a public highway.—The proof is either *direct* or *presumptive; direct*, as by showing that the highway has been constituted a public one by competent authority, or *presumptive*, by evidence of the use of a road which is of public convenience, by the public, which affords a presumption of their right so to use it, as against a private claimant.

The proof is *direct* where the road is proved to have been made under some statute or proceeding by writ of *ad quod damnum*.

By the stat. 13 Geo. 3, c. 78, s. 19 (*z*), where any highway has been diverted or turned above twelve months, either from necessary or other causes, and new highways, &c. have been made for the benefit of the public, and no suit or prosecution has been commenced for the diverting or turning the same, the new highway shall from thenceforth be the *public* highway to all intents, and persons liable to the repair of the old highway shall also be liable to the repair of the new in the same manner as of the old. This clause, it has been held, is retrospective only (*a*).

Direct evidence.

By another clause of the same section (*b*), provisions are made for future

(*t*) *Rouse* v. *Bardin*, 1 H. B. 351, Loughborough *dissent*.

(*u*) *Allen* v. *Ormond*, 8 East, 4. But it was said that the description might have been held to be insufficient on special demurrer.

(*x*) *R.* v. *Inhab. of Hammersmith*, 1 Starkie's C. 357.

(*y*) *R.* v. *Lyon*, 5 D. & R. 497.

(*z*) This clause is not repealed by the stat. 55 Geo. 3, c. 68.

(*a*) *Waite* v. *Smith*, 8 T. R. 133.

(*b*) This has been repealed by the stat. 55 Geo. 3, c. 68, which requires more public notices in such cases, gives greater facility of appeal to the sessions, and gives power to the justices, under certain regulations, to stop up unnecessary highways, &c. See as to the proceedings under this stat. *R.* v. *Sheppard*, 3 B. & A. 414. The stat. 55 G. 3, c. 68, does not repeal the stat. 13 G. 3, c. 78, s. 62; and therefore notice to the justices of holding a special session, at which an order is made, is necessary; *R.* v. *Justices of Worcestershire*, 2 B. & A. 228. Where the order for stopping up an useless old road referred to a plan annexed, but the notice affixed merely described the number of yards of such road to be stopped, without stating the *termini*, or referring to any plan; held that the former was sufficient, but not the latter. *R.* v. *Horner*, 2 B. & Ad. 150. Where the trustees upon a new road being made over the plaintiff's land, for which he was to be compensated by receiving the old road in exchange, by one and the same order for stopping up, directed the soil to be given up to the plaintiff, held, that as in the case of a party, *sui juris*, agreeing for the sale of the lands, no conveyance was necessary under sec. 84 of 3 Geo. 4, c. 126, so in the case of an exchange by the permission of such a party to the making of a new road over his soil, it became effectually dedicated to the public without an actual conveyance, and that he might maintain an action of trespass in respect of the old road. *Allnut* v. *Pott*, 1 B. & Ad. 302, and 3 M. & Ry. 439, *n*. Where an order for diverting a highway substituted a line of road, part newly made under the order,

diversions of highways, by two justices at special sessions, by the consent of the owner of lands. Direct evidence.

It has been held, that in an action of trespass, on issue taken on a plea that the *locus in quo* was a public highway, the legality of an order of justices in ordering the old highway to be stopped up before a new one has been made and put into a proper state, might be questioned, although the order of justices for stopping up the old road had been appealed against and confirmed at the sessions (*c*); and that evidence was admissible to show that a new road, such as the Act requires, had not been made previously to the order for stopping up the old road (*d*).

Where a highway lies in an open field, and the passengers are accustomed to turn out of the principal track when it is founderous, these outlets are part of the highway (*e*).

Where a man assigns a road out of his own land, because the highway is founderous, it does not become a highway till it be so found by writ of *ad quod damnum* (*f*).

Where trustees are authorized to make a road from one point to another, the making the old road is a condition precedent to any part becoming a highway repairable by the public (*g*).

Or next, the evidence is presumptive, and presumptions are to be derived from the *termini* and other circumstances of the road itself, and from the use and enjoyment of it by the public. Presumptive evidence.

It is not essential that the *termini* of the road should be either market-towns or public roads, provided it be proved that the public are entitled to use it, and that it has been of public convenience. The public may have a Termini.

and part along a new turnpike road, held, that it not appearing on the face of the order that the public would have secured to them as permanent a right on such new turnpike road as they had before, the order was bad. The Court could not intend that the new turnpike was a public highway; if the Act made it a turnpike road for a limited period only, it would subsist as a public road for that period only. And *quære*, whether an old road can be diverted for carriages and continued for foot passengers. *R.* v. *Winter*, 8 B. & C. 785. Under the 55 Geo. 3, c. 68, an order may be made by justices for stopping up an unnecessary footway, without ordering a sale; the words of the latter branch of sec. 2 are to be taken distributively, and the effect is, that justices may stop up in all cases, but must direct a sale in those cases only where a highway or bridleway has been stopped up. *R.* v. *Glover*, 1 B. & Ad. 483; overruling the construction put on that section in *R.* v. *Kenyon*, 6 B. & C. 640. Where the order for stopping up a highway stated that the justices "having upon view found, *or*, it having appeared to us," &c. that the highway was an useless and unnecessary one; held bad under 55 Geo. 3, c. 68, s. 2, which makes it necessary that it should appear upon view to the justices. *R.* v. *Justices of Worcestershire*, 8 B. & C. 254; S. C. *R.* v. *Rogers*, 2 M. & Ry. 289. An order for diverting a highway, containing also an order for stopping up the old highway, and not any statement that the justices have viewed the course proposed for the new one; held invalid. *R.* v. *Kent Justices*, 10 B. & C. 477. As to the surveyor's authority. *Bouverie* v. *Miles*, 1 B. & Ad. 48. *Witham Navigation Co.* v. *Padley*, 4 B. & Ad. 69. *Lowen* v. *Kaye*, 4 B. & C. 3. *Alston* v. *Scales*, 9 Bing. 3. As to the form of the order, *R.* v. *Glover*, 1 B. & Ad. 483. *R.* v. *Kenyon*, 6 B. & C. 640. *R.* v. *Justices of Worcestershire*, 8 B. & C. 624.

(*c*) *Welsh* v. *Nash*, 8 East, 394. As to the form of the order, see *Davidson* v. *Gill*, 1 East, 64. The stat. as to the residence of the justice within the hundred is merely directory. 8 East, 390.

(*d*) The notice of appeal against an order should state that the appellant is *aggrieved*. *R.* v. *Justices of Essex*, 5 B. & C. 431. Notices to the justices of the district, signed by the chief-constables and by their authority served on the justices, are notices on the justices within the statute 13 G. 3, c. 78, s. 62. *R.* v. *Justices of Suffolk*, 6 B. & C. 110.

(*e*) 1 Roll. 390, l. 10.

(*f*) Cro. Car. 267.

(*g*) *R.* v. *Cumberworth*, 3 B. & Ad. 108. *R.* v. *Hepworth*, *cor.* Hullock, B., York Lent Assizes, 1829. (Addition in Appendix). *R.* v. *Inhabitants of Mellor*, Lancaster Assizes.

Termini. right to a road as a common street, although there be no thoroughfare (*h*), or to a road terminating in a common (*i*).

So it may be a highway, although it is circuitous (*k*), and although it is used by the public but occasionally, and although it does not terminate in any town, or in any other public road (*l*); and on the contrary, it is not necessarily a public highway, although it does lead from one market-town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions (*m*).

Enjoyment. Evidence to prove a public highway consists usually in showing that the public have used and enjoyed the road; and their actual occupation of it without interruption for a considerable space of time affords a strong presumption of a right to use it; and, as will afterwards appear, a much shorter period of possession will suffice to indicate a right in the public, than to show that a private person has a title to the estate of which he is possessed. The particular manner in which it has been used, as, where it has been used for some public purpose, as for conveying materials for the repairs of other highways (*n*), or upon any occasion likely to attract notice, is very material; for such instances of *user* would naturally awaken the jealousy and opposition of any private owner who was interested in preventing the acquisition of any right by the public, and consequently acquiescence affords a stronger presumption of right than that which results from possession and *user* in ordinary cases. Although the *termini* of a road afford no conclusive evidence as to its being a highway (*o*), yet the circumstances of its leading from one market-town to another, or from one public road to another, coupled with *user* by the public, and without decisive evidence of interruption and permission by a private owner, are conclusive as to the right of the public (*p*).

Repairs. Proof of the repair of the road by a parish is strong evidence to show that it is a public highway (*q*); and evidence of repairs done by a parishioner,

(*h*) *Rugby Charity* v. *Merryweather*, 11 East, 375. But see *Woodyer* v. *Haddon*, 5 Taunt. 125. The plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street for twenty-one years (during nineteen of which the houses had been completed, and the street watched, cleansed and lighted, and both the footways, and half the causeway, paved, at the expense of the inhabitants) by the defendant's fence. The defendant then pulled down his wall; but it was held that he could not use the highway as a public highway from his own close.

(*i*) *R.* v. *Wandsworth*, 1 B. & A. 63.

(*k*) *R.* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265.

(*l*) *R.* v. *Inhab. of Wandsworth*, 1 B. & A. 63.

(*m*) See 11 East, 376, note (*a*).

(*n*) *R.* v. *Wandsworth*, 1 B. & A. 63.

(*o*) 2 East, 375; 1 Camp. 262. The Strand and Covent Garden are connected by a road which, in point of law, is a private road, although constantly used by the public.

(*p*) 1 Vent. 189.

(*q*) *R.* v. *Wandsworth*, 1 B. & A. 63. But where a local Turnpike Act required the inhabitants to do statute duty upon the new roads set out and made by the trustees under the Act, the powers of which were limited to twenty-one years, and the Act expired, the common-law obligation to repair only attaches in respect of such roads as have been made by the trustees and adopted by the public; and the fact of having done statute duty, as required by the Act, during its continuance, does not furnish a ground for presuming an adoption to render them liable. *R.* v. *Mellor*, 1 B. & Ad. 32. Where private roads, set out under an Inclosure Act, were improperly directed by the commissioners to be repaired by the inhabitants and occupiers in the same manner as public highways, it appeared that a road, set out as a private road, had been used by the public and repaired by the parish above twenty years; held, first, that the commissioners had no power to make such order, nor were the inhabitants bound to obey; and secondly, that if the inhabitants had repaired under a mistaken notion of their liability, and not on a voluntary disposition to repair the road, as one useful and convenient for the public, the defendants were entitled to be

under an agreement with the parish that he shall therefore be excused his statute-duty, is virtually evidence of repairs by the parish (*r*).

Length of time.

The enjoyment and *user* of a road by the public is frequently evidence of a right in the public, although the *user* is of modern date, provided that *user* has been attended with circumstances of *publicity*, from which an acquiescence on the part of the original owner, and a dedication by him of the road to the public, may be inferred. Thus it has been held, that a permission to the public for the space of eight, or even of six years, to use a street in London, without bar or impediment, is evidence from which a dedication to the public may be inferred (*s*). So where a court situated on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed (*t*). Where a lease was granted of certain ground to be a passage for fifty-six years, evidence of an *user* of the road by the public three or four years after the expiration of the lease, was held to be evidence of a gift to the public (*u*). Presumptions thus derived may be rebutted by proof that the owner did not acquiesce in the use by the public. The acquiescence of a lessee will not bind the reversioner, without such evidence of acquiescence on his part as will afford a presumption of a grant by him (*x*). So the erection of a bar upon the road is evidence to rebut the presumption of a dedication to the public (*y*), although the bar has been long broken down (*z*). And although the bar does not exclude foot-passengers, no right to a public footway can be presumed, since there cannot, it is said, be a partial abandonment to the public (*a*).

But where land is vested in trustees for public purposes, they may dedicate the use of the surface to the public as a highway, provided such use be not inconsistent with the purpose for which the land is vested in them (*b*).

Where a road has been set out under a local Act, by commissioners, for the use of particular persons, but in fact has been used by the public for many years, this is not, it seems, sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish (*c*).

And it has been held, that in order to charge a parish with the repairs of

acquitted. (Tenterden, L. C. J.) *R.* v. *Edmonton*, 2 M. & M. 24.

(*r*) *Ibid.*

(*s*) *Trustees of Rugby Charity* v. *Merryweather*, cited 11 East, 376. But see *Woodyer* v. *Haddon*, 5 Taunt. 125; *supra*, 524, note (*s*); and see *Jarvis* v. *Dean*, 3 Bingh. 447.

(*t*) *R.* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265.

(*u*) *R.* v. *Hudson*, Str. 909.

(*x*) 11 East, 376. And see tit. PRESUMPTION. Where a way, situate in Westminster, which was not a thoroughfare, had been treated as a highway for a century, and been enumerated in a public Act as a public road, but had during the whole period been let on lease, it was held that the jury were right in deciding that it was not a public way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years. *Wood* v. *Veal*, 5 B. & A. 454, and *qu.* whether that could be public highway which is not a thoroughfare. *Ibid.* Where the road adjoining to houses had been used by the public for four or five years, leading from White Conduit-street, and communicating with a public highway, it was left to the jury to say whether there had been a dedication to the public; and on the jury finding that there had, the Court refused to disturb the verdict. *Jarvis* v. *Dean*, 3 Bing. 447.

(*y*) *Roberts* v. *Karr*, 1 Camp. 262; 11 East, 375. *Lethbridge* v. *Winter*, 1 Camp. 263. And it has been held that the owner of the soil may replace the bar after it has been broken down twelve years.

(*z*) *Ibid.*

(*a*) 1 Camp. 263, n. *Barraclough* v. *Johnson*, 3 N. & P. 233.

(*b*) *R.* v. *Inh. of Leake*, 5 B. & Ad. 469. *Jarvis* v. *Dean*, 3 Bing. 447.

(*c*) *R.* v. *St. Benedict*, 4 B. & A. 447; see *Campbell* v. *Wilson*, 3 East, 294. But where a public Act recognizes a public highway, no adoption of it by the parish is necessary. *R.* v. *Lyon*, 5 D. & R. 497.

Length of time.

a road as a public highway, it was necessary to show that the parish had adopted the highway by proof of repairs done (*d*): the contrary, however, has since been decided; the adoption of a parish is no more than the use of the road by the public, the parish being part of the public (*e*).

Reputation.

Evidence of reputation is admissible to prove that the way is public (*f*); but evidence of this nature, arising *post litem motam*, is not admissible (*g*). So a verdict upon issue taken on a public right of way, and finding it to be such, is afterwards evidence (*h*), although such issue be taken in an action of trespass between private parties, and be offered in evidence to prove the fact between other parties in a civil action (*i*), and the rule applies to all cases of public prescription (*k*).

By the stat. 5 & 6 W. 4, c. 50, s. 23, no road to be thereafter made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be thereafter set out as a private drift-way or horse-path, in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway (repairable by the parish), without three calendar months' notice of the proposal to dedicate such highway, nor unless the same shall have been made in a substantial manner, and of the width required by the Act, to the satisfaction of two justices of the peace of the division, who are required to view the same, and certify, &c., such certificate to be enrolled at the sessions; and after twelve months' use of such road by the public, being kept in repair in the meantime by the party dedicating it, is to become a highway repairable by the parish.

Against some other district.

II. Upon an indictment against the inhabitants of some other district than a *parish*, or against an individual, the prosecutor, on the plea of "Not guilty," must prove, in addition, the obligation upon the defendants to repair the road, as alleged in the indictment, since it is not founded on a

Proof of a prescriptive obligation.

presumption of law (*l*). The obligation in such a case arising from inhabitancy must be *prescriptive* (*m*), and must be proved, as in other cases of prescription, to have existed time out of mind. The evidence in such case will depend, in some measure, upon the way in which the prescription is alleged. If a prescriptive obligation to repair the particular road be alleged,

(*d*) *R.* v. *St. Benedict*, 4 B. & A. 450; and see *R.* v. *Cumberworth*, 3 B. & Ad. 312.

(*e*) *R.* v. *Leake*, 5 B. & Ad. 469.

(*f*) Vent. 189. But an award made under a submission by a tenant for years, as to his liability to repair *ratione tenuræ*, is not evidence against another, for it was made *post litem motam*. *R.* v. *Cotton*, 3 Camp. 444. But on an issue as to a right of way, where the road had been used by the public for thirty years, the defendants having put in a document forty years old, drawn up at a parish meeting called to resist the repairs then attempted to be thrown on them, stating the lane to be private property, subject to a foot and bridleway, and signed by thirteen inhabitants, twelve of whom were dead, and the other was called as a witness; it was held to be admissible evidence, although slight, of reputation; it appearing also that twenty-two years before the action an agreement had been made between the owner of the soil and a colliery company, to allow them the use of the road, paying 5*s.* a year, and supplying cinders for the repair, which the parish were to spread; held, that although the acts of user, taken alone, might be evidence from which to infer a dedication, yet, being all referable to the agreement, it amounted only to a licence, upon compliance with the terms imposed. *Barraclough* v. *Johnson*, 8 Nev. & P. 233.

(*g*) *Ibid.*

(*h*) *Reed* v. *Jackson*, 2 East. 355; vide *supra*, Vol. I. tit. REPUTATION.

(*i*) *Ibid.*

(*k*) Per Ld. Kenyon, 2 East. 357. See Vol. I. p. 30.

(*l*) *R.* v. *Martin*, Andr. 226. The inhabitants of a town, &c. cannot be liable to the repair of a bridge, &c. *ratione tenuræ*, for they cannot hold lands. *R.* v. *Inhabitants of Pennegoes*, 2 B. & C. 166.

(*m*) Doug. 421.

the evidence will be confined to proof of the repairing of that particular road (*n*). If a prescriptive obligation to repair all public roads within the district be alleged, proof must be given of such repairs within the division, and in such case it is unnecessary to prove that the road in question is an ancient road (*o*); but if it should appear that there is any road within the township or other division, which is not repaired by the township or division, but by the parish at large, the variance would be fatal, unless the exception were specially alleged (*p*). Again, if the indictment alleged a division of the parish into particular districts, and averred a custom for each district to repair its own roads, independent of the rest, evidence of such a general custom would be admissible; but in such case, if it appeared that any one road in the parish was repaired by the parish at large, the variance would be fatal (*q*). It is not necessary to aver, in a special plea by a parish, which alleges that a sub-division is liable by prescription to repair the roads within it, and it is also unnecessary to prove, under such a plea, or in an indictment, any *consideration* for the liability (*r*). Proof of a prescriptive obligation.

A county liable to the repairs of a public bridge, is liable to the repairs of the road for 300 feet at each end of the bridge (*s*).

III. Upon an indictment against an individual, in addition to the proof that the road is a public highway, and that it is out of repair, the prosecutor must prove the obligation to repair as alleged in the indictment. To show a liability *ratione tenuræ*, the defendant must be proved to be the occupier of the lands in respect of which the obligation arises, since the law looks to the visible occupier, and not to the owner (*t*), whom it may be difficult to ascertain, for the performance of the duty. But since the obligation to repair *ratione tenuræ* implies a prescription (*u*), the prosecutor must prove the prescription by showing acts of repair by the defendant, or by former occupiers; and according to the number of instances in which repairs have been made by the occupiers for the time being, a stronger or weaker degree of presumption arises as to the obligation, as in other cases of prescription. Where the defendant, being charged *ratione tenuræ*, pleaded that his liability arose from an encroachment which had been removed, it was held that evidence of repairs done by the defendant for twenty-five years after the removal of the encroachment was presumptive evidence that the defendant repaired *ratione tenuræ* (*x*). Of liability ratione tenuræ.

(*n*) As to the nature and extent of such proof, see tit. PRESCRIPTION.

(*o*) *R.* v. *Netherthong*, 2 B. & A. 179; 2 T. R. 106.

(*p*) *R.* v. *Eccleyfield*, 1 Starkie's C. 393. The allegation of an obligation to repair all roads within the township, which, but for the said custom, would be repairable by the inhabitants of the parish at large, was introduced in order to prevent surprise from proof of the existence of roads repairable *ratione tenuræ*. P. C. in *R.* v. *Fylingdales*, 7 B. & C. 438.

(*q*) *Ibid.*

(*r*) *R.* v. *Inhabitants of Eccleyfield*, 1 B. & A. 348. *R.* v. *Inhabitants of St. Giles, Cambridge*, cited Ibid. *Gateward's Case*, 6 Co. 610; vide *etiam*, *R.* v. *Inhabitants of W. R. of Yorkshire*, 4 B. & A. 623. *Secus*, where the road is not within the parish, *R.* v. *St. Giles's, Cambridge*, and P. C. B. R. Sittings after T. T. 1823.

(*s*) *R.* v. *W. R. of Yorkshire*, 7 East, 588, 22 H. 8, c. 5; *semble*, that in general the party liable to repair the bridge is also liable to repair the adjoining highway. *Ibid.*

(*t*) 1 Roll. 390, l. 60; and see *R.* v. *Watts*, 1 Salk 357. As to the liability to repair *ratione tenuræ* where a road has been diverted or widened, see *R.* v. *Bulme*, Cowp. 648; 13 G. 3. c. 84, s. 62, 63; 4 G. 4, c. 95.

(*u*) Upon an issue of liability to repair *ratione naturæ* of an ancient mill, which was shown not to exist before the time of Hen. 8, held, that it could not be supported; it is essential to prove the liability from time out of memory. *R.* v. *Hayman*, 1 M. & M. 401.

(*x*) *R.* v. *Skinner*, 5 Esp. C. 219. *R.*

Where an entire estate is liable to the repair of a road, and the estate is divided into several parts, the occupier of each part is liable to the whole duty (*y*).

Obligation by reason of inclosure.

By reason of Inclosure or Encroachment.—The prosecutor must prove the fact of inclosure on one or on both sides of the highway; and since the public had before the inclosure a right to use the field for passage, when the highway was out of repair, the law, after the defendant has by inclosure deprived the public of that right, imposes upon him the burthen of repairing it (*z*). If he inclose on both sides, he will be liable to the repair of the whole of the road; if he inclose on one side only, leaving the other side open, he is bound to repair one moiety only (*a*); but although he inclose on one side only, yet if there be an ancient inclosure on the other, he will be bound to repair the whole (*b*). This obligation remains no longer than the inclosure or encroachment; and therefore the defendant may show in defence, that before the alleged offence he had thrown down the inclosure, and restored the road to its former state (*c*).

Defence by a parish, not guilty.

A parish cannot, under the plea of "not guilty," enter upon any defence which does not negative one of the allegations in the indictment, viz. that the road is a public road, is situated within the parish, and is out of repair. In order to discharge themselves from the obligation to repair, the inhabitants must plead specially that some other persons are liable, and upon issue joined upon such an alleged obligation, are bound to prove it (*d*). Where, however, the parish is relieved from its obligation by a public Act of Parliament, it seems that they may take advantage of the statute, under the plea of "not guilty" (*e*); but unless the Act expressly discharge the parish from the burden of repairs, it will still remain liable, although the Act directs that trustees shall take tolls, and apply the money to the repair of the road (*f*). So where the trustees of a turnpike road had repaired the road under the authority of the Act for twenty years, is was held that they were not liable to the repair of the road, there being no clause in the Act obliging them to repair the road (*g*). So where a township is bound by prescription to repair all the highways within it, it cannot be discharged without showing *by evidence* some persons certain who are bound to repair the road (*h*). But where a township is charged with a prescriptive obligation to repair a particular road, or an individual is charged *ratione tenuræ*, or *ratione clausuræ*, it is sufficient to negative the special charge by proof that some others are liable, without fixing upon whom in certain (*i*).

Indictment for obstruction.

Upon an indictment for obstructing a *public* road (*k*) or navigable river,

Stoughton, 2 Saund. 157. 12. 2 Keb. 625. Amb. 295. The defendant may be bound by prescription to repair the road before his own house. Mar. pl. 71.

(*y*) *R.* v. *Duchess of Buccleugh*, 1 Salk. 357. 3 Salk. 77. *Supra*, 440.

(*z*) Cro. Car. 366; 1 Roll. 390; Jon. 396.

(*a*) 1 Sid. 464. 2 Starkie's C. per Abbott, C. J.

(*b*) *Ibid.*

(*c*) Per Keeling, 2 Saund. 160. *R.* v. *Skinner*, 5 Esp. C. 219.

(*d*) Plea, that *M. M.* is bound to repair, *absque hoc*, that the defendants are liable, the defendants are to begin notwithstanding the traverse. *R.* v. *Inhabitants of Southampton*; cor. Holroyd, J., Summer Lent Ass. 1818. Manning's Index, 215, 2d edit. P. 672, note (*t*). Vide *etiam*, *R.* v. *Burbon*, 5 M. & S. 392.

(*e*) *R.* v. *St. George's, Hanover-square*, 3 Camp. 222.

(*f*) *R.* v. *Netherthong*, 2 B. & A. 179.

(*g*) *R.* v. *The Commissioners of Landilo District, Carmarthenshire*, 2 T. R. 232. An agreement with another that he shall repair a road, does not exempt the parish. 1 Vent. 189. Neither does the King's grant. 3 Mod. 69.

(*h*) *R.* v. *Inhabitants of Hatfield*, 4 B. & A. 75.

(*i*) *Ibid.*

(*k*) Under the 57 Geo. 3, c. 29, s. 72

the defendant may prove, in answer to the charge, that the obstruction was by accident, and did not arise from intention, or through negligence. Where a barge was sunk by misfortune in a navigable river, it was held that no indictment could be supported for not *removing it* (*l*); so it may be proved that the obstruction arose from the exercise of a right by the defendant, as by the holding of a fair there, after an *user* of twenty years (*m*). Indictment for obstruction.

It has already been seen, that an acquittal upon a former indictment for not repairing a highway, is not conclusive evidence, if it be evidence at all, to discharge the defendant (*n*); but that a conviction is usually conclusive as to the obligation to repair, unless fraud be shown (*o*). Upon an indictment for the non-repair of a road *ratione tenuræ*, it was held, that an award made under a submission by a former tenant of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, having been made *post litem motam* (*p*).

Where upon an indictment for the non-repair of a road, which lay in two parishes, the obligation was laid to be *ratione tenuræ*, it was held that the inhabitants within the parishes were *not* competent witnesses on the part of the prosecution (*q*). It has also been held, that inhabitants of a parish are not competent to give evidence for the parish, although they are so poor as to be excused from the payment of taxes, because, as it is said, although at present they are poor, they may become rich (*r*). It may, however, well be doubted whether any inhabitant would not be competent unless he were liable to some duty in respect of the highway in question (*s*). It has been held, upon an indictment against a parish, that a rated inhabitant of another parish, in which the defendants insisted that the highway was situated, was not competent to prove the contrary (*t*). It seems that the prosecutor is a competent witness, although the Court may award costs against him, if the proceeding shall appear to have been vexatious (*u*). Competency.

(Metropolis Paving Act), the authority given to the surveyor to remove such things as impede the public passage, is to be confined to such things as project upon the public ways, and cannot be extended to rails, &c. standing on a line and enclosing a space over which the public never have had a right of passage. *Bouverie* v. *Miles*, 1 B. & Ad. 38.

(*l*) *R.* v. *Watts*, 2 Esp. C. 675.

(*m*) *R.* v. *Smith*, 4 Esp. C. 109. 2 Saund. 175. n. 2.

(*n*) Vol. I. tit. JUDGMENT. But yet it has been considered to be such evidence, that upon the *acquittal* of the inhabitants of a parish the Court has suspended the judgment, in order that the case might again be tried without any prejudice from the former verdict. *R.* v. *The Inhabitants of Wandsworth*, 1 B & A. 63. And Lord Ellenborough said, that to maintain the verdict would be to send the parties to a second trial with a mill-stone about their neck, the weight of which it would be impossible to resist. See also *R.* v. *Burbon*, 5 M. & S. 322.

(*o*) Ibid. and see *R.* v. *Wandsworth*, 1 B. & A. 63. *R.* v. *Andrews*, Peake's C. 219. If judgment be given against a parish, whether it be after verdict or by default, the judgment will afterwards be conclusive evidence of liability, unless fraud be shown, and fraud is put by way of example: if other districts can show that they had no notice of the indictment, the defence having been made and conducted entirely by the district in which the highway indicted lay, without their knowledge and privity, the Court will consider it as being substantially an indictment against that district, and give the other districts liberty to plead the prescription, to a subsequent indictment for not repairing the highways in that parish. *R.* v. *Townsend*, Doug. 421. *R.* v. *Lancaster*, Hil. 40 G. 3, 2 Saund. 159, a. note (10).

(*p*) *R.* v. *Cotton*, 3 Camp. 444.

(*q*) *R.* v. *Buckeridge*, 4 Mod. 48.

(*r*) *R.* v. *Inhabitants of Hornsey*, 10 Mod. 150.

(*s*) See the stat. 34 Geo. 3, c. 74, s. 6. *R.* v. *Inhabitants of Terrington*, 15 East, 471. *R.* v. *Kirdford*, 2 East, 559. And tit. INTEREST—INHABITANTS. See also Vin. Ab. Evidence, 17, the *Peterborough Bridge Case*.

(*t*) By Bayley, J. at Nottingham, cited 15 East, 474.

(*u*) See *R.* v. *Inhabitants of Hammersmith*, 1 Starkie's C. 357; for *semble* it

Competency.

A witness is competent to prove a road to be a highway, although he has agreed to let, at an annual rent, a way across his own land, which cannot be used unless the disputed road be established (*x*).

Upon an indictment against the township of Pilling, in the parish of Garstang, charging the inhabitants with the obligation to repair all roads within the township, held that an inhabitant of the adjoining township of Nateby, in the same parish, was competent to prove that the road in question, which extended through Nateby, was a public highway. For although a conviction would discharge the parish, yet it would afford evidence to show that the road was a public one, and so to charge Nateby (*y*).

The statute 5 & 6 Will. 4, c. 50, s. 100, provides that no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceeding, to be brought or had in any court of law or equity, or before any justice of the peace under or by virtue of this Act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer, appointed by virtue of that Act.

By the stat. 3 Geo. 4, c. 126, s. 137, inhabitants of parishes, &c. are competent witnesses on proceedings for the conviction of offenders, for offences against the Act.

A party rated to the highway rates is not rendered a competent witness on an indictment for not repairing a highway, such not being "a matter relating to the rates or cesses," within the 54 Geo. 3, c. 170 (*z*).

But by the late stat. 3 & 4 Vict. c. 26, no person shall be disabled from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for or towards the maintenance of churches, chapels, or highways, or for any other purpose whatsoever.

Commissioners of a highway cannot maintain ejectment for strips of land by the side of the highway (*a*).

HUNDRED.

Under the late Act 7 & 8 Geo. 4, c. 31 (*b*), which repeals former statutes giving a remedy against the hundred in the case of robbery, &c. except as to offences before then committed, it is essential to prove:—

will not be presumed that the proceeding is frivolous, especially after a bill has been found by a grand jury. So if the indictment has been removed by *certiorari*. See tit. INTEREST.

(*x*) *Pollard* v. *Scott*, Peake's C. 18.

(*y*) *R.* v. *Inhabitants of Pilling*, Lancaster Summer Ass. 1823, cor. Holroyd, J.

(*z*) *R.* v. *Bishop's Auckland*, 2 Mo. & R. 286. But in *R.* v. *Hayman*, M. & M. 401, Tindal, C. J., is reported to have held that rated parishioners were admissible to prove a liability *ratione tenuræ*, and see *Hudebourck* v. *Langstone*, M. & M. 402 (*n*). But see Vol. I. p. 159; *R.* v. *The Recorder of Bath*, 9 Ad. & Ell. 714.

(*a*) *Doe* v. *Roe*, 8 Sc. 146. Upon the question as to slips of land between a highway and private inclosures belonging to the lord of the manor, the Court, upon a bill of exceptions, held, that grants of similar slips, at a distance from the spot claimed, were to be confined to such as were situated by the side of the highway which passed by the plaintiff's inclosures. *Doe* d. *Barrett* v. *Kemp*, 2 Bing. N. C. (C. P.) 102. S. C. 7 Bing. 332; and 5 M. & P. 173.

(*b*) The remedy against the hundred under this st. extends to houses, &c., buildings used in carrying on trade, &c., machinery employed in any manufacture, &c., engines for working mines, &c., bridges, waggon-ways to mines, &c. feloniously demolished, pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together. The remedy is extended by the

1st. That the conditions specified in the 3d sect. of the Act have been complied with, which prescribe that the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence (*c*), or the servant or servants who have the care (*d*) of the property damaged, shall within seven days (*e*) after the commission of the offence, go before some justice of the peace residing near (*f*) and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known (*g*), and shall

st. 2 & 3 W. 4, c. 72, to *threshing* machines or to any erection or fixture belonging to such machines.

(*c*) It is therefore unnecessary to examine *all* the owners or *all* the servants, and this seems to have been the rule under the st. 9 G. 1, c. 22; so that the alteration does not seem to have substantially altered the law in this respect. See the cases, note (*d*).

(*d*) Where the examination, taken before the justices according to the 9 Geo. 1, c. 22, s. 8, was only of the steward of the landlord having the superintendence of the farm on which the fire occurred, it appearing that there were several other servants of the landlord in possession of, and using parts of the premises; held, that the latter were also to be deemed "persons having the care," &c. within the words "servant or servants," of the Act, and ought to have been examined, or shown that they had no means of knowledge, and consequently that the Act had not been complied with to entitle the party to his remedy against the hundred. *Duke of Somerset* v. *Mere*, 4 B. & C. 167. But that where the principal, having knowledge, &c., has been examined, it is not necessary that the servants should also be examined. Under the 9 Geo. 1, c. 22, it was held, that where no servant was in the care of the premises at the time, the examination of the party himself was sufficient; and although the justice may inquire as to his suspicions of the offender, there was nothing in the Act requiring suspicions to be stated. *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134. Where premises are under the care of several servants all ought to be examined. *Duke of Somerset* v. *Mere*, 4 B. & C. 167. But where one servant has the general care of the property, he is the proper person to be examined, although other servants may have the special care of particular parts. *Lowe* v. *Broxtowe*, 3 B. & Ad. 550. Where the owner of the premises maliciously set on fire, gave in his own examination, held that it was sufficient, without that of his servants; the statute requiring only the evidence of servants "having the care" of the premises, which is to be understood as referring to cases where the master is absent, and the premises are left in the charge of servants. *Rolf* v. *Inh. of Elthorne*, 1 M. & M. 185. And see *Nesham* v. *Armstrong*, 1 B. & A. 146; *infra*, note (*g*). In the case of a reversioner, his own oath is sufficient, without examining the tenant or his servants. *Pellew* v. *Inhabitants of Wonford*, *supra*.

(*e*) The days within which the notice is to be given from the act done, are to be reckoned exclusive of the day on which it is done. *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134. See below, 534, note (*b*). And see *Lester* v. *Garland*, 15 Ves. 247. Where a computation is to be made from an act done by the party, the day of doing the act shall be included, but not otherwise. Ib.

(*f*) Under the st. 27 Eliz. c. 11, s. 11, it was held that the justice need not be within the county at the time of administering the oath, for the act is merely ministerial. B. N. P. 186; 1 Jones, 239; Cro. Car. 211; 1 Leon. 323; 2 Will. Saund. 376, b. Where the robbery was committed twenty miles from the residence of the justice, and although many justices lived nearer, Abney, J., on a case reserved, held it to be sufficient, considering the statute to be directory on that point. *Lake* v. *Hundred of Croydon*, Lent, 1744, B. N. P. 186. And it has been held to be no objection that the examination was taken out of the jurisdiction, it being taken by a justice who usually resided with his family within the jurisdiction. *Helier* v. *Benhurst*, Cro. Car. 211.

(*g*) In an action under the st. 52 Geo. 3, c. 130, the 4th sect. of which requires that the person or persons seeking to recover damages shall within four days after notice, &c. give in his or their examination on oath, or the examinations on oath of his or their servant or servants that had the care of his or their erections, buildings, &c. before a justice of peace, &c. whether he or they know the person or persons who committed the fact, it was held that the oath of one of several partners, negativing his own knowledge of the offender, but without stating that to the best of his belief the other partners had no knowledge, was insufficient. *Nesham and others* v. *Armstrong*, 1 B. & A. 146. Under the stat. of Eliz. it was, it seems, insufficient for the plaintiff to swear that he did not know the robbers, without adding "or any of them." Noy, 21; Com. Dig. Hundred, C. 4; *Trimmer* v. *Inh. of Mutford*, 6 D. & R. 10. In *King* v. *Inh. of Bishops Sutton*, 2 Str. 1247, it was held to be insufficient for the

submit to the examination (*h*) of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended; provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence.

The plaintiff under this section should be prepared to prove the examination by its production if taken in writing (*i*), and the due taking by some witness who was present at the time (*k*). If the plaintiff himself was not examined, it should be shown that those who were examined were his servants having the care of the property (*l*): the recognizances should also be produced and proved.

It is sufficient to show that the party presented himself to be examined in case the justice should think proper (*m*).

2dly. The plaintiff must prove a felonious (*n*) demolition and destruction of the property by persons riotously and tumultuously assembled, as alleged (*o*), within the hundred (*p*).

It seems to be necessary, under the present statute, as well as under the statute 1 Geo. 1, s. 2, c. 5, to prove either that the mob did demolish, pull down and destroy the dwelling-house, &c., or that they began to do so; for here, as under the former Act, the right is given to recover against the

plaintiff to state that he had good reason to suspect that the fact was done by R. G. and W. L.; for there is a great difference between knowing and suspecting.

(*h*) The examination ought, it seems, to be taken in writing: *qu.* and vide B. N. P. 186, which cites *Graham* v. *Hund. of Becontree*, cor. Wythers, J., to show that such an examination, under the former statutes, need not be in writing; the plaintiff, however, would comply with the condition of the statute in *submitting* himself to examination.

(*i*) It is unnecessary that the justice should take the examination in writing; it is sufficient if he appear upon the trial, and prove the substance of the matter sworn. *Graham* v. *Becontree Hundred*, B. N. P. 186, (under the stat. 27 Eliz.). If the affidavit has been taken in writing, no other evidence but that is admissible; but that may be read, it is said, on proof that it was delivered to the person producing it, by the justice's clerk, without proving his hand-writing.

(*k*) See however *Graham* v. *Becontree*, B. N. P. 186, and note (*i*).

(*l*) *Supra*, note (*d*).

(*m*) *Lowe* v. *Broxtowe*, 3 B. & Ad. 550, per Ld. Tenterden.

(*n*) See the stat. 7 & 8 Geo. 4, c. 30, s. 8.

(*o*) By the sec. 2, if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine or other engine for sinking, draining or working any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture or goods whatever, in any such church, chapel, house or other of the buildings or erections aforesaid. It is not necessary to aver a felonious demolition in *express terms* provided it appear that a felony has been committed. *Beatson* v. *Rudiforth*, 4 Marsh, 362; 7 Taunt. 45; 3 Price 48.

(*p*) See *Constable's Case*, Hob. 246. 2 Will. Saund. 375, N. Where a distinct hundred is called the half-hundred or upper hundred, and the action is brought against the hundred of *A.*, the plaintiff is liable to a nonsuit. *Constable's Case*, *supra*. But if the half hundred of *A.* be in fact part of the hundred of *A.*, the defendants, it is said (2 Will. Saund. 375 b., note (3), ought to plead in abatement.

hundred, which otherwise would have merged in the felony (*q*). The breaking windows, window-frames and shutters, is a sufficient beginning to demolish, if the criminal agents *intended* to demolish; that intent may be confirmed, or rebutted, by circumstances. If, whilst they are occupied in the work of destruction, they are suddenly interrupted by a civil or military force, the presumption is that they would have proceeded to demolition if they had not been so interrupted (*r*); for what they intended to do must be inferred from what they were doing. But if the mob retire without actual interruption, and without demolishing, it is for the jury to say whether they intend to demolish, or merely to effect mischief short of demolition (*s*). Where they do not demolish, although they have it in their power to do so, it may be presumed that they did not intend to demolish (*t*). Intention.

It was held under the stat. 9 G. 1, c. 22, that the term dwelling-house was used in that statute as descriptive of the species of property intended to be protected, and therefore that the owner of a dwelling-house might recover in respect of such an injury done to it, although no part of it was occupied by him or his family as a dwelling-house (*u*). The plaintiff is entitled to recover not only for the damage done to the subjects enumerated in the statute, but also for the damage at the same time done by any such offenders to any fixture, furniture or goods whatever in any such church, chapel, house, or other building (*x*). Dwelling-house.

It should appear that the plaintiff was the owner of the property; of this, possession is *primâ facie* evidence. The trustee even of a satisfied term, in whom the legal estate is vested, is entitled to recover (*y*).

(*q*) See Lord Ellenborough's observations in *Lord King* v. *Chambers & another*, 1 Starkie's C. 195, and in *Beckwith* v. *Wood*, 2 Starkie's C. 263; 2 Will. Saund. 377. *Burrows* v. *Wright*, 1 East, 615. *Greasley* v. *Higginbotham*, Ibid. 636. Under the stat. 57 G. 3, c. 13, it was held to be necessary to prove to the reasonable satisfaction of the jury that the fire was wilfully and maliciously occasioned. *R.* v. *Gainsbury*, 4 D. & R. 250. Holt's C. 603.

(*r*) See Lord Ellenborough's observations, *Lord King* v. *Chambers*, 1 Starkie's C. 195. *Sampson* v. *Chambers*, 4 Camp. 221. The defendants having broken the windows, sashes, and destroyed furniture, departed, having manifestly completed their purpose; held, that it did not amount to a "beginning to demolish," within the 7 & 8 Geo. 4, c. 30, s. 8. *R.* v. *Thomas*, 4 C. & P. 237.

(*s*) See Ld. Ellenborough's observations, *Lord King* v. *Chambers*, 1 Starkie's C. 195; and *Reid* v. *Clarke*, 7 T. R. 496. In the case of *Lord King* v. *Chambers*, Ibid., the mob retired after breaking the windows, window-frames, &c. and in about five minutes afterwards the street was occupied by the military. The jury found for the defendant. In the case of *Beckwith* v. *Wood* (2 Starkie's C. 263), the mob attacked the house to effect the liberation of a person confined there, and they announced their intention to pull down the house if he was not delivered up. And see *R.* v. *Thomas*, 4 C. & P. 237; *Price's case*, 5 C. & P. 510; *R.* v. *Batt*, 6 C. & P. 329.

(*t*) *Reid* v. *Clarke*, 7 T. R. 496; 2 Starkie's C. 265.

(*u*) *Rea* v. *Wood*, 2 Starkie's C. 269. But a building intended for a dwelling-house, but not completed, is not a house, outhouse or barn, within the 9 Geo. 1, c. 22, s. 7, so as to enable the owner to recover against the hundred. *Elmore* v. *Hundred of St. Briavells*, 8 B. & C. 461. By the late stat. 2 & 3 W. 4, c. 72, the provisions of the 7 & 8 Geo. 4, c. 31, are extended to threshing machines. The words house, shop or other buildings, under the stat. 57 G. 3, c. 19, were held not to include hustings erected to take elections. *Allen* v. *Ayre*, 3 D. & R. 96.

(*x*) 7 & 8 G. 4, c. 30, s. 2; before this statute, where the demolition and injury was part of the same riotous transaction, the plaintiff was entitled to recover in respect of such contemporaneous damage. *Greasley* v. *Higginbotham*, 1 East, 636. *Hyde* v. *Cogan*, Doug. 699. *Wilmot* v. *Horton*, ib. 701, n. *Secus*, in the case of a distinct substantive offence. *Beckwith* v. *Wood*, 1 B. & A. 487, where arms were stolen from a gunmaker's shop; and see *Smith* v. *Bolton*, Holt's C. 201; and in this respect the law seems to remain as it was.

(*y*) *Pritchett* v. *Waldron & another*, 5 T. R. 14. Parties jointly interested may join. *Winterstoke Hundred's case*, Dyer, 370. One of two lessees may recover, ac-

3dly. The sum requisite to restore the premises to the state in which they were before is the proper quantum of damages (*z*).

4thly. The plaintiff must prove by the production of the writ, or otherwise (*a*), that the action was commenced within three months after the offence committed (*b*).

By sec. 5, no inhabitant shall by reason of any interest arising from such inhabitancy be exempted or precluded from giving evidence.

HUSBAND AND WIFE.

I. *Evidence in actions by the husband and wife, or one of them*, p. 534.
II. *In actions against the husband and wife, &c.* p. 538.
III. *Indictments against them*, p. 548.
IV. *Competency*, p. 549.

Action by husband and wife.

I. *Joint action by the husband and wife.*—In general, when the husband and wife join, the interest of the wife must be alleged in the declaration (*c*); and consequently, if she has been improperly joined, the defect appears upon the record, and is not matter of proof in defence upon the trial.

It is unnecessary, unless the defendant deny the marriage by a plea in abatement, to give any evidence of the marriage (*d*); it is sufficient to

cording to his share. *Lowe* v. *Broxtowe*, 3 B. & Ad. 558. As to the case of a church, chapel or corporation property, see sec. 11. A reversioner may sue. *Pellew* v. *Inh. of Wonford*, 9 B. & C. 134.

(*z*) *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 273.

(*a*) See TIME. The commencement of the action would now appear on the record.

(*b*) See the st. sec. 3. According to the decisions under the stat. 27 Eliz. c. 13, s. 9, the day of committing the offence is to be included. It was held under that statute, that if a robbery be committed on the 9th of October, the action must at the latest be commenced on the 8th of October next. *Norris* v. *Hundred of Gawtrey*, Hob. 139; 2 Roll. Ab. 520; 1 Brownl. 156; Doug. 465. And see *Price* v. *Hundred of Chewton*, 1 P. Wms. 437. But now see *Pellew* v. *Wonford*, 9 B. & C. 134, and tit. TIME.

(*c*) 2 Bl. Rep. 1236. Com. Dig. *Pleader*, 2 A. 1. She *must* join in respect of all causes of action which are complete before the marriage (3 Lev. 403; Co. Lit. 351; 7 T. R. 349; Com. Dig. *Baron and Feme*, V.); so in real actions, and actions of waste (1 Bulst. 21; 7 Hen. 4, 15, a.; 3 Hen. 6, 53); or personal injury to the wife, by slander or battery, during coverture (Yel. 89; 1 Brownl. 205; 2 Cro. 501. 538; Com. Dig. *Baron and Feme*, V.) She *may* join wherever there was an inception of the cause of action in her before coverture, although it become complete afterwards (2 Saund. 47, g.; Salk. 114; 2 Lev. 107; Cro. Eliz. 459; Com. Dig. *Baron and Feme*, X.); yet in *detinue*, except for the charters of the wife's inheritance, it is said that the husband must sue alone (B. N. P. 50; 1 Salk. 114; Bac. Ab. tit. *Detinue*, A. But see R. tem. Hardw. 120); or where she is the meritorious cause of action; as, where a bond or promissory note is made payable to her (*Phillishirk* v. *Pluckwell*, 2 M. & S. 393. *Day* v. *Pasgrave*, cited Ibid. from Mr. Ford's note, 3 Lev. 403; 2 Mod. 217; Salk. 114; 4 Mod. 156; *Peat* v. *Taylor*, Cro. Eliz. 61). In an action for use and occupation, the wife may join with her joint-tenant and her husband. P. C. B. R. *Smith* v. ——, Mich. 2 G. 4. Or where an express promise is made to pay money to her for her service, as by the cure of a wound (*Brashford* v. *Buckingham*, Cro. Jac. 77. 205. *Rose* v. *Bowler*, 1 H. B. 106. *Waller* v. *Baker*, 2 Wils. 414); or the husband alone may sue. So the husband may sue alone on a covenant to husband and wife in respect of the wife's land. *Arnold* v. *Revoult*, 1 B. & B. 443. See *Beaver* v. *Lane*, 2 Mod. 217. So where she was joint plaintiff in a former action, and a cognovit was given. *Wills* v. *Nurse*, 1 Ad. & Ell. 65. Where the action would not survive to the wife, she *must not* be joined (Com. Dig. *Baron and Feme*, W.); as, where words not actionable are spoken of the wife, and occasion special damage to the husband. 1 Salk. 206; 1 Lev. 140; 1 Sid. 246. The husband and wife cannot sue as partners in this country, although they are foreigners, and may be partners by the law of their own country, where they resided when the cause of action, a balance of account, was contracted. *Cosio & others* v. *De Bernales*, 1 Ry. & M. 102. A note given to the wife *dum sola*, for money lent and not reduced into possession by the husband, does not survive to him. *Galers* v. *Maderley*, 6 M. & W. 423.

(*d*) *Dickenson & Ux.* v. *Davis*, 1 Str. 480; B. N. P. 20; Cro. Jac. 655.

identify the parties; the defendant cannot impeach the marriage by evidence under the general issue. Action by husband and wife.

Where the action is brought in respect of an injury done to the wife, as by slander or imprisonment, and consequential damages to the husband are also laid, for which he ought to have sued alone, no evidence ought to be given of such special damage, and the defect will be aided by a special verdict, confining the damages to the detriment to the wife (*e*). As if the declaration allege a battery of both (*f*), or a battery of the wife, and the taking the goods of the husband (*g*), or the imprisonment of the wife, *per quod* the affairs of the husband remained undone (*h*).

By the husband alone.—If the husband alone bring an action where his wife ought to have joined, as in debt on a bond, or for a chose in action, due to the wife before coverture (*i*), or for a personal wrong done to the wife, either before or during coverture, as by slander or battery of the wife, where the action is not founded on special and consequential damage to the husband (*k*) the declaration will be bad; but the objection usually appears on the record, and does not arise upon the evidence (*l*). By the husband alone.

Where the husband sues in respect of special damage to himself, in consequence of a personal injury to the wife, or lays the assault upon the wife, or other personal injury to her, in aggravation, he is entitled to recover in respect of the damage to himself only, and not for the injury to the wife; for the action for the latter damage would survive to the wife (*m*); but he

(*e*) 2 Mod. 66; 2 Lev. 101; 1 Lev. 3; Com. Dig. *Pleader*, C. 87. In *Russell* v. *Corne* (1 Salk. 119), where, in an action by the husband and wife for the imprisonment of the wife, the declaration alleged, *per quod*, the affairs of the husband remained undone, it was held, according to the report in Salkeld, that the *per quod* was well laid in aggravation; but in Str. 1094, Lee, C. J. said that he had seen a manuscript note of the case in Salkeld, and that Holt, C. J. said that he would not intend that the Judge suffered the husband to give the special damage in evidence. In *Todd* v. *Redford* (11 Mod. 264), which was an action by the husband and wife for an assault on the wife, *per quod* the husband expended money in her cure, and entire damages were given, it seems to have been held that the verdict might be supported. It seems, however, to be clear in principle, that where a special damage results to the husband from an injury to the wife, for which an appropriate action lies for the husband, he cannot recover jointly with the wife. See *Dix* v. *Brooks*, Str. 60. In trespass on the lands of the wife, they may recover in respect of the grass cut and carried away. Cro. Eliz. 96. *Willy* v. *Hawksmore*, cited in *Weller* v. *Baker*, 2 Wils. 424. In case by husband and wife for slander of the latter, held that special damage for loss of the wife's service could not be recovered, which would accrue to the husband alone. *Dengate* v. *Gardiner*, 4 M. & W. 5.

(*f*) 2 Mod. 66. Com. Dig. *Pleader*, C. 87. Per Powell, J., *Todd* v. *Redford*, 11 Mod. 264. If husband and wife join for the battery of both, it is wrong; but it may be helped by a verdict separating the damages, and judgment may be given for the damages to the wife, and the writ will abate for the residue. B. N. P. 21; 9 Edw. 4, 51; Cro. Jac. 655.

(*g*) Com. Dig. *Pleader*, C. 87. *Dub.* 1 Lev. 3, if the defendant be found not guilty as to the goods.

(*h*) Str. 1094. *Russell* v. *Corne*, 1 Salk. 119. *Newman* v. *Smith*, Salk. 642. *Dix* v. *Brookes*, Str. 60. But see *Todd* v. *Redford*, 11 Mod. 264; *supra*, note (*e*).

(*i*) 1 Rol. 347. *Milner* v. *Milnes*, 3 T. R. 627; 1 Sid. 25.

(*k*) Yel. 89; 1 Brownl. 205; 1 Roll. 360; Cro. Car. 90; Com. Dig. *Baron and Feme*, V.

(*l*) See the different cases, Com. Dig. *Baron and Feme*, T. W. X. It seems to be an invariable rule, that the wife must be joined in respect of all causes of action which are complete in the wife before coverture, and which of course will survive to her; but there are several instances in which a cause of action accrues during marriage, and which would survive to the wife, and where the husband may sue alone, as in the case of a bond or promissory note given the wife during coverture. *Supra*, 534. *Howell* v. *Main*, 3 Lev. 403. See also *Saville* v. *Sweeney*, 4 B. & Ad. 514. Words are spoken of the wife in a separate business, *per quod*, &c. the wife must not be joined.

(*m*) *Dix* v. *Brooks*, Str. 60, where the plaintiff declared for breaking and entering his house, and assaulting his wife; and the Court, on motion in arrest of judgment, said that the plaintiff might join that in his declaration to aggravate damages for

Action by the husband alone.

may allege and prove that in aggravation, in respect of which he cannot maintain another and more appropriate action. Thus, in trespass, for breaking and entering his house, he may allege the assaulting and menacing his wife, servants, and children, in aggravation (*n*), in order to show the enormity of the trespass (*o*). So, it seems, although the contrary has been held (*p*), he may, in an action of trespass for breaking and entering his house, give in evidence loss of service, or other consequential damage which has accrued from a trespass on his wife or daughter (*q*).

In an action by the husband alone, in respect of consequential damage from a trespass against the wife, it is incumbent on the plaintiff to give *primâ facie* evidence of marriage, and that the defendant may negative the fact of marriage by a plea in bar or by evidence under the general issue.

The husband may maintain an action in his own name for the service or labour of his wife (*r*); and if he bring such an action in respect of earnings during cohabitation, it is no answer to show that she was previously married to another who is still living, for she may be considered as servant to the plaintiff (*s*). In such an action, it seems that an admission by the wife, such as a receipt given by her, is not evidence (*t*), unless, perhaps, there be some evidence to show that the husband had constituted her his agent for that purpose (*u*).

In an action by the husband for harbouring his wife, *per quod*, &c., the defendant may, under the general issue, show that he did not wrongfully detain her, by showing violent conduct on part of husband during derangement from habits of intoxication (*x*).

By the wife alone.

Action by the wife.—The wife cannot sue without the husband (*y*), but if

which he could *not singly* recover, and for which the party injured might have a separate action; as in the common case of beating a servant, *per quod servitium amisit*. In *Newman* v. *Smith* (Salk. 642), it was held that the plaintiff might allege the beating of his daughter (in an action of trespass, *q. c. f.*) in aggravation of damages, although the loss of service could not be given in evidence, because for that he had an appropriate action; and that he might in such an action recover also for a personal injury to himself. But see *Bennett* v. *Alcott*, 2 T. R. 166.

(*n*) *Newman* v. *Smith*, Salk 642. *Dix* v. *Brooks*, Str. 60.

(*o*) Ibid.

(*p*) Ibid.

(*q*) *Bennett* v. *Alcott*, 2 T. R. 166.

(*r*) Salk. 114; B. N. P. 136; Cro. Jac. 77. For the promise in law is made to him; but on an express promise to the wife they may join. Ibid.

(*s*) Per Parker, C. J., Str. 80.

(*t*) Per Lee, C. J., B. N. P. 136.

(*u*) *Supra*, tit. AGENT.

(*x*) Per Alderson, B., *Braithwaite* v. *Jackson*, Lanc. Lent Assizes, 1835. The pleas were, 1, not guilty; 2, that the husband conducted himself with cruelty and violent threats, which produced reasonable fear, in consequence of which she left the house. Per Alderson, if the defendant knew that the detention was against the plaintiff's will, then the question is, did the defendant act on the *bonâ fide* belief that the husband misconducted himself; if so, the jury should find for the defendant under the general issue.

(*y*) *Marshal* v. *Rutton*, 8 T. R. 545; although she lives separately from her husband, and has a separate maintenance secured by deed. Neither can she be sued alone. Ibid. A feme sole trader, by the custom of London, may be sued, but the husband must be joined for conformity, although execution may be joined against her alone. See *Beard* v. *Webb*, 2 B. & P. 98. *Langham* v. *Bewett*, Cro. Car. 68. A married woman being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her, with lawful interest; held, that although she could not have maintained any action on the note during the lifetime of her husband, yet he having died and it having been given for a good consideration, it was a chose in action, and survived to the wife, and she might maintain an action upon it against either of the other parties to it, at any time within six years of the death of her husband, and recover interest from the date of the note *Richards* v. *Richards*, 2 B. & Ad. 447.

she alone bring an action, where she has a right of action, the defendant cannot take advantage of her coverture by evidence under the general issue; it is a personal disability, and must, according to the general rule (*z*), be pleaded in *abatement* (*a*), although the husband may reverse the judgment by writ of error (*b*). But if the wife alone bring an action where she has no legal cause of action, it will be a ground of nonsuit at the trial (*c*). But mere declarations by her that she was married when the cause of action accrued, without proof of either an actual marriage or cohabitation, are not sufficient (*d*). If, however, upon the trial, evidence be given of coverture, which would, being unanswered, show that the wife herself had no cause of action, she may rebut that evidence by proof of the husband's civil death, by exile and abjuration of the realm (*e*), or transportation for felony for a term of years.

Action by the wife alone.

Where a married woman brought an action for goods sold and delivered, and the defendant proved the plaintiff's coverture, and the plaintiff then gave in evidence the record of the husband's conviction for felony, and sentence of transportation for seven years, which term was then expired, it was held at *Nisi Prius* that this was evidence of the husband's abjuration of the realm; and that, if in fact he had returned, the *onus* of proving the contrary lying on the defendant, the right of action remained (*f*).

After a solemn admission by a woman that she is married to a man, and

(*z*) 3 T. R. 631.

(*a*) Coverture in a woman, whether plaintiff or defendant, must be pleaded in abatement (Com. Dig. tit. *Pleader*, 2 A. 1. *Milnes* v. *Milnes*, 3 T. R. 827.) See *Westbrooke* v. *Strutville* (Str. 79), where, in an action for an assault, the defendant proved his marriage with the plaintiff, and she proved in answer her previous marriage to one Westbrooke, who was living at the time of the second marriage; it was insisted that she ought not to give felony in evidence to support her action; but Ld. King admitted it. See B. N. P. 20.

(*b*) 2 Bl. R. 1236. If she marry during the suit, the coverture must be pleaded by plea *puis darrein* continuance. Bac. Ab. *Abatement*, C. *Morgan* v. *Painter*, 6 T. R. 265.

(*c*) *Caddell* v. *Shaw*, 4 T. R. 361; where a widow, a feme sole trader in London, brought an action in the Court of K. B. for goods sold and delivered by her whilst she was covert. Mere evidence of an acknowledgment that she was covert has been said to be insufficient. *Wilson* v. *Mitchell*, 3 Camp. 393.

(*d*) *Wilson* v. *Mitchell*, 3 Camp. 393.

(*e*) *Belknap's Case*, 2 Hen. 4. 7, a. 1 Hen. 4. 1, a; where the husband was banished to Gascony, there to remain till he attained the King's favour (Co. Litt. 132, b. 133, a.; Mod. 851; Com. Dig. *Abatement*, E. 6); and where the husband ought to join, and the coverture is pleaded in abatement, this is a good replication. In *Marsh* v. *Hutchinson* (2 Bos. & Pul. 231), Ld. Eldon observed, "The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead; so she became entitled to the enjoyment and profits of her own land, though, if he had not been civilly dead, he would have been seised of the lands in her right; and indeed she might have sued for an assault in her own name, and might have been made a defendant without her husband in all cases in which the husband must otherwise have joined."

(*f*) *Carroll* v. *Blencow*, 4 Esp. C. 27. But see Lord Eldon's observations in *Marsh* v. *Hutchinson*, 2 B. & P. 233. In *Sparrow* v. *Carruthers* (cited in *Corbett* v. *Poelnitz*, 1 T. R. 7, and 2 Bl. R. 297), the action was on a note given by a woman who kept a public-house, for malt supplied to the public-house; plea the general issue; the defence was coverture; the replication in evidence was, that the husband had been transported, and the time not yet expired; and Yates, J., thought that the Court must consider the transportation as suspending her disability. See Lord Eldon's observations on this case, 2 B. & P. 233; where he says, "A difficulty of equal importance occurs where a wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. As far as his (Mr. J. Yates's) opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out."

Action by the wife alone.

that the goods in his possession are his goods by the marriage, she will be precluded afterwards, as against creditors, from denying the marriage (*g*).

In an action by a trustee for the wife, it is usually necessary to prove his interest in the chattel or other property in respect of which he sues, by means of the settlement deed (*h*).

Where, in trespass for seizing under a distress against the husband, it appeared that on the marriage the wife's stock in trade and other articles belonging to her in and about her said business were assigned to trustees, and she being lame, the jury had found that a horse and gig, which before and after the marriage she had always used in going about to her customers, was kept for the purpose of the trade, and not for pleasure, and there being no other property to satisfy the words "and other articles," the Court discharged a rule for entering a nonsuit (*i*).

Actions against the husband and wife.

II.—*Actions against husband and wife.*—In an action against husband and wife it is sufficient to prove the marriage *de facto*, by evidence of cohabitation, acknowledgment, and reputation; for a man who has allowed a woman to pass in the world as his wife, shall not afterwards be permitted to say that she is not so (*k*). And they cannot prove in defence that they were not legally married (*l*).

But in an action against the husband and wife, in respect of the contract of the wife *previous to the marriage* (*m*), the husband may prove under the general issue that she was, at the time of the supposed contract, the wife of another man (*n*).

Against the husband.

Against the husband alone (*o*).—Although the wife cannot bind the husband

(*g*) *Mace* v. *Cadell*, Cowp. 323.

(*h*) *Norwood* v. *Hepper*, 3 Taunt. 421. *Liddlow* v. *Wilmot*, 2 Starkie's C. 86. Upon the trial of an indictment against the husband for cruelty to the wife, an agreement of compromise was entered into between the husband and the brother and father of the wife (the prosecutors), for separation and maintenance, with covenants on the part of the latter to indemnify the husband, and a nominal fine was imposed in consequence: the Court, on demurrer to a bill for specific performance, held that such a stipulation could be enforced; a compromise of a misdemeanor being by the policy of the law permitted, though not of a felony, and overruled the demurrer. *Elworthy* v. *Bird*, 2 Sim. & St. 372. It is not, however, a general rule that the law allows of compromises in cases of misdemeanor. *Supra*, 248.

(*i*) *Dean* v. *Brown*, 5 B. & C. 330. Trover for goods secured to the wife before marriage to enable her to carry on separate business, against the assignees of the bankrupt husband. The goods are not liable for the husband's debts, unless he intermeddle in the business, and that is a question of fact for the jury. *Jarman* v. *Woolloton*, 3 T. R. 618. If the wife treat the goods which she has as executrix as the goods of her husband, they are liable to be taken in execution for his debt. *Quick et Ux.* v. *Staines*, 1 B. & P. 293.

(*k*) *Norwood* v. *Stevenson*, Andr. 137. Peake's Ev. 351.

(*l*) Or even plead in bar *ne unques accouple*; for the legality of the marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. *Norwood* v. *Stevenson*, Andr. 237.

(*m*) The ground of the husband's liability in respect of the contracts of the wife before marriage, and of her acts both before and after marriage, is this, that the law having conveyed to him all marital rights in respect of the wife's property, he ought also to be liable to the burthen of claims upon that property. And conversely, as he is liable to the burthen, he is also entitled to the consideration, and therefore a secret settlement by the wife before marriage is a fraud on his marital rights, and cannot be supported. See *Goddard* v. *Snow*, 1 Russ. 485, which questions the *dicta* in *Strathmore* v. *Bowes*, 2 Cox, 28; 1 Ves. J. 28.

(*n*) *Cowley* v. *Robertson and his Wife*, 3 Camp. 438. Action for goods sold to defendant's wife, at his request; a plea that she was not the wife of the defendant was held to be bad on demurrer, as being immaterial, and amounting to the general issue. *Sinclair* v. *Hervey*, 2 Ch. C. T. M. 642.

(*o*) The husband and wife must be sued jointly in respect of the debt or contract of the wife before marriage, although the husband state an account, and expressly promises to pay the debt (*Mitchinson* v. *Hewson*, 7 T. R. 348. Alleyn, 72.) The

by any act or contract of her own, yet he may be affected by them after proof that he gave her authority to act as his agent (*p*); or by evidence, from which a previous authority by him, or his subsequent assent, can be implied. Against the husband.

Where the wife, without any authority from the husband, contracted with a servant by deed, it was held, that the servant, after the services were performed, might maintain an action of *assumpsit* against the husband according to the terms of the deed (*q*). And if the husband, although not liable in point of law, promise to pay the debt of the wife, he will be bound by it, although it was made under a mistake of the law (*r*).

Where the husband covenanted in a deed of separation (reciting his agreement to allow her £.100 out of his salary, as, &c.) to pay the same during her life, held, that the covenant was *controlled* by the recital, and that upon his dismissal from the office not by any act of his own, he was not liable to the covenant (*s*).

Where the action is brought in respect of goods supplied to the wife: 1st. They either cohabit, or 2dly, live apart; and if they live apart, they do so either by mutual consent, or by the default of one without the consent of the other, or by act of law. A presumption arises from *cohabitation*, that the wife has authority from the husband to purchase such articles as are necessary for herself and the family (*t*), unless the contrary appear, and that, having been supplied to her, they came to his use (*u*). Against the husband for goods supplied to the wife. During cohabitation.

A husband, however, is liable only for debts contracted by his wife, on the assumption that she acts as his agent; if he supplies her with necessaries, she is not to be deemed his agent beyond that, unless he sees her wear articles purchased by her without disapprobation. Where it was proved that he furnished her with all necessary apparel, and was ignorant of her dealing with the plaintiff, it was held that he was not liable (*x*).

The presumption, which is one of fact for the jury, is liable to be rebutted by evidence negativing the husband's assent to the contract; as by proof of express notice to the plaintiff, or to his servant, that the husband would not

husband may be sued alone for rent due during the coverture, on a lease which the wife has as executrix. Com. Dig. *Baron and Feme*, V.; Thom. En. 117.

(*p*) *Supra*, tit. AGENT.

(*q*) *White* v. *Cuyler*, 6 T. R. 176.

(*r*) *Hornbuckle* v. *Hornbury*, 2 Starkie's C. 177, cor. Lord Ellenborough, C. J. *Harrison* v. *Hall*, 1 Mo. & R. 185.

(*s*) *Hesse* v. *Albert*, 3 M. & Ry. 406.

(*t*) Bac. Ab. *Baron and Feme*, H.; 2 Str. 1122; and per Holt, *Etherington* v. *Parrott*, Salk. 118. *Longfoot* v. *Tiler*, 1 Salk. 113. Where the wife of the defendant took her niece to the plaintiff's school, and there was slight evidence of her agency in ordinary household expenses, which was objected to as inadmissible, the Court considering it some, although slight, evidence to go to the jury, refused to disturb the verdict. *M'George* v. *Egan*, 5 Bing. N. C. 196.

(*u*) Where the wife took up goods, but pawned them before they had been made into clothes, it was held that the husband was not liable, for they never came to his use (Salk. 118, pl. 10); but it would have been otherwise if they had been first made up and worn, and then pawned. Ibid. So if the wife pawn her clothes, and afterwards borrow money to redeem them, the husband is not liable. 2 Show. 283. And where the wife living with the husband carries on trade, his authority is, it seems, to be presumed. Where the wife carries on business on her own account, during the imprisonment of the husband, and after his return to live with her articles were furnished in the business with his knowledge; it was held that he was liable for them, though the invoices and receipts were in the name of the wife, and though she was rated, and paid the house and paving rates. The learned Judge left it to the jury to say, whether the wife was not the agent of the husband, and advised them to find for the plaintiff; and the Court afterwards held that the direction was right. *Petty* v. *Anderson*, 3 Bing. 170.

(*x*) *Seaton* v. *Benedict*, 5 Bing. 31; and the jury having found a verdict for the plaintiff, damages 10 *s.*, the Judge certified to deprive him of costs. Ib. 187.

be responsible (*y*). Proof by the plaintiff that the articles were consumed in the defendant's family is but presumptive evidence of his assent, and a special verdict for the plaintiff, which does not find the assent of the defendant, is insufficient (*z*). It is a defence for the husband to show that the credit was given not to himself but to the wife, although they lived together, and although the husband saw the wife in possession of the clothes for the value of which the action is brought (*a*). As where the plaintiff, without the privity of the husband, supplied the wife of an apothecary in a small town with dress to the amount of 200*l.*, after the father of the wife had paid a similar bill, and had admonished the plaintiff not to supply her with other goods without the knowledge of the husband (*b*). If the husband rely on notice to the plaintiff not to trust the wife during cohabitation, he must, it seems, prove express notice; it is insufficient to prove a general notice in the Gazette or other newspaper (*c*), without further showing that the plaintiff read the paper.

Where the husband has turned the wife out of doors.

Where the husband and wife do not cohabit, the liability of the husband is much varied by circumstances. If he go abroad, or simply live apart from his wife, his implied liability seems to remain as it was before (*d*).

If the husband turn away the wife, he sends credit with her for reasonable expenses (*e*), or, in other words, he lies under a *legal obligation* to pay the debts which she necessarily incurs; and therefore he cannot, in such a case, discharge himself either by a general or particular notice not to trust her.

The case of *Bolton* v. *Prentice* affords a strong illustration of the distinction. The defendant there, had, during the cohabitation, given to the plaintiff (a milliner) express notice not to trust the wife; twelve months afterwards the defendant turned his wife out of doors, and she was furnished by the plaintiff with *apparel suitable to her degree*; and the Court, on a motion by the defendant for a new trial, denied it, saying, that when a man turned

(*y*) B. N. P. 134, 135; Str. 113; Salk. 118. *Ozard* v. *Darnford*, cor. Lord Mansfield, Midd. Sitt. after Mich. T., Sel. N. P. 260, 7th ed.; and per Lord Eldon, in *Rawlins* v. *Vandyke*, 3 Esp. C. 250.

(*z*) B. N. P. 136. The case is there assimilated (B. N. P. 134) to that of credit given to a servant; but a servant has no authority till the master has recognized him as agent by his mode of dealing; a wife, on the other hand, derives her credit from the very nature of the relation, accompanied by cohabitation.

(*a*) *Metcalf* v. *Shaw*, 3 Camp. 22. *Bentley* v. *Griffin*, 5 Taunt. 356. In the former case Lord Ellenborough nonsuited the plaintiff; in the latter it was left as a question of fact for the jury to say to whom the credit had been given. See *Leggatt* v. *Reid*, 1 Car. 16.

(*b*) *Metcalf* v. *Shaw*, 3 Camp. 22.

(*c*) Bac. Ab. *Baron and Feme*, H. *Harris* v. *Morris*, 4 Esp. C. 40.

(*d*) Where the husband and wife live apart, the person who gives credit to the wife stands in her place, inasmuch as the husband is bound to maintain her, and the Spiritual Court, or a Court of Equity, will compel him to allow her an adequate alimony; but if she elope from her husband, or live in adultery, or if upon separation the husband agree to make her a sufficient allowance, and pay it, he is not liable; in the former case she forfeits her title to alimony, and in the latter has no further demands on her husband. *Ozard* v. *Darnford*, cor. Lord Mansfield, Midd. Sitt. after Mich. 20 G. 3, Selw. N. P. 261.

(*e*) B. N. P. 135. Where a party, after cohabiting with the woman as his wife, went abroad and died, held, that in the absence of any contract, all that could be implied was, that he gave her an implied authority to bind him as a wife might have done; but that her contract could not bind his estate, if made after his death. *Blades* v. *Free*, 9 B. & C. 167; 4 M. & Ry. 282. Where the plaintiff has supplied goods to a *feme covert* in the absence of the husband abroad, it lies upon him to show that the wife was in such a state as to render the supply necessary; and although a subsequent promise may render the husband liable, it is for the jury to say if such promise has been in fact made. *Bird* v. *Jones*, 3 M. & Ry. 121.

away his wife he gave her general credit, and the prohibition was gone and superseded (*f*). Where the husband has turned the wife out of doors.

If the husband by ill usage and harsh treatment compel the wife to leave him, the case is the same as if he had actually turned her out of doors (*g*).

And it is not necessary that the wife should have suffered actual violence before she leave the house; it is enough that she had reasonable ground for apprehension (*h*), or that the husband, by the indecency of his conduct, precluded her from living with him.

Where they part by consent, and *no allowance* is made by the husband, the legal obligation on the husband to provide her with necessaries still remains. If in such case an allowance be made, it is to be presumed that she is trusted on her own credit, provided the fact be known that such allowance is made (*i*). And then it is not incumbent on the husband to prove personal notice to the plaintiff; it is sufficient if the fact has been notified where the parties lived (*j*). This it seems furnishes a reasonable presumption that the plaintiff either did know the fact, or that he might have known it had he made proper inquiries (*k*). Where they part by mutual consent.

(*f*) B. N. P. 135. Where the husband having struck his wife and turned her out of doors, she had subsequently obtained a divorce *a mensâ et thoro*, and alimony had been decreed, but which had not been duly paid, it was held that neither a deed of separation nor decree for alimony would discharge the husband from his liability. *Hunt* v. *De Blaquiere*, 5 Bing. 590. And he is liable for necessaries supplied during a suit for alimony, although a decree is afterwards obtained for alimony previous to the time when such necessaries were supplied. *Keegan* v. *Smith*, 3 B. & C. 375.

(*g*) Per Lord Kenyon, *Hodges* v. *Hodges*, 1 Esp. C. 441.

(*h*) *Liddlow* v. *Wilmot*, 2 Starkie's C. 86; *Houliston* v. *Smith*, 3 Bing. 127. In *Horwood* v. *Hepper*, 3 Taunt. 421, Sir J. Mansfield is reported to have said, that nothing short of actual terror and violence will support this action; and Lawrence, J. is stated to have said, that the circumstance of a prostitute being placed at the husband's table was not sufficient to justify the wife's departure, so long as she could obtain support in the house. It is but justice to the memories of those learned Judges to doubt whether they ever sanctioned such a doctrine—a doctrine which was justly reprobated by the Court in the case of *Houliston* v. *Smith*, 3 Bing. 127. In that case Gaselee, J. said, "I have always considered the law on this subject to be as laid down by Lord Kenyon, that if a man renders his house unfit for a modest woman to continue in it, she is authorized in going away."

(*i*) If a husband, during temporary absences, supplies the wife with an allowance for necessaries, the tradesman who knows this, but credits the wife with goods, cannot recover. *Holt* v. *Brien*, 4 B. & A. 252. It is not necessary that the allowance should be secured by deed. *Holt* v. *Brien*, 4 B. & A. 252.

(*j*) *Todd* v. *Stokes*, 1 Lord Raym. 444. 8 Will. 3, by Lord Hale, B. N. P. 135. The husband lived at Winchester, and on separation by consent, articled to allow the wife 20 *l.* per annum, and she, five years afterwards, contracted the debt with the plaintiff, an apothecary in London; the husband, it was held, was not liable.

(*k*) It has been said (B. N. P. 135; and by Holt, C. J. in *Todd* v. *Stokes*, 1 Ld. Ray. 444), that if the debt be contracted by the wife at a distance from the husband's residence, and so soon after the separation that it could not be known at the place where the debt was incurred, the husband will still be liable. The principle on which the necessity for such notice rests is not very evident. If the liability of the husband for goods supplied to the wife during separation, rested upon a mere *legal obligation*, independently of any assent or notice of dissent, on the part of the husband (*supra*, 80, *infra*, 544), even express notice would not obstruct the liability, which would depend wholly on the question whether the husband had or had not supplied the wife with necessaries; if, on the other hand, the liability depended on a presumed authority from the husband, and a contract by him, and it were necessary to prove a previous knowledge of the circumstance of an allowance on the part of the plaintiff, in order to rebut the presumption of such a contract, the reason would equally apply to cases of elopement and of adultery, where such a notice is unnecessary. See p. 545. *Quære*, therefore, whether, where the wife removes to a distance from the husband, who makes her a suitable allowance, it is not incumbent on one who trusts her to make inquiry as to her situation; it is not in the power of the husband to give immediate

And it seems to be now settled that where the husband allows his wife a sufficient maintenance, it is immaterial whether the tradespeople had notice of such allowance or not (*l*).

Without consent.

Where the wife leaves the house of her husband *without* his consent and against his will, no action is maintainable against the husband for necessaries supplied to her during such absence (*m*). In such case it seems to make no difference whether the husband makes an allowance under a settlement or otherwise, for the husband is guilty of no default in neglecting a duty the performance of which by another raises an implied promise to repay. He is not liable in such case, although he has executed a deed, which is invalid, because it stipulates prospectively for the separation of the parties (*n*). If he has made a legal provision on separation for the maintenance of the wife, the remedy is against the fund, and the trustees must obtain payment from the husband (*o*).

Against the husband for goods supplied to the wife.

From what has been said, it follows that the plaintiff, in an action against the husband for necessaries supplied to the wife, must prove the marriage, either by direct proof, or by evidence of cohabitation and repute, or admissions by the husband; and where they live separate, the plaintiff must prove the circumstances under which they parted (*p*), either that they live so through the husband's default, or with his consent (*q*). Although they part by mutual consent, the husband lies under a legal obligation to support the wife, unless she has forfeited her right to maintenance by misconduct (*r*); and consequently he is liable for necessaries supplied to her, unless he can show that he himself maintains her, or that she has an adequate provision from some other source (*s*).

and effectual notice of the allowance in every place to which the wife may remove immediately after separation, but every one who trusts her may make previous inquiries. The affirmative has since been decided. See note (*l*).

(*l*) In the case of *Clifford* v. *Laton*, 1 M. & M. 101, it was held (by Lord Tenterden), that the plaintiff could not recover, she having a sufficient separate maintenance, although not from the husband. And per Lord Tenterden, C. J., where a wife lives with her husband he may generally be taken to be cognisant of her contracts; but where they are living separate, it is for the party seeking to charge the husband to make out by proof that he is liable. The plaintiff in that case did not know the party to be a married woman. And see *Mainwaring* v. *Leslie* 1 M. & M. 18. His lordship added, if a shopkeeper will sell goods to every one who comes into his shop, without inquiring into their circumstances, he takes his chance of getting paid, and it lies on him to make out by full proof his claim against any other person. And in *Mizen* v. *Pick*, 3 M. & W. 481, Alderson, B. intimated his doubts whether Lord Eldon expressed himself to the extent of what is stated in *Rawlins* v. *Vandyke*; and in giving judgment says, "I do not see how notice to the tradesmen can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable."

(*m*) *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200.

(*n*) *Ibid.*

(*o*) *Ibid.*

(*p*) *Mainwaring* v. *Leslie*, 1 M. & M. 18.

(*q*) For if the plaintiff rely on an implied contract, he must show that circumstances exist which raise that implied contract; *supra* 58. And as where they live apart it may be without default on the part of the husband, this is a fact essential to his liability, and the *onus* of proof lies on the plaintiff. See *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200. *Contra*, *Coe* v. *King*, 12 Mod. 372; where it was held that mere proof of prior cohabitation was *primâ facie* sufficient evidence to charge the husband. In *Longfoot* v. *Tiler*, Salk. 160, Holt, C. J. ruled that the husband was liable on the wife's contract for tea, in which she dealt, on mere evidence of cohabitation.

(*r*) *Nurse* v. *Craig*, 2 N. R. 152. *Harris* v. *Morris*, 4 Esp. C. 41.

(*s*) Vide *infra*, 545; and *Liddlow* v. *Wilmot*, 2 Starkie's C. 86.

Necessaries.

Whether the wife live with or apart from her husband, evidence is essential to show that the goods supplied were necessary and convenient, according to the husband's degree and estate in life (*t*); for it is not to be presumed that he made the wife his agent (*u*) beyond that extent where he cohabits with her, nor will the law impose a larger obligation upon him where they live apart. And regard is to be had to the *estate* of the husband, and not merely to his degree, for one of high degree may be a man of low estate (*v*). And in the ascertainment of what is suitable to his circumstances (which is usually a question of fact for the jury) (*x*), they are not to be guided by the fortune brought by the wife, but to regulate their verdict according to the real circumstances of the husband (*y*). Where the conduct of the husband renders it necessary that she should exhibit articles of the peace against him, his allowing a separate maintenance does not exempt him from liability to the costs of those articles (*z*).

Where the husband was a common labourer, and after separation the wife worked for her livelihood, Lord Holt held that the money she earned should go to keep her (*a*). There seems to be no satisfactory reason why one who has lent money to the wife (who has been turned out of doors by her husband) in order to provide her with necessaries, should not be entitled to recover it from the husband, for it may happen that she may not be able to procure credit (*b*).

(*t*) B. N. P. 136. *Manby* v. *Scott*, 1 Lev. 4, 5; 1 Sid. 109. In an action against the husband for supplies to the wife, living separate, and only a payment of a sum into court pleaded, held, that the defendant thereby admitting the authority to contract, it was a question only of amount, but that she could not pledge his credit beyond what would be reasonable and necessary for her subsistence; the bill, 140 *l.*, being for horses and carriages let on hire for ten months, and 73 *l.* paid into court, the jury found for the defendant. *Emmett* v. *Norton*, 8 C. & P. 506.

(*u*) Where there is no express promise on the part of the husband, and it cannot be inferred from his acts and conduct that he authorized the wife to act, the question is whether the law will under the circumstances raise an implied assumpsit; this the law will not do, unless the articles supplied be necessaries. See *Montague* v. *Benedict*, 3 B. & C. 631, and *infra*, note (*x*).

(*v*) Per Ld. Hale, in *Manby* v. *Scott*, Bac. Ab. *Baron and Feme*, H.

(*x*) Bac. Ab. *Baron and Feme*, H. It has been held that a husband, who has turned his wife out of doors, is liable for the costs of articles of the peace which are necessary for her safety (*Shepherd* v. *Mackoul*, 3 Camp. 326). A tradesman who sold lace and silver fringes for a petticoat and side-saddle, which amounted to 94 *l.*, and all within four months, to the wife of a serjeant at law, afterwards a Judge, recovered against him. Skinn. 349. But in the case of *Montague* v. *Benedict*, 3 B. & C. 631, which was an action for jewels supplied to the wife of a special pleader, to the amount of upwards of 100 *l.*, part of which the wife herself had paid, and it appeared that the wife brought a fortune under 4,000 *l.*, that she received by virtue of her marriage settlement the sum of 60 *l.* annually, and that before the supply of the jewels by the plaintiff she had jewelry suitable to her condition; that they lived in a ready-furnished house, at the rent of 200 *l.* a year, and there was no evidence to show his privity, and that no application was made to the husband for many months after, but that the plaintiff always called when he knew the husband was from home; it was held that there was no question for the jury; the articles not being necessary, the plaintiff was bound to prove either an express or implied contract on the part of the husband, and that here the circumstances did not raise an implied contract.

(*y*) Per Lord Eldon, C. J., *Ewers* v. *Hutton*, 3 Esp. C. 255.

(*z*) *Turner* v. *Rookes*, 2 P. & D. 294; 10 Ad. & Ell. 47. Where a husband is indicted for assaulting his wife, one who advances money to the attorney for carrying on the prosecution, and without which he could not have gone on, cannot recover from the husband such money as supplied for necessaries. *Grindell* v. *Godman*, 5 Ad. & Ell. 755. Otherwise (*semble*) according to the above case, where she exhibits articles of the peace against her husband.

(*a*) 1 Salk. 118.

(*b*) See *Harris* v. *Lee*, 1 P. Wms. 482. The husband gave his wife the foul distemper; she came up to town to be cured, and borrowed money from *A.* to pay the surgeon, and for necessaries; the husband

Assent by the husband.

Where, however, the husband allows the wife to assume an appearance which he is unable to support, he is answerable for the consequences of the deception, and is liable to pay for articles supplied to the wife corresponding with that appearance, however inconsistent it may be with his circumstances (*c*). And although where they do not cohabit, the husband is liable for necessaries only according to his estate, yet if he, after separation, be privy to and sanction her appearance in a pretended state of affluence inconsistent with his real circumstances, he would, it seems, be liable just as if the appearances had been real (*d*); and so he is if, knowing that his wife has ordered goods which are inconsistent with his fortune, and having the power of returning or countermanding them, he does neither, for then he adopts her act (*e*).

Separation by act of law.

But although in general a husband is not liable where the wife through her own default lives apart from him, yet it is otherwise, in some instances, where the separation is by operation of law; for in such case the wife has not the power to return. And therefore, if the wife be imprisoned for felony, the husband is liable for necessaries (*f*); but it is otherwise if she be kept in an improper place by the covin of the gaoler (*g*). So if the husband be imprisoned for any offence, it should seem that he would be liable as if he had deserted his wife, for the separation is a consequence of his own fault. Where they are separated *a mensâ et thoro* by sentence of the Ecclesiastical Court, she is allowed alimony at the discretion of the Judge, except in case of adultery (*h*).

A declaration for provisions supplied to the husband will be supported by evidence of provisions supplied to the wife at his request during his absence (*i*).

Defence by the husband.

The defendant may prove in answer that the wife eloped from him (*k*), or that since the separation she has lived in a state of adultery, although she did not elope with the adulterer (*l*). And in such cases, notice to the trades-

having died, charging his land with debts, it was decreed that *A.* should stand in the place of those who had supplied the necessaries.

(*c*) *Waithman* v. *Wakefield*, 1 Camp. 120. *Atkins* v. *Curwood*, 7 C. & P. 756.

(*d*) Ibid.

(*e*) Ibid.

(*f*) *Scott* v. *Manby*, 1 Sid. 118.

(*g*) *Fowles* v. *Dineley*, Str. 1122.

(*h*) 1 Bl. Comm. 429. See 5 T. R. 679.

(*i*) B. N. P. 136, as decided in *Ross* v. *Noel*, 31 Geo. 2, C. B., on a case reserved. It is added, that it was also said that it would be wrong in the case of a third person; but it seems that there is no difference between the two cases, if the delivery be on the request of the defendant. But see *Ramsden* v. *Ambrose*, Str. 127; B. N. P. 136; *Harris* v. *Collins*, Ibid. 1 Sid. 145.; Com. Dig. Action on the Case on Assumpsit.

(*k*) B. N. P. 135. *Morris* v. *Martin*, Str. 647. *Child* v. *Hardyman*, 2 Str. 875. *Todd* v. *Stokes*, 1 Ld. Raym. 444. 12 Mod. 244. 1 Salk. 116. *Car* v. *King*, 12 Mod. 372. In the case of *Manby* v. *Scott*, 1 Lev. 4, the tradesman trusted the wife after she had gone away, *without her husband's consent*, and after an *express prohibition* on his part; and it was held that the husband was not liable (1 Lev. 4. 1 Sid. 109.) The Judges of the Court of K. B. were divided upon the question; but in the Exchequer it was decided in favour of the husband, by eight Judges (one of whom was L. C. B. Hale) against three; but Atkyns, J. one of the eight, differed from the three on the ground of the special prohibition. Proof of prohibition by the husband will not alone be sufficient to discharge him.

(*l*) *Mainwaring* v. *Sands*, Str. 706. *Govier* v. *Hancock*, 6 T. R. 603. Although, when he turned her out of doors, there was no imputation upon her conduct (Ibid). But where, after the defendant's wife had committed adultery, he left her in the house with two children bearing his name, and without making any provision for her, and she continued to live in a state of adultery, the Court of C. P. held that he was liable for necessaries, in the absence of proof that the plaintiff knew or ought to have known the circumstances. *Norton* v. *Fazan*, 1 B. & P. 226. Where the husband is not civilly liable for necessaries to the wife, on account of her having quitted him and lived in

man of the fact of elopement, or of the adultery, is immaterial (*m*); for the legal obligation to maintain the wife, which alone in this case raises the implied promise, ceases. But although the wife elope, yet, if she afterwards solicit to be received, and the husband refuse, the legal obligation revives (*n*). So the husband may show in defence that he allowed a separate and adequate (*o*) maintenance to the wife; but in this case, it has been held to be necessary to show that the tradesman had notice of the separate maintenance (*p*). But it was held by Lord Holt to be sufficient to show that the fact was notorious in the place where the husband resided (*q*). And it has

Defence by the husband.

adultery, he cannot be charged criminally under the Vagrant Act, for neglecting and refusing to maintain her. *Rex* v. *Flinton*, 1 B. & Ad. 226. *Ewers* v. *Hutton*, 3 Esp. C. 255. The proper construction of the statute 13 Ed. 1, is, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited. *Hethrington* v. *Graham*, 6 Bing. 135, and 3 M. & P. 300.

(*m*) Per Raymond, C. J. Str. 706; and Ld. Holt always ruled it so. Per Raymond, C. J. *Morris* v. *Martin*, Str. 647; and *Child* v. *Hardyman*, Str. 875. The previous adultery of the wife, or the fact that she was then living in adultery, is no defence for a trustee in an action on a bond for securing an annuity to the wife. *Field* v. *Serres*, 1 N. R. 121; and see Moore, 683.

(*n*) Where the wife had left the husband in consequence of some violence, and resided, with his knowledge, at the plaintiff's house, and he refused to receive her back unless she would give up certain property; held, that being bound to maintain her without any such condition, and having never offered to take her back, he was liable for necessaries. (Cor. Parke, J.) *Reed* v. *Moore*, 5 C. & P. 200. But he will not be liable to any extent if she be living apart in adultery; the verdict, however, in an action for *crim. con.* being *inter alios partes*, is not evidence in the action for such supplies; and if the husband inform the tradesman that she is living in adultery, he will not be liable beyond necessaries, although he does not prove the adultery. *Hardie* v. *Grant*, 8 C. & P. 512.

(*o*) *Ewers* v. *Hutton*, 3 Esp. C. 255; *Hodgkinson* v. *Fletcher*, 4 Camp. 70. In an action for coals supplied to the wife, living separate, held that he was liable, unless the wife be shown to have a competent provision, and it lies on him to show that, and a mere notice that he will not pay is not sufficient to relieve him from the liability: where the tradesman served both, and agreed with the husband not to charge him with the goods supplied to the wife, he cannot recover from the husband. *Dixon* v. *Hurrell*, 8 C. & P. 717. A bond by the husband reciting an instrument for separation, and covenanting for payment of an annuity, is valid. *Jee* v. *Thurlow*, 2 B. & C. 547. And a plea of adultery committed by the wife is no bar. Ibid. And see *St. John* v. *St. John*, 11 Ves. 537. *Seagrove* v. *Seagrove*, 13 Ves. 439. *Worral* v. *Jacob*, 3 Mer. 456. In *Durant* v. *Titley*, 7 Price, 577, the deed of a husband covenanting with a trustee for the payment of an annuity to the wife *in case they should live separate*, was held to be void, as being contrary to the policy of marriage. *Secus*, where the deed is not prospective, but where the husband covenants, on an agreement to separate, to pay an annuity. *Jee* v. *Thurlow*, 2 B. & C. 547. Where it was found that during their cohabitation a deed was executed not intended to be accompanied with immediate separation, held that it was void. *Hindley* v. *Lord Westmeath*, 6 B. & C. 200. Courts of equity will enforce deeds of separation, and the performance of covenants for payments to a trustee, except as against creditors of the husband; and the want of an indemnity by the trustee to the husband held not to affect the right. *Ross* v. *Willoughby*, 10 Price, 1. The adequacy of the maintenance is a question of fact for the jury. *Hodgkinson* v. *Fletcher*, 4 Camp. 70. If, in consideration of the wife proceeding no further in the prosecution of an indictment for an assault, the husband agree to secure her an annuity, it is an illegal contract, and, in a creditor's suit, she is not entitled to come in as a creditor. *Garth* v. *Earnshaw*, 3 Y. & C. 584.

(*p*) *Rawlins* v. *Vandyke*, 3 Esp. C. 250, cor. Ld. Eldon. In the case of *Turner* v. *Winter*, cited Sel. N. P. 262, Ld. Mansfield, C. J. is said to have nonsulted the plaintiff, because, on separation, the defendant had agreed to make the wife an allowance, and had regularly paid it.

(*q*) *Supra*, 541. If the liability of the husband in such case depended on a presumption of authority delegated by him to the wife, such notice would obviously be material for the purpose of negativing the presumed authority. But *qu.* whether the liability of the husband, where the wife lives apart, depends upon that principle; if it did, the husband might discharge himself by giving express notice not to trust her, which he cannot do; and it would be no defence to show that the wife had eloped, or lived in adultery, without notice of the fact to the plaintiff. As the liability of the

Defence by the husband.

since been held that such notice is unnecessary (*r*). It is not necessary for the husband to prove that he executed a deed, or even a written instrument, to secure the maintenance to the wife (*s*). But the formal execution of such a deed by the husband and trustee of the wife will be no defence, unless the husband prove that he actually *paid* the allowance (*t*). He is liable for necessaries supplied to her previous to a decree for alimony in the Ecclesiastical Court, although alimony is decreed from a time previous to the supply (*u*).

The husband may also show that his wife has separate funds of her own, adequate to her maintenance according to his situation in life; for although she does not derive that provision from him, he is not liable unless her funds be inadequate (*v*). The adequacy of the allowance, and of the separate funds of the wife, is a question of fact for the jury (*x*). The receipts of the wife are not evidence to prove that the maintenance has been paid (*y*). It is no defence to show that the defendant was not really married to the woman with whom he cohabits as his wife, even although he can prove that the plaintiff knew the fact; for the implied promise results from the presumption of authority given by the defendant to the wife; and if the defendant treat a woman as his wife in the face of society, the presumption of authority arises independently of the fact of marriage (*z*). But although the parties have long cohabited as husband and wife, it is, seems, a good defence, where goods are supplied to the supposed wife after separation, to show that she is not in fact the wife of the defendant (*a*). For in case of separation, the implied promise rests, it seems, upon the legal obligation to maintain the wife, and that obligation must be founded on a legal marriage. The husband is not liable, as upon an implied *assumpsit*, to maintain his wife's children by a former husband (*b*). But an implied promise may arise from his conduct, as where he adopts the children, receives them into his family, and treats them as part of it, and stands in *loco parentis* (*c*); even although the contract for necessaries be made by the wife during his absence from home (*d*).

husband in case of separation seems to rest on the legal obligation to maintain the wife, must not (in principle) the *implied assumpsit* cease when the obligation is at an end?

(*r*) *Supra*, 542 (*l*).

(*s*) *Hodgkinson* v. *Fletcher*, 4 Camp. 70. But see *Ewers* v. *Hutton*, 3 Esp. 255; where Lord Eldon held that a deed of separate maintenance, executed by the husband and wife only, was a nullity; but in that case, it is to be observed, there was no evidence of any actual payment of the maintenance.

(*t*) *Nurse* v. *Craig*, 2 N. R. 148, by three of the Judges of C. B., Sir J. Mansfield, C. J. *dissent*. This was a strong case: the wife's trustee under the deed, with whom the husband had covenanted to allow her maintenance, brought *assumpsit* for necessaries supplied to the wife; and it was held that the action lay, the husband not having paid the stipulated maintenance.

(*u*) *Houliston* v. *Smith*, 3 Bing. 127.

(*v*) *Liddlow* v. *Wilmot*, 2 Starkie's C. 86, *cor.* Ld. Ellenborough; and by Lord Tenterden in *Clifford* v. *Laton*, 1 M. & M. C. 101. The plaintiff knew that she had resources of her own independent of her husband. So in the Ecclesiastical Court the wife is at all times entitled to have her costs taxed, since the marriage gives all the property to the husband; but where she has separate property the privilege does not apply. *Beevor* v. *Beevor*, 3 Phill. 461. *Thomson* v. *Harvey*, 4 Burr. 2177.

(*x*) 4 Camp. 70; 2 Starkie's C. 86.

(*y*) 4 Camp. 70.

(*z*) *Norwood* v. *Stevenson*, Andr. 237. *Watson* v. *Threlkeld*, 2 Esp. C. 637. *Munro* v. *De Chemant*, 4 Camp. 215; But see *Robinson* v. *Nahon*, 1 Camp. 245.

(*a*) *Munro* v. *De Chemant*, 4 Camp. 215, *cor.* Ld. Ellenborough.

(*b*) *Tubb* v. *Harrison*, 4 T. R. 118. *Cooper* v. *Martin*, 4 East, 76. And the husband may maintain an action for the amount of necessaries on an express *assumpsit* by such child, made after he has attained his age.

(*c*) *Stone* v. *Carr*, 3 Esp. C. 1.

(*d*) Ibid. and per Lord Ellenborough, *Cooper* v. *Martin*, 4 East, 76.

The husband may, it seems, in answer to an action of *assumpsit*, on an agreement to allow the plaintiff 12*s*. a week for the use of the wife, prove her adultery under the general issue, without a special plea (*e*). But the declarations of the wife are not, it seems, admissible to prove the fact of adultery (*f*).

Where there is a cause of action *against the wife*, as upon her contract before marriage or a tort committed by her during marriage (*g*), and she is sued alone, the coverture is no defence on the evidence, unless it be pleaded in abatement (*h*). Against the wife alone.

Where there is no cause of action against the wife by reason of the coverture, she cannot now give the coverture in evidence under the plea of *non est factum*, or of the general issue (*i*). And she is not estopped from setting up such a defence by proof that she had declared herself to be a widow, and that she had executed deeds and carried on lawsuits under that description (*k*). If she make a demise of her land jointly with her husband, her agreement to the deed after his death will affirm it (*l*), although there be no re-execution (*m*), and although the demise be not warranted by the stat. 32 H. 8, c. 28 (*n*). And such agreement may be proved by circumstances, as by a re-delivery of the deed (*o*).

Upon the principle of common law, the wife of one who has abjured the realm (*p*) is liable in respect of a cause of action subsequent to such abjuration. There seems to be no instance in which it has been held that the wife of an Englishman who resides abroad is liable (*q*).

(*e*) *Scholey* v. *Goodman*, 1 Bing. 340.

(*f*) Ibid.

(*g*) See Com. Dig. *Baron and Feme*, Y.; & *supra*, 534.

(*h*) Com. Dig. *Pleader*, 2 A. 1. Ibid. *Abatement*, F. 2. 3 T. R. 631. And in that case the civil death of the husband by abjuration, transportation, &c. may be replied (vide *infra*, 547, note (*q*),) or that he is an alien enemy and out of the realm (1 Salk. 118). It is now perfectly settled, that in other cases the husband must be joined, although she is separated from her husband, and has a separate maintenance by deed (*Marshall* v. *Rutton*, 8 T. R. 545), or live in adultery, and separate from her husband (*Gilchrist* v. *Brown*, 4 T. R. 766), or be divorced *a mensâ et thoro* for adultery. *Lewis* v. *Lea*, 3 B. & C. 291; and see *Hatchett* v. *Baddeley*, 2 Bl. 1082. *Hyde* v. *Price*, 3 Ves. 443. A warrant of attorney executed by a feme covert, held invalid, although at the time divorced *a mensâ et thoro*. *Faithorne* v. *Blaquire*, 6 M. & S. 73.

(*i*) Under the new rules, Hil. T. 4 W. 4. It was formerly otherwise. B. N. P. 172; *supra*, tit. DEED; Com. Dig. *Baron and Feme*, Q.; 12 Mod. 101; 1 Salk. 7; 3 Keb. 228; 2 Str. 1104.

(*k*) *Davenport* v. *Nelson*, 4 Camp. 26.

(*l*) 1 Roll. 149, l. 10, 11; Com. Dig. *Baron and Feme*, s. 1.

(*m*) Cowp. 201.

(*n*) Which authorizes leases by one of full age seised in right of his wife, or jointly with his wife, of any estate of inheritance made before coverture, or after, by writing indented under seal.

(*o*) *Goodright* v. *Straphan*, Cowp. 201.

(*p*) *Lean* v. *Schutz*, 2 Bl. 1199; 4 B. & C. 207. So of one transported for a term. *Carrol* v. *Blencowe*, 4 Esp. C. 27. *Walford* v. *Duchesse de la Pienne*, 2 Esp. C. 554. Lord Kenyon in that case held, that if an emigrant left his wife in this country and resided abroad, it was tantamount to an abjuration by a native, and that the wife might be sued as a feme sole. And see *Franks* v. *Duchess de la Pienne*. But in a later and similar case Lord Ellenborough held that the wife was not so liable, and his ruling was confirmed by the Court, in the case of *Kay* v. *The Duchesse de la Pienne*, 3 Camp. 123. A temporary absence from this country is not sufficient to render the wife liable, even although the husband be a foreigner. *Walford* v. *The Duchesse de la Pienne*, 2 Esp. C. 554. *Franks* v. *Same*, Ib. 587.

(*q*) Per Heath, J. in *Marsh* v. *Hutchinson*, 2 B. & P. 226. An Englishman may be compelled to return at any time by the King's privy seal (Ibid.) See *Marsh* v. *Hutchinson*, 2 B. & P. 226. In that case the husband, an Englishman, had resided in Holland for ten years, and had become possessed of madder-grounds there, from the cultivation of which he derived considerable profit; three or four years before the action was brought, he sent the defendant and his family to England, where his wife resided as a married woman; the husband remained in Holland to look after his

Against the wife alone.

The defendant may prove her coverture by the usual presumptive evidence of marriage, as well as by direct proof (*r*). Proof that the husband was alive within seven years of the time when the debt was contracted will be sufficient (*s*). Mere acknowledgments of the marriage by the defendant and her alleged husband are insufficient (*t*).

Indictment against husband and wife.

III.—In general, it seems that a wife may be indicted, even for felony, jointly with the husband (*u*); but if it appear on the evidence upon an indictment for any felony, except murder or homicide (*x*), that the husband was *present* when the offence was committed, and acted in the commission of it, the wife, it seems, ought to be acquitted, on the presumption that she acted under the coercion of her husband (*y*). This practice, however, of acquitting the wife in cases of all felonies except murder, seems to have been encouraged out of tenderness to her sex, and in order to obviate the unjustifiable rigour of the law, which would, for the same felony, have saved the husband by admitting him to the benefit of the clergy, whilst the wife must have suffered death (*z*). But, on account of the heinousness of the offence, this doctrine does not extend to cases of murder (*a*), or manslaughter, nor to that of treason (*b*); neither does it extend to assaults and batteries, or, as it seems,

madder-grounds, and also in order to recover a situation which he had held as agent for the English packets at the Brill, in case the intercourse between the two countries should be re-established. It was held that the wife was not liable in an action for coals supplied to her under those circumstances. In the case of *De Gaillon* v. *Victoire Harel L'Aigle* (1 B. & P. 357), where the replication stated that the husband resided abroad, and that the defendant lived separate from him, and traded in this country as a feme sole, and that the plaintiff traded with and gave credit to her as a feme sole, the defendant was held to be liable; but Heath, J. afterwards (1 N. R. 80) said that the decision proceeded much upon the ground that the husband was a foreigner. In the case of *Farrer* v. *The Countess of Granard* (1 N. R. 80), a replication, alleging that the husband resided in Ireland, and that the defendant lived in this country separate from him as a single woman, and as such promised, &c., was held to be bad on demurrer. And see *Stretton* v. *Bushach*, 1 Bing. N. C. 139; *Bogget* v. *Frier*, 11 East, 301; *Marshal* v. *Rutton*, 8 T. R. 545. A divorce *a mensâ et thoro* does not render the wife liable as a feme sole. *Lewis* v. *Lee*, 3 B. & C. 291. But a divorce *ab initio* renders her a single woman by operation of law, as if she had always been single. *Anstey* v. *Manners*, Gow. 11.

(*r*) *Kay* v. *Duchesse de la Pienne*, 3 Camp. 123. *Leader* v. *Barry*, 1 Esp. C. 353. *Bick* v. *Barlow*, 1 Doug. 171.

(*s*) *Hopewell* v. *De Pinna*, 2 Camp. 113.

(*t*) *Wilson* v. *Mitchell*, 3 Camp. 394.

(*u*) 1 Hale, 46. 516; Dalt. 104; 22 Edw. 4, 7. But not, it seems, as an accessory in receiving felons.

(*x*) The same rule applies in the case of an indictment for a misdemeanor, except in such cases as are afterwards mentioned. As in the case of an indictment for uttering counterfeit coin. *Infra*, 549.

(*y*) 1 Hale, 44, 5, 6, 7; 1 Bl. Comm. 28. It seems that the allegation in the indictment, that she is the wife, sufficiently shows the fact. *R.* v. *Knight*, 1 Carr. 116. Central Court, March 1837; the husband and wife were indicted for a *misdemeanor* in uttering counterfeit coin, and held that the wife was entitled to be acquitted on the presumption of coercion. *Cor.* Mirehouse, C. S., after consultation with Bosanquet and Coltman, Js. Where a prisoner was described in the indictment as a single woman, but had been described by all the witnesses as the wife of the other prisoner, and passed and appeared as such, it was held that if the jury were satisfied that she was so in fact, they ought to acquit, notwithstanding she had pleaded to the indictment. *R.* v. *Woodward and another*, 8 C. & P. 561.

(*z*) Hale, 46.

(*a*) Where the husband and wife were indicted for the murder of an apprentice to the husband, and it was proved that the deceased died from want of proper necessaries, and not from wounds, Lawrence, J. directed the wife to be acquitted, because it was the duty of the husband to provide food; although if he had provided food, and she had withheld it, she would have been guilty. *R.* v. *Squires*, Stafford Lent Assizes, 1792; Russel, 25. The Earl and Countess of Somerset were jointly convicted as accessories before the fact to the murder of Sir Thomas Overbury. 1 St. Tr. 351; 1 Hale's P. C. 45.

(*b*) *Arden & Somerville's Cases*, 1 And. 104.

to any other forcible and violent misdemeanors committed jointly by the husband and wife. So she may be convicted jointly with him upon an indictment for keeping a bawdy-house, such offences being, it is said, usually carried on by the intrigues of her sex (*c*). And it seems that the presumption does not arise in any case unless the husband be actually present when the felony is committed (*d*); for then only is she supposed to act under such coercion as will absolve her from the consequence of her act (*e*). And formerly, it seems, that even in cases of larciny and burglary both might be convicted of the joint offence (*f*). But in the time of Ld. Hale, it had become the settled practice in such cases to acquit the wife peremptorily (*g*). But Ld. Hale, although he admitted that the practice had prevailed, and approved of it, because it operated in *favorem vitæ*, was yet very strongly of opinion that it was a mere *primâ facie* presumption (*h*). A wife cannot be convicted of setting fire to her husband's house, with intent to injure him; to constitute the offence the intent must be to injure or defraud some third person, not one identified with herself (*i*). Where a wife commits a felony or other crime in the absence of her husband, although by his command, she is liable to be convicted (*k*). And she may be convicted as a principal in the felony, and the husband as an accessory before the fact (*l*).

Indictment against husband and wife.

If the husband commit felony or treason, the wife is not guilty of either in receiving him, for she is *sub potestate viri*, and bound to receive him (*m*); but it is otherwise if the husband in such cases knowingly receive the wife (*n*). And it has been held that an indictment, charging her jointly with the husband as an accessory after the fact, in receiving felons, is vitious (*o*); for the act is adjudged in law to be entirely the act of the husband (*p*).

Presumption as to coercion.

IV.—The husband and wife cannot be witnesses *for* each other, for their interests are identical; nor *against* each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury (*q*). So important is this rule, that the law will not allow it to be violated, even by agreement; the wife cannot be examined against her husband, although he consent (*r*); and the principle is further preserved by adhering to the rule even after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery (*s*). The application of these principles will be considered as they relate to the following classes of cases:

Competency.

(*c*) Haw. B. 1, c. 1, s. 12; 3 Salk. 384.

(*d*) Hale's P. C. 45; Kel. 31.

(*e*) *Hughes's Case, cor.* Thompson, B., Lanc. Lent Ass. 1813; *supra*, tit. FORGERY; 1 Hale, 46; Kel. 37; 2 East's P. C. 559. But see 27 Ass. 40.

(*f*) Bract. l. 3, c. 32, s. 10; Dalt. c. 104.

(*g*) 1 Hale, 45; and see 2 Edw. 3, Corone, 160, *accord.*

(*h*) 1 Hale, 45 & 516.

(*i*) *March's Case*, 1 Ry. & M. C. C. 183.

(*k*) 1 Hale, 45.

(*l*) *R.* v. *Morris*, 2 Leach, 696; *supra*, tit. ACCESSORY.

(*m*) 1 Hale, 47.

(*n*) Co. P. C. 108; 1 Hale, 47.

(*o*) *R.* v. *Dey & Ux.*, M. 37 E. 3; 1 Hale, 47.

(*p*) 1 Hale, 48. Where the charge of receiving stolen goods was joint against husband and wife, and it had not been left to the jury to say whether she received them in the absence of the husband, it was held, that she could not be properly convicted, although she had taken a more active part than he had done. *Archer's Case*, 1 Ry. & M. C. C. 146.

(*q*) 2 Haw. c. 46; 2 Hale, 279; 2 Str. 1095; Co. Litt. 6. 112. 187. *Supra*, Vol. I.

(*r*) *Barker* v. *Dixie*, R. tem. Hardw. by Ld. Hardwicke, 264.

(*s*) See *Aveson* v. *Lord Kinnaird*, 6 East, 192.

1. Where the husband or wife is a party.
2. Where one of them, not being a party, is interested in the result of a proceeding between others.
3. Where neither of them is a party to the suit, or interested in the event.

Where one of them is a party.

1. Where either of them is a party the rule seems to be universal, that the other is altogether incompetent in either civil or criminal proceedings. In an action by the plaintiff, as a feme sole, for goods sold and delivered, the husband is not competent to defeat the action by proof of the marriage (*t*).

Upon an indictment for bigamy, the real wife is incompetent; and the second wife is also incompetent until the first marriage has been established (*u*); so in a criminal case the wife is not a competent witness against any co-defendant tried with her husband, if the testimony concern the husband, although it be not given *directly* against the husband (*x*); nor for a co-defendant if the evidence tend to the husband's acquittal, as in the case of conspiracy, where the acquittal of the co-defendant would enure to the acquittal of the husband (*y*); or of an assault, where the cases of the co-defendants cannot be separated (*z*); and where the wife would be incompetent as a witness, on such grounds, her examination (*a*) or admission cannot be read (*b*), or given in evidence, except in cases where she is proved to have been constituted the agent of her husband, and then her acknowledgment or admission stands upon the same ground with that of any other agent (*c*). An admission by the wife, even of a trespass committed by herself, is not evidence to affect the husband (*d*).

Where one not being a party is interested in the result.

2. Where one of them, not being a party, is interested in the result.—Here there is a distinction between the giving evidence *for*, and giving it *against*, the other. It is an invariable rule that neither of them is a witness for the other who is interested in the result, and that where the husband is disqualified by his interest, the wife is also incompetent (*e*). Thus the wife of a bankrupt cannot be examined as to the bankruptcy of her husband (*f*). The husband is an incompetent witness for the wife, where her separate estate is concerned (*g*). In an action by a trustee for the wife against the sheriff, for taking goods the separate property of the wife, under an execution against the husband, the latter was held to be an incompetent witness for the plaintiff, on the ground of the wife's interest, although he had an interest on the other side, in having the debt satisfied by the execution (*h*). Where a carrier brought an action to recover the value of a box belonging to the husband which had been delivered by a mistake to a wrong person, the wife of the owner of the box was held to be incompetent (*i*). The interest of the

Nature of the interest.

(*t*) *Bentley* v. *Cooke*, Brownl. 47. The defendant's wife cannot be examined for the plaintiff without the defendant's consent, although the marriage has taken place since she was subpœnaed. *Pedley* v. *Wellesley*, 3 C. & P. 558.

(*u*) *R.* v. *Griggs*, 1 Raym. 1; 1 Inst. 6. b.; Gilb. Ev. 252. *R.* v. *Cliviger*, 2 T. R. 265.

(*x*) 1 Hale, 301; 2 Hale, 201; Dalt. c. 111; 2 T. R. 268; 4 T. R. 678.

(*y*) Per Ld. Ellenborough, *R.* v. *Locker & others*, 5 Esp. C. 107. *R.* v. *Frederick*, Str. 1095.

(*z*) *R.* v. *Frederick*, Str. 1095.

(*a*) Hutt. 16; B. N. P. 287; 1 T. R. 69; 1 Burr. 635; Brownl. 47.

(*b*) 2 Ch. C. 39; B. N. P. 286.

(*c*) See tit. AGENT.

(*d*) *Denn* v. *White*, 7 T. R. 112.

(*e*) Ld. Raym. 744; Str. 1095.

(*f*) 1 P. Wms. 610, 611; 12 Vin. Ab. pl. 28; 1 Brownl. 47.

(*g*) 1 Burr. 424.

(*h*) *Davis* v. *Dinwoody*, 4 T. R. 678. The wife was, in fact, the real plaintiff in the action. See *Bland* v. *Ansley*, 2 N. R. 331.

(*i*) This may be used as an illustration of the rule, although there may be a doubt

husband must, in order to disqualify the wife, be vested and certain; the mere expectation and hope on her part of benefiting her husband, when she gives evidence against an accomplice of the husband (the latter having been convicted), will not destroy her competency (*j*). Nature of the interest.

On the other hand, where the interest of the husband, consisting in a civil liability, would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject the husband to an action. This case differs very materially from those where the husband himself could not have been examined, either because he was a party, or because he would criminate himself. The party to whom the testimony of the wife is essential has a legal interest in her evidence; and as he might insist on examining the husband, it would, it seems, be straining the rule of policy too far to deprive him of the benefit of the wife's testimony. In an action for goods sold and delivered, it has been held that the wife of a third person is competent to prove that credit was given to her husband (*k*).

In an action by a trustee under a separation agreement, against a husband, for the arrear of a weekly sum he had agreed to allow his wife; the declarations of the wife are not evidence to show that during the time in respect of which the demand was made she was living in adultery (*l*).

3. Where neither of them is either a party to the suit, or interested in the general result, the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate the other, or, as it seems, involve the disclosure of some communication made by the other. It has, indeed, been said, that the rule applies to all evidence which tends collaterally, and by its connection with some other circumstances, to criminate the husband or wife of the witness, although the fact itself, abstractedly considered, involves no criminality, because it may lead to a criminal charge, and to the apprehension of the other (*m*): and therefore, that if the evidence *tend* to criminate the other, it is not admissible. Accordingly, it was held, in a settlement case, that a witness was not competent to prove her previous marriage with a man who had been removed as the husband of another woman, along with the latter. Here the rule seems to have been carried further than the principle will warrant: such evidence induces no breach of that confidence between married persons which ought to be held sacred; and neither that evidence, nor any decision founded upon it, can be afterwards used against the other party as proof of the fact. Where neither is a party, or interested in the result.

The position laid down in the case of *The King* v. *Cliviger*, and which certainly seems to be too extensive and too indefinite, has been materially contradicted in the later case of *The King* v. *The Inhabitants of All Saints, Worcester* (*n*). The respondents removed a pauper to the place of her maiden settlement, and produced Ann Willis to prove her own marriage with G. Willis. The appellants objected, on the ground that they intended to prove the subsequent marriage of G. Willis with the pauper. The sessions received the evidence of Ann Willis, who proved the marriage. The

whether the husband himself would have been incompetent; for in an action against the carrier the record would not have been evidence further than to show that such a trial was had, and such a sum recovered, and the husband must have proved his case *aliunde*. Ld. Raym. 344.

(*j*) *R.* v. *Rudd*, Leach, C. C. L. 133.

(*k*) B. N. P. 287. *Williams* v. *Johnson*, cor. King, C. J.; 1 Str. 504.

(*l*) *Scholey* v. *Goodman*, 1 Bing. 349.

(*m*) By Ashurst and Buller, Justices, in *R.* v. *Cliviger*, 2 T. R. 263.

(*n*) K. B. Easter Term, 1817; Phil. on Ev. 82.

Where neither is a party, or interested in the result.

respondents then proved the maiden settlement of the pauper in the appellant parish, and her marriage with G. Willis subsequently to the first marriage (*o*); the appellants then objected, that the testimony of Ann Willis ought to be struck out. The Court of King's Bench held that the evidence was unobjectionable when received, and could not subsequently be expunged. That the evidence was admissible, since it did not directly criminate the husband, and could not afterwards be used against him, or made the groundwork of any future prosecution. The Court further intimated, contrary to the case of *The King* v. *Cliviger*, that the former wife would have been competent to prove the marriage, even although the subsequent marriage had been previously proved (*p*).

It follows from the above decision, that the rule laid down by the Court in the case of *The King* v. *Cliviger*, where it was said that the husband or wife could not be admitted to give any evidence which *tended* to the criminination of the other in collateral cases, was too general.

Even after a divorce *a vinculo matrimonii*, the woman cannot prove any contract or other matter which arose during the coverture (*q*).

Wife de facto.

The general rule does not extend to a wife *de facto* but not *de jure*; and this is not an exception, but a case which does not fall within the general rule.

Upon an indictment for forcible abduction and marriage, the woman is a competent witness for the Crown. For the marriage being obtained by force, has no obligation in law (*r*), and the prisoner cannot take advantage of his own wrong (*s*). So in such case it is said that she is a competent witness for the prisoner (*t*). It has, however, been said, that if the marriage

(*o*) This proof, it seems, ought properly to have come from the appellants.

(*p*) In the case of *R.* v. *The Inhabitants of Bathwick*, 3 B. & Ad. 639, it was held, upon a question of settlement, that the wife was a competent witness to prove her first marriage with her husband, although he had been first examined and had proved a second marriage.

(*q*) *Munroe* v. *Twisleton*, Peake's Ev. App. lxxxvii.

(*r*) Gilb. Ev. 254; *R.* v. *Fulwood*, Cro. Car. 482. 488, 489. *R.* v. *Brown*, 1 Hale, 301; 1 Vent. 243; 3 Keb. 193; 5 St. Tr. 6; Ann. 83.

(*s*) 1 Comm. 444. In *Fulwood's Case*, 1 Hale's P. C. 302, upon an indictment for a forcible abduction and marriage, it was held that the evidence of the woman was admissible if the force be continuing upon her till the marriage; and in *Brown's Case*, 1b. and 1 East, 243, 3 Keb. 193, the evidence of the child was admitted: 1. because otherwise the stat. would be vain and useless, for possibly all that were present were of the offender's confederacy; 2. that the marriage was but *de facto*, and not *de jure*; but 3dly, principally because it was *flagrante crimine*, the child having been taken on the Thursday, married on the Friday, and seized the next day, before they had lain together, and whilst the force was continuing. There were other witnesses who proved the forcible taking, but none to prove the marriage against her will but herself. In the case of *The King* v. *Wakefield & others*, Lancaster Spring Assizes, 1827, for a conspiracy unlawfully to take Ellen Turner and procure her to be married to E. G. Wakefield, one of the defendants, proof was given that Ellen Turner, a young lady about the age of fifteen, had, under an artful contrivance and pretence, been removed by the defendants from a school in Lancashire, and taken to Scotland, where she was induced, by the pretext that it would rescue her father from ruin, to marry E. G. Wakefield. And her testimony was held by Hullock, Baron, to be admissible, even supposing the marriage to have been valid, on the principle of necessity, and also on the ground that the defendant could not by his own criminal act exclude such evidence against him; and the learned Judge referred to the cases of *R.* v. *Jagger*, cor. Lawrence, J. at York, which was the case of an attempt by the husband to poison his wife; also the case of *R.* v. *Bowes & others*, for a conspiracy to carry away Lady Strathmore, and of Lord Audley, and several instances in which a wife had been allowed to exhibit articles of the peace against her husband. The defendants were convicted, and two of them sentenced to three years imprisonment.

(*t*) *R.* v. *Perry*, Bristol, 1794, 1 Haw. P. C. c. 46, s. 79. There the testimony of the wife was admitted to show that the marriage was not forced.

has been ratified by subsequent voluntary cohabitation, she is not competent either for or against the prisoner (*u*); neither would she be competent, unless the force was continuing at the time of the marriage (*x*).

Competency of wife de facto.

Where a woman was called as a witness for a man with whom she had cohabited for several years as his wife, it is said to have been doubted whether she was a competent witness for him, and the Court came to no decision upon the point (*y*). In such a case, the fact of marriage seems to be the most simple and convenient, and, indeed, the legal test of competency. It appears to be clear, that the woman would be a competent witness *against* the man, notwithstanding such cohabitation; and the parties living in a state of illicit intercourse could not avail themselves of the benefits and protection which result from a lawful marriage (*z*); but if she would be a competent witness against him, it would certainly be going a great length to hold that she was not also competent for him, and to say, that because he had cohabited with her as his wife, he was to be estopped from disputing the fact where his life was at stake, and debarred from making use of her testimony when it was essential to his defence. Besides, there would be great uncertainty and difficulty in deciding upon the length of cohabitation, the nature and number of the representations made by the party, which should thus estop him. And in conformity with these principles, the case of *Batthews* v. *Galindo* was decided (*a*). It seems, however, that in one instance (*b*), Lord Kenyon refused to admit a woman to be examined as a witness for a prisoner charged with forgery, who had himself in court represented her to be his wife, but denied the marriage on hearing the objection taken to her competency.

Declarations in nature of facts.

Neither does the rule extend to declarations of the parties, which are in the nature of facts; for in such cases the presumptions which are made are not founded on the *credit* of the party but of the fact (*c*), and the objection on the score of policy is out of the question. Thus, the declaration of the wife at the time of effecting a policy on her life, of the bad state of her health, is evidence against her husband (*d*). So a declaration by the wife at the time of leaving her husband's house, that she fled through fear of violence, is evidence against the husband (*e*).

Declarations of the wife.

Declarations made by the wife as the agent of the husband, are, as has been seen, admissible, after proof of her authority to act for her husband, just as those of any other agent are (*f*).

(*u*) *R.* v. *Brown*, Hale, 301; 1 Vent. 243; 3 Keb. 103.

(*x*) Cro. Car. 488; Vent. 243; 4 Mod. 3; Str. 633; 2 Haw. c. 46.

(*y*) *Campbell* v. *Twemlow*, 1 Price, 81. The case arose upon an arbitration, and the arbitrator had rejected the witness; but as all matters of law, as well as of fact, had been submitted to the arbitrator, his decision was considered to be final.

(*z*) See *Adey's Case*, Leach, C.C.L. 245.

(*a*) 4 Bing. 610. It was there held that the mere circumstance of a woman cohabiting with a party, though it goes to her credit, is no ground for rejecting her testimony in an action to which he is party, and that it is immaterial as to the character in which she stands when the declarations are made; the true principle is, that she shall not be excluded unless *de jure* the wife of the party.

(*b*) Chester Circuit, 1782, cited by Richards, C. B. in *Campbell* v. *Twemlow*, 1 Price, 81. But in the case of *Batthews* v. *Galindo*, the doctrine laid down by Lord Kenyon was repudiated.

(*c*) *Supra*, Vol. I. tit. HEARSAY.

(*d*) *Aveson* v. *Lord Kinnaird*, 6 East, 188.

(*e*) Per Lord Ellenborough, in *Aveson* v. *Lord Kinnaird*, 6 East, 188.

(*f*) *Supra*, tit. AGENT.—BILLS OF EXCHANGE. Gilb. L. E. 183. Also *White* v. *Cuyler*, 6 T. R. 176; where, in an action of *assumpsit* by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife at the time of hiring, in order to show the terms of hiring. In an action by husband

The wife of a paper-maker having done an illegal act in delivering out paper before it could legally be removed according to law, stating at the time that her object was to raise money to pay duties with, former acts done by her in illegally removing paper, and depositing it for the alleged purpose of raising money to pay duties, which were in fact afterwards paid by her, are admissible in evidence to prove the authority of the husband to do the illegal act charged (*g*).

Necessity.

Some exceptions to the general rule are founded on evident necessity (*h*), where the fact is presumed to be exclusively within the knowledge of the wife (*i*). The wife is a witness *ex necessitate*, on a charge against her husband of violence committed on her person (*k*); so the dying declarations of the wife against her husband are admissible in the case of murder (*l*).

Husband and wife—Competency.

On the same ground, the wife, on an appeal of bastardy, is competent to prove the adulterous intercourse, although the effect may be to relieve the husband from the charge of maintaining the child; but she is not competent to prove non-access (*m*), or any fact which may be proved by other testimony. It has been said that, on grounds of state policy, the wife is a competent witness against her husband in case of treason (*n*). The husband and wife are competent, as has been seen (*o*), to prove the legitimacy or illegitimacy of their children, and to prove the fact of adultery, but not to prove non-access (*p*); so they are competent to prove the marriage, or the contrary (*q*).

Where a husband and wife perished at sea, the husband at the time the vessel struck being on deck, and the wife and child below, there being no

and wife, the declarations of the wife (executrix) are inadmissible for the defendant. *Alban* v. *Pritchet*, 6 T. R. 680. But in an action against the husband, as administrator of his wife, for a debt due from her *dum sola*, held that her admissions during the coverture were admissible, the defendant's character of husband having nothing to do with the action against the representative of the wife whom she might bind, (Tenterden, L. C. J.) *Humphries* v. *Boyce*, 2 M. & M. 140. Where a *feme covert* has for many years been separated from her husband, and during that time has received to her separate use the rents of her own property, which accrued to her by devise, after the separation, she is presumed to receive the rents and acknowledge the tenure by the husband's authority. *Doe* v. *Biggs*, 1 Taunt. 307. Where a testator gave a power to his daughter, describing her as a *feme covert*, to appoint by deed; held, that she might well execute it by deed. *Downes* v. *Timperon*, 4 Russ. 334.

(*g*) *Attorney-general* v. *Riddell*, 2 Tyr. 523. See also *Attorney-general* v. *Siddon*, 1 Tyr. 41; *R.* v. *Gutch*, 1 M. & M. 437.

(*h*) 1 Sid. 431. By the express provision of the stat. 21 Jac. 1, c. 19, s. 5 & 6, commissioners of a bankrupt may examine the wife of the bankrupt for the finding out of the estate, goods and chattels of the bankrupt, concealed, &c. by the wife or other person.

(*i*) 1 Ford's MS. 416; An. 82; Andr. 161; Say. 62.

(*k*) As in case of rape (*R.* v. *Ld. Audley*, 1 St. Tr. 387; Ann. 83; Hale, 301; Hutt. 46); and although the contrary has been laid down (T. Raym. 1 Gilb. Ev. 253; 2 Keb. 403), yet the affirmative seems to be now settled (*R.* v. *Aryre*, 1 Str. 633. *Lady Lawley's Case*, B. N. P. 287. *R.* v. *Mead*, Burr. 542. *R.* v. *Bowes*, 1 T. R. 698. *Jagger's Case*, East's P. C. 454.) So the affidavit of the wife has been allowed to be read in court to ground a criminal information against the husband (*Lady Lawley's Case*, B. N. P. 287. *Mary Mead's Case*, 1 Burr. 542). So she may exhibit articles of the peace against her husband. *R.* v. *Doherty*, 13 East, 171; B. N. P. 287. Vide *R.* v. *Wakefield*, *supra*, 552.

(*l*) *R.* v. *Woodcock*, Leach, C. C. L. 563, 3d ed.

(*m*) *Supra*, BASTARDY. *R.* v. *Rooke*, 1 Wils. 340. *R.* v. *Kea*, 11 East, 132.

(*n*) B. N. P. 289; T. Ray. 1 *tam. qu. & vid.* Brownl. 47; Bac. Ab. Ev. A. 1. For the wife is not bound to discover the treason of the husband. T. Ray. 1 Brownl. 47.

(*o*) *Supra*, 313.

(*p*) *Supra*, tit. BASTARDY. 2 Str. 925; 3 P. Wms. 276; B. N. P. 283. *R.* v. *Cliviger*, 2 T. R. 263.

(*q*) *R.* v. *Bramley*, 6 T. R. 330; where a pauper, removed as a widow, was held to be competent to disprove the marriage.

evidence of the latter having survived, administration with the will annexed granted to the next of kin of the husband as a widower (*r*).

INFANT.

Trial of non-age.

THE trial of the non-age of a party is either by *inspection*, or in the ordinary way by a jury (*s*). In a suit to reverse a fine for the non-age of the cognizor, or to set aside a statute or recognizance, and similar cases, a writ issues to the sheriff, commanding him that he constrain the party to appear, that it may be ascertained by the view of his body by the King's Justices, whether he be of full age or not, *ut per aspectum corporis sui constare poterit Justiciariis nostris si prædictus A. B. sit plenæ ætatis necne* (*t*). Where the Court entertains doubts of the fact upon inspection, it may proceed to take proofs of the fact by the examination of the infant himself, and other witnesses, if necessary (*u*).

General presumption.

The general presumption of law is, that an infant does not know his own rights (*x*).

Although the promise of an infant will not bind him, except for necessaries, yet he may take advantage of any promise made to him, although the consideration were merely the infant's promise, as in an action on mutual promises to marry (*y*).

Where evidence in bar.

In an action on bond, or other specialty, infancy is not a defence under the plea of *non est factum*, for the deed of an infant is not void, but merely voidable (*z*); and now, in general, under the new rules of H. T. 4 W. 4,

(*r*) *In the Goods of Murray*, 1 Curt. Prer. 596.

(*s*) As to the proof of non-age, see tit. PEDIGREE.

(*t*) 9 Rep. 31. According to Glanvil, l. 13, c. 15, non-age was formerly tried by a jury of eight men. 3 Bl. Comm. 332.

(*u*) 2 Roll. Ab. 373; 3 Bl. Comm. 332.

(*x*) 1 Inst. 246; Show. 83.

(*y*) *Holt* v. *Ward*, B. N. P. 155; Str. 937. So he may sue on a contract for a purchase of potatoes (*Warwick* v. *Bruce*, 2 M. & S. 205), or submit to a reference (*Knight* v. *Stone*, Sir W. Jones, 164; S. C. Noy, 93). So the infant may recover on a contract by the defendant for cutting and taking away the grass of the infant. Gilb. L. E. 187, 2d edit.; Vent. 51; Mad. 25; 2 Sid. 41. 446; 2 Str. 939; 2 Keb. 581. In an action on an agreement for a Scotch tack made with the tutors of a minor, but the action was brought in his own name; held, that it being made for his benefit, it was competent for him to sue in his own name upon the contract, and that it lay upon the defendant to show that the plaintiff was a minor at the time of action brought. *Fitzmaurice* v. *Waugh*, 3 D. & R. 273. An infant may make a valid contract of hiring and service with a father. *R.* v. *Chillesford*, 4 B. & C. 94; *R.* v. *Stevenson*, 2 B. & C. 34. In an action for wages, whilst the servant was an infant, the master cannot set off sums which he had advanced for silk dresses, &c. not being necessaries, nor does the statement of an account bind her, but payments to an infant on account of wages for necessaries are valid payments. *Hedgley* v. *Holt*, 4 C. & P. 104. By the stat. 9 Geo. 4, c. 14, s. 4, no action shall be maintained whereby to charge any person upon any promise after full age to pay any debt contracted during infancy, or upon any ratification after full age to pay any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

(*z*) B. N. P. 172. *Tam. qu.* if the deed be obviously to the prejudice of the infant; and see the observations of L. C. J. Eyre, in the case of *Keane* v. *Boycott*, 2 H. B. 515. A single bond, *i. e.* a bond without a penalty, given by an infant for necessaries, is good. Hargr. Co. Litt. 172, and the cases there cited; and therefore it extinguishes an antecedent debt for necessaries. The general rule as to deeds by infants is, that if the agreement be for the benefit of the infant at the time, it shall bind him. Per Ld. Mansfield, C. J. in *Drury* v. *Drury*, Dom. Pro. 26th May 1762, 5 Bro. Ap. 570; and by Buller, J. *Maddon* v. *White*, 2 T. R. 161, where he says that notwithstanding the doctrine, Co. Litt. 380, b, also laid down in Brownlow, all the modern cases have expressly held that an infant cannot avoid a lease which is made for his own benefit; and he cited Mr. Dunning's argument in *Zouch* v. *Parsons* (3 Burr. 1806),

infancy, to be available as a defence, must be specially pleaded; but in an action of simple contract, the infancy of the defendant at the time of the contract is *primâ facie* a defence, even although he has paid money into court (*a*), unless the action be for necessaries; he is not liable on an account stated (*b*).

In an action against an infant, to recover money advanced for him in Scotland, to prevent his arrest, it was held that proof was necessary to show that by the law of Scotland such a defence was available (*c*).

But an infant is liable in respect of all torts committed by him, as for slander or battery (*d*); and in *detinue* for goods delivered to him for a particular purpose, and which he has failed to return (*e*); and in assumpsit for money embezzled (*f*). But if an action against an infant be founded in a contract, the plaintiff cannot, by changing the form of his action in respect of a breach, convert it into a tort, as by charging him in *tort* for the negligent or immoderate use of a horse which he has hired (*g*).

Proof in reply to infancy.

If the defendant prove his infancy, the plaintiff may reply by evidence that he ratified the promise upon attaining his age (*h*). His continuance in possession after his full age of lands demised to him during his minority, is an affirmance of the lease (*i*), and he will be liable to previous arrears of rent (*k*). The plaintiff must prove a ratification of the agreement, a *promise* to pay the debt; a mere acknowledgment of the debt is insufficient (*l*), for the law will imply no promise in the case of an infant, but for necessaries (*m*); and therefore part payment, or an express promise to pay part,

who says, "as to the infant's lease, the benefit of the infant is to be considered; his leases are good if rent is reserved for them; this exception arises from necessity, therefore it is necessary to validate his leases reserving rent." If an infant bargain and sell lands by deed indented and inrolled, he may avoid it at any time. 2 Ins. 673. A feoffment by an infant with livery is not void but voidable only. Covenant does not lie against an infant apprentice. *Gilbert* v. *Fletcher*, Cro. Car. 179. *Lilley's Case*, 7 Mod. 16. He may avoid his apprenticeship on coming of age, but his father, &c. will still be liable on the covenant. 1 Saund. 312, note (b). But an apprentice cannot avoid his indentures by a tortious act, as by absconding. *Gray* v. *Cookson*, 16 East, 13. On an indictment for conspiring to procure a marriage with a minor, the latter cannot be a witness against the wife. There is no distinction in principle between admitting a wife or husband for or against each other. *R.* v. *Serjeant*, 1 Ry. & M. C. 352.

(*a*) Per Buller, J., *Hitchcock* v. *Tyson*, 2 Esp. C. 481. For the money may have been paid in on account of necessaries.

(*b*) Although it be on account of necessaries supplied to him. *Ingledew* v. *Douglas*, 2 Starkie's C. 36. Such an account is not evidence even to show the fact that the necessaries were supplied. Ibid.

(*c*) *Male* v. *Roberts*, 3 Esp. C. 163. And see *Mure* v. *Kaye*, 4 Taunt. 54. It seems that money advanced to release an infant taken on mesne process for necessaries, may be recovered here. *Clarke* v. *Leslie*, 5 Esp. C. 28; so to release an infant when in execution. Ibid. And see *Finly* v. *Jowle*, 13 East, 6.

(*d*) 8 T. R. 336, 7. Bac. Ab. *Infancy*, H.

(*e*) 1 N. R. 140.

(*f*) *Bristow* v. *Eastman*, 1 Esp. C. 172.

(*g*) *Jennings* v. *Rundall*, 8 T. R. 335. The objection was there taken by plea of infancy, to which the plaintiff demurred.

(*h*) If to a plea of infancy the plaintiff reply a promise after he attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to prove that he was not of age at the time. *Borthwick* v. *Caruthers*, 1 T. R. 648. And per Holroyd, J. in *Bates* v. *Wells*, Lanc. Sp. Ass. 1822.

(*i*) 1 Rol. 731. l. 35; Com. Dig. *Enfant*, C. 6. But if the estate to the infant was *void*, it cannot be affirmed by his agreement at full age; as, if an infant lessee take a new lease, to commence on a future day, it will not be a surrender, although it commenced at full age, and he then entered and claimed by the new lease. 1 Rol. 728, l. 40.

(*k*) Ibid. and 2 Cro. 320; 2 Bul. 69; Godb. 365. So during his infancy, if he *occupy* by virtue of the lease. 2 Buls. 69.

(*l*) *Lara* v. *Bird*, H. T. 31 Geo. 3; Peake's L. E. 297. The promise must be voluntary. *Harmer* v. *Killing*, 5 Esp. C. 102.

(*m*) *Thrupp* v. *Fielder*, 1 Esp. C. 628. Peake's L. E. 297.

will bind him to that extent, but no further (*n*). And the promise must, in order to support the action, be made before action brought (*o*).

If the plaintiff reply that the articles supplied were necessaries, he must prove the defendant's rank and condition in life, and show that the things furnished were suitable to and consistent with that situation. The question of necessaries is a relative fact, to be governed by the fortune and circumstances of the infant, the proof of which lies on the plaintiff (*p*). Whether they were necessaries or not is usually a question of fact for the jury (*q*). An infant is liable for necessary victuals (*r*), apparel (*s*), physic, and surgical attendance (*t*), schooling, and instruction (*u*), for a fine assessed on him on his admission to a copyhold estate (*x*). So he is liable for necessaries supplied to his wife (*y*), or child (*z*). But he is not liable as for necessaries in respect of goods bought to sell again, although he keeps an

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(*n*) *Green* v. *Parker*, cor. Forster, J., Peake's L. E. 297. And per Holt, C. J. in *Hyling* v. *Hastings*, 1 Ld. Raym. 389.

(*o*) *Thornton* v. *Illingworth*, 2 B. & C. 824. *Secus*, it has been held, under the stat. of limitations. *Yea* v. *Fouraker*, 2 Burr. 1099.

(*p*) Per Lord Kenyon. *Ford* v. *Fothergill*, 1 Esp. C. 211; and see *Maddox* v. *Miller*, 1 M. & S. 738. Where the debt was for grocery goods to stock his shop, but out of which his family were supplied; held, that *pro tanto* as necessaries, he was liable to be sued. *Turberville* v. *Whitehouse*, 12 Price, 692. Where a father sufficiently supplied the defendant, his son, a minor, with clothes, the question is, whether the articles of clothing supplied by the plaintiff were necessaries; if a tradesman trusts an infant, he does it at his peril, if it turns out that he has been properly supplied. *Story* v. *Pery*, 4 C. & P. 526.

(*q*) The question generally depends upon the collateral circumstances of the case, such as the rank and situation of the party, and the suitableness of the articles. The finding of the jury is of course subject to the control of the Court in point of law. See Cro. Eliz. 587. Com. Dig. *Enfant*, B. 5. An infant is not liable on a bill of exchange, though given for necessaries. *Williamson* v. *Watts*, 1 Camp. 552. But he is liable on a bill of exchange accepted after 21, though drawn before. *Stevens* v. *Jackson*, 1 Camp. 164. He is not liable on contracts made by a firm in which he is partner during minority, but he will be liable to such as are made after 21, unless he disaffirm the partnership. *Goode* v. *Harrison*, 1 B. & A. 147. He is not liable in respect of goods which do not reach him till he has attained his age, if the property vested in him previously, by delivery to the carrier. *Griffin* v. *Langfield*, 3 Camp. 254. A tailor cannot recover for more clothes than are necessary, according to the actual state of his wardrobe, taking into consideration clothes ordered from other tailors. *Burghart* v. *Angerstein*, Mo. & R. 458. An infant, being a lieutenant in the navy, is not liable for the price of a chronometer supplied to him when out of employment. *Berolles* v. *Ramsay*, Holt's C. 77. He is not liable on the warranty of a horse. *Howlett* v. *Haswell*, 4 Camp. 118. In *Chartress* v. *Bayntun* (7 C. & P. 62), it was held that a stanhope was not a necessary for a minor, being the son of a beneficed clergyman, and holding a commission in the army.

(*r*) Co. Litt. 172, a; Jon. 182. And if he be a housekeeper, for victuals supplied to his family. 1 Sid. 112.

(*s*) Co. Litt. 172, a; 1 Rol. 179, l. 5. Or for making clothes; and if he brings the cloth to the tailor, the latter need not show that it was suitable to his quality (Latch. 157). An infant captain in the army has been held to be liable for a livery provided by his orders for his servant, being necessary for the credit of his station (*Hands* v. *Slaney*, 8 T. R. 578); but it was held that he was not liable for cockades supplied to the soldiers by his orders, for these were not necessaries incident to his station. So regimentals supplied to an infant member of a volunteer corps were held to be necessaries. *Coates* v. *Wilson*, 5 Esp. C. 152.

(*t*) Palm. 528.

(*u*) Co. Litt. 172, a; 1 Sid. 112; Mar. 40.

(*x*) *Evelyn* v *Chichester*, Burr. 1717; B. N. P. 154. Per Yates, J. Note, he enjoyed the estate when he came of age; but debt, it seems, would not lie in such a case, because an infant cannot wage his law; but if an infant take a lease for years and hold when of age, he may be charged in debt for the rent. *Supra*, 556.

(*y*) *Turner* v. *Trisby*, Str. 168; B. N. P. 155. So for money advanced to liberate him when taken in execution for necessaries. *Clarke* v. *Leslie*, 5 Esp. 28.

(*z*) B. N. P. 155. For *persona conjuncta æquiparatur interesse proprio*. Barnes, 184.

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open public shop, for he has not discretion to carry on business (*a*); or for money supplied to buy necessaries with, unless it be actually so expended (*b*).

The plaintiff cannot show, in reply to the defence of infancy, that the infant stated an account with him even for necessaries (*c*). Where it appears that the things themselves were necessary, abstractedly considered, it is still a good defence to prove that the defendant was supplied with necessaries by his parents or friends, although no proof be given that this was known to the plaintiff (*d*).

Action by infant.

An infant who has paid money with his own hand, though without a valuable consideration, cannot, it seems, recover it back. Where an infant paid money as a premium for a lease, and enjoyed it for a short time during infancy, but avoided it on attaining his age, it was held that he could not recover the money (*e*). An infant heir-at-law cannot eject his ancestor's tenant from year to year, without giving the ordinary notice to quit (*f*). After the death of the master of an apprentice, his assets are liable to the maintenance of the apprentice (*g*).

Criminal liability.

An infant under the age of twenty-one is privileged as to some misdemeanors, particularly in cases of omission, unless he be bound in respect of tenure, &c., as not repairing a bridge or highway (*h*); for not having the command of his fortune till twenty-one, he wants the capacity to do that which the law requires. Yet, with regard to other offences, even those of a capital nature, an infant is equally liable to suffer with a person of full age (*i*). By the law, as it now stands, and has stood at least ever since the time of Edward 3, the capacity of doing ill and contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen, and in these cases the maxim of the law is, that *malitia supplet ætatem*. Under seven years of age, indeed, an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony (*k*).

Capacity, or matter of proof.

(*a*) Cro. Jac. 494; B. N. P. 154; Peake's L. E. 281, and *Green* v. *Parker*, there cited. *Whittingham* v. *Hill*, Cro. Jac. 494. *Wywall* v. *Champion*, 2 Str. 1083. *Aliter*, by Clarke, Baron, B. N. P. 154.

(*b*) *Semble*, B. N. P. 154; Ca. K. B. 157. *Darby* v. *Boucher*, 1 Salk. 279. *Probart* v. *Knouth*, 2 Esp. C. 472 (n).

(*c*) *Truman* v. *Hirst*, 1 T. R. 40. *Bartlet* v. *Emery*, ibid. 42 (*n*). Peake's L. E. 280. *Ingledew* v. *Douglas*, 2 Starkie's C. 36. *Hedgley* v. *Holt*, 4 C. & P. 104.

(*d*) *Ford* v. *Fothergill*, Peake's C. 229; 1 Esp. C. 211. It is the duty of a tradesman to make inquiries from the parents; if the infant be supplied with necessaries by them, the tradesman cannot recover for those which he has supplied. *Cooke* v. *Deaton*, 3 C. & P. 114. The infant, if not left destitute of necessaries, but provided with such as his friends think it proper to supply, cannot bind himself to a stranger, even for such things as might otherwise be deemed to be necessaries. *Bainbridge* v. *Pickering*, 2 Bl. 1325.

(*e*) *Holmes* v. *Blogg*, 1 Moore, 466; 2 Moore, 552; 8 Taunt. 508; Wilmot's Notes, 226, n.; and per Ld. Mansfield, in the *Earl of Buckinghamshire* v. *Drury*, ibid. and 3 Brown's P. C. 492; 2 Eden's C. 1.

(*f*) *Madden* v. *White*, 2 T. R. 159.

(*g*) *Wadsworth* v. *Gye*, 1 Sid. 216; Cro. Eliz. 553; Str. 1267; 1 Salk. 66.

(*h*) 1 Hale's P. C. 20. *Secus* where the guardian in socage is in possession. *R.* v. *Sutton*, 5 N. & M. 353.

(*i*) In the Comm. vol. iv. p. 22, it is stated, that for a breach of the peace, riot, battery, or the like, an infant *of the age of fourteen* is answerable; but as an infant *under the age of fourteen* is liable to suffer death in respect of a capital offence, can there then be any doubt as to his liability to suffer imprisonment for a less offence?

(*k*) Dalt. J., c. 147. A child under ten years of age was charged with stealing a small quantity of coals; the Judge directed the jury that they must be satisfied that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong; the jury acquitted the prisoner. *R.* v. *Owen*, 4 C. & P. 236.

Also under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax*, yet, if it appear to the Court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death (*l*). But in all cases the evidence of malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction (*m*).

Competency.

The competency of an infant has already been considered (*n*). It is observed by Sir W. Blackstone (*o*), that where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances. Such evidence is always desirable in criminal cases, to confirm the testimony of an adult witness, as well as that of an infant. It is, in many instances, even more desirable in the former than in the latter case, where the inexperience and simplicity of the witness render subornation very difficult. By the stat. 9 G. 4, c. 14, s. 5, no action shall be maintained on a promise or ratification after full age, unless it be in writing, signed by the party to be charged.

St. 9 G. 4, c. 14.

INFERIOR COURT.

A RESTRICTION that no action shall be brought (otherwise than in the inferior jurisdiction), in respect of any *debt* under 40 *s.*, does not apply where the plaintiff declares on a special contract for the selling of a chattel of the plaintiff by the defendant, the claim not being colourably inserted (*p*).

INNKEEPER.

THE general rule of law is, that an innkeeper is bound to keep the goods of his guest, who resorts to his house *animo hospitandi*, so that no loss happen *pro defectu hospitatoris* (*q*). And, therefore, in such cases two questions

(*l*) Thus, a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared, upon their trials, that one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil (1 Hale's P. C. 26, 27; 4 Comm. 24). And there was an instance in the last century but one, where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, condemned, and hanged accordingly (Emlyn on Hale's P. C. 25; 4 Comm. 24). Thus also, in modern times, a boy of ten years old was convicted, on his own confession, of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges that he was a proper subject of capital punishment. Fost. 72.

(*m*) 4 Comm. 23, 24.

(*n*) See Index, tit. WITNESS.—COMPETENCY.

(*o*) 4 Comm. 214.

(*p*) *Mansfield* v. *Brearey*, 1 Ad. & Ell. 347. As to the mode of procuring return of the actual proceedings, see *Salter* v. *Slade*, 1 Ad. & Ell. 608. And see as to a plea of Court of Requests Act, *France* v. *Parry*, 1 Ad. & Ell. 615.

(*q*) Per Ld. Ellenborough in *Farnworth* v. *Packwood*, 1 Starkie's C. 251. An innkeeper shall be charged if there be a default in him or his servants in the well and safe keeping of his guest's goods and chattels within his common inn, for the innkeeper is bound in law to keep them safe without any stealing, and it is not any excuse for him to say that he delivered to the guest the key of the chamber in which he is lodged, and that he left the chamber-door open. And although the guest doth not deliver his goods to the innkeeper to keep, nor acquaints him with them, yet if they be carried away or stolen, the innkeeper shall be charged; and so, although they who stole the goods shall be unknown. But if the guest's servants, or he who comes, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for here the fault is in the guest to have such companions or servants. *Calye's Case*, 8 Rep.

usually arise: 1. Whether the guest came to the inn *animo hospitandi*; 2dly. As to the fact that the goods were lost.

The plaintiff must prove, in the first place, that he was received as a guest at the inn (*r*). Although the innkeeper refuse to take charge of the plaintiff's goods till a future day, on request to do so, still if the plaintiff remain as a guest, and the goods are stolen, the innkeeper is liable (*s*).

A house of entertainment in London, where beds and provisions are furnished, though not frequented by coaches, and destitute of stables, is an inn, the keeper of which is subject to the common-law liability (*t*).

The plaintiff may sue if his goods were lost, although his servant (*u*) or his friend having the custody of his goods was the guest (*x*).

In the next place, he must prove the loss and value of the goods.

Defence. The defendant may show in defence that he never received the plaintiff as a guest, but refused (*y*).

In the next place, although the plaintiff prove a *primâ facie* case, yet the defendant may show that the plaintiff himself conduced to the loss.

If a guest contract for the exclusive use of a room, to be used as a shop, and take the key, he discharges the landlord (*z*). If, indeed, the landlord himself afterwards take the key, the onus of safe custody again devolves

33, a.; and see Moore, 78, pl. 207; 22 H. 6, 21, b.; 11 H. 4, 45, a. b.; 42 Ed. 3, 11, a.; 5 Mod. 543; 1 Roll. Ab. 4; 10 H. 7, 26. *Spencer* v. *Spencer*, Dyer, 266. *East India Company* v. *Pullen*, 2 Str. 690. Com. Dig. Action against a common Carrier, C. 1; Cro. Eliz. 285; Salk. 18.

(*r*) *Bennett* v. *Meller*, 5 T. R. 273; *Bird* v. *Bird*, 1 And. 29.

(*s*) *Bennett* v. *Meller*, 5 T. R. 273. So if on a fair day he place the gig of plaintiff with others as usual in a public street. *Jones* v. *Tyler*, 1 Ad. & Ell. 522.

(*t*) *Thompson* v. *Lacy*, 3 B. & A. 283.

(*u*) *Beedle* v. *Morris*, innkeeper of Dunchurch, Cro. J. 224; Coke's Ent. 347. So under the St. of Winton, where the servant was robbed, either the master or servant might have maintained the action against the hundred.

(*x*) Yel. 162. He is responsible for money belonging to his guest. *Kent* v. *Shuckhard*, 2 B. & Ad. 803. *Dorman* v. *Jenkins*, 4 N. & M. 170. A traveller desired part of his luggage to be taken into the commercial room of the inn, which but for such order would, by the usage of the house, have been carried with the rest into his bed-room; the innkeeper is nevertheless answerable for the loss of it. *Richmond* v. *Smith*, 8 B. & C. 9; and 2 M. & Ry. 235. A tavern-keeper had a room for a public entertainment of music, to which persons were admitted at 2 *d.* a head, without a licence under 25 Geo. 2, c. 36; he is liable to the penalty, whether he received it for his own benefit or for others, and however respectable the persons frequenting it might be; the 13th sect. applies to common informers. *Green* v. *Botheroyde*, 3 C. & P. 471.

(*y*) *White* v. ———, Dyer, 158. The Court held that if one come to an inn, and the host say that his house is full of guests, and does not admit him, and the traveller says that he will make shift among the other guests, the landlord shall not be charged, because he refused cover, although the cause of refusal was false, for the plaintiff may have his action for so refusing; and it was held that these facts were good evidence, on issue joined on a plea by the landlord that the goods were taken without his default.

(*z*) *Farnworth* v. *Packwood*, 1 Starkie's C. 249. *Burgess* v. *Clements*, Ib. 251, in the note. The plaintiff, in the case of *Burgess* v. *Clements*, 1 Starkie's C. 251, requested to have a private room to exhibit his goods, and receive his customers. The landlady showed him into a private room, gave him the key, and advised him to lock the door. The loss happened at night; the plaintiff had a candle in the room, but the curtains of the windows were down. When the defendant's son left him he was packing up the goods, and had been out two hours before the loss was discovered. When he went out he was not sure that he had even shut the door after him; the key was found in it. The defendant went into the room after the plaintiff went out, and found the candle burning. The learned Judge left it to the jury to say, whether the plaintiff had not, by his careless and negligent conduct, discharged the defendant from his common-law responsibility. The jury found for the defendant, and the Court of K. B. affirmed the verdict; 4 M. & S. 306.

upon the landlord (*a*). Such a case differs materially from *Calye's Case* (*b*), where the landlord gave the guest the key of the room; but it was to be occupied merely as a lodging-room, and not for any aliene purpose (*c*). Defence.

Where it appeared that the plaintiff, being a guest at an inn, had deposited his pocket-book, containing bills of exchange and bank-notes, on the chimney-piece of his bed-room, and had left the book there so exposed, the learned Judge directed the plaintiff to be nonsuited, on the ground that he had been guilty of gross negligence in leaving valuable property so exposed (*d*).

In an action of trover for goods, the defendant may justify in evidence, as an innkeeper having a lien on them for the payment of the bill of the guest (*e*). But it is otherwise if the innkeeper receive a horse under a special agreement at so much per week, so long as he continues at pasture (*f*).

A landlord cannot insist on a lien on the horse of *A.* which has been left at the inn by *B.* who has wrongfully seized it, if the landlord knew, at the time of receiving the horse, that *A.* was a wrong-doer, for by so doing he made himself a party to the wrongful act of *A.* (*g*).

INSOLVENT.

By the stat. 7 G. 4, c. 57, s. 16, the provisional assignee appointed under the Act may sue in his own name, if the Court shall so order (*h*), for the recovering, obtaining and enforcing of any estates, debts, effects or rights of any such prisoner; and in the case of the resignation or removal from office of such assignee, or of his death, all the real and personal estate, &c. vested in or possessed by such provisional assignee, shall vest in his successor in office to be appointed by the Court. And by sec. 38, upon the appointment of a new assignee by the Court, all the estates, effects, rights and powers of such prisoner, vested in any such former assignee, shall be vested in such new assignee; and proof of such removal and appointment, entered of record, shall be received by such certified copy thereof as is thereinbefore directed to be received as proof of assignments under the Act (*i*). Title of assignee.

By the same statute, s. 19, it is enacted, that every conveyance and

(*a*) Ibid.

(*b*) 8 Co. 65.

(*c*) See the observations of Le Blanc, J., in *Farnworth* v. *Packwood*, 1 Starkie's C. 253.

(*d*) Cor. Hullock, B., Lancaster Lent Assizes, 1827.

(*e*) *Thompson* v. *Lacy*, 3 B. & A. 283; *Supra*, 560; 2 Show. 161. It has even been said that an innkeeper may sell a horse brought to the inn, and left there without any special agreement, when his keep amounts to his value, upon a reasonable appraisement. Per Popham, C. J., Yelv. 67. But in *Jones* v. *Pearle*, Str. 556, it was held that an innkeeper could not in such case sell the horse except in the city of London.

(*f*) *Chapman* v. *Allen*, Cro. Car. 271.

(*g*) *Johnson* v. *Hill*, 3 Starkie's C. 172.

(*h*) The Court refused after verdict to stay proceedings in an action by the provisional assignee, on the ground that the plaintiff had not proved that he was authorized by the major part of the creditors to bring the action, and that he brought it with the approbation of the Insolvent Court, pursuant to 1 G. 4, c. 119, and 3 G. 4, c. 123. The proper course, if the action were improper, was by application to that Court, which might restrain the plaintiff from proceeding any further. *Doe* d. *Spencer* v. *Clark*, 3 Bing. 370. But in the case of *Allison* v. *Rayner*, 7 B. & C. 441, in an action brought by an attorney against the assignee of an insolvent's estate, for the costs of an action prosecuted by the attorney on the retainer of the assignee, it was held to be incumbent on the plaintiff to prove that the consent of the creditors, and the approbation of one of the commissioners of the Insolvent Court had been obtained, or at least that he had informed his client that such consent was necessary.

(*i*) Under sec. 11, the copyhold vests without any entry on the roll. *Doe* v. *Glenfield*, 1 Bing. N. C. 729.

assignment (by the petitioning insolvent) to the provisional assignee, and a counterpart of every such conveyance and assignment, by such provisional assignee to such other assignee or assignees, shall be filed of record in the said Court; and a copy of any such record made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose, endorsed thereon, and to be sealed with the seal of the said Court, shall be recognized and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all courts, and before commissioners of bankrupt and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceedings in the said Court in the matter of the said prisoner's petition (*j*).

Proof of proceedings.

By the stat. 7 G. 4, c. 57, s. 76, a copy of the petition, schedule, order and other orders (*k*) and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c. and sealed with the seal of the said Court, shall be at all times admitted in all Courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the Court as aforesaid (*l*).

Under sec. 19 of the 7 Geo. 4, an assignee, in order to prove his title, is not bound to show the petition, but the order of discharge and certified copies of the assignment to the provisional assignee and to himself, are sufficient (*m*).

The assignees of an insolvent cannot recover by action property which accrues to the insolvent after his discharge, but must, under the statute, apply to the Insolvent Debtors Court to issue execution on the judgment

(*j*) See *Doe* v. *Land*, 3 D. & R. 509.

(*k*) It has been said that a parol admission of the fact of discharge of an insolvent, made by the opposite party, is not evidence of the fact without proof of the order. *Scott* v. *Clare*, 3 Camp. 236.

(*l*) Certified copies, although made evidence for the insolvent or his creditors, (*semble*) are, it has been held, not so for other persons, nor against him; but if the original schedule and his handwriting thereto be proved, it would be evidence against him. *Nicholls* v. *Downes*, 4 C. & P. 330. The stat. 7 Geo. 4, c. 57, s. 76, does not preclude a party from giving the original document in evidence. *Northam* v. *Latouche*, 4 C. & P. 145. The Insolvent Act requiring that the petition shall be subscribed by the prisoner and filed, and a certified copy admitted as legal evidence, it must be presumed to have been regularly done, and such copy is therefore a sufficient proof of an allegation, in a declaration for a libel, that a petition subscribed by the plaintiff as such prisoner has been duly filed, &c. *Gould* v. *Hulme*, 3 C. & P. 625. Where the copy of the provisional assignment, under 1 Geo. 4, c. 119, c. 7, was produced from the Insolvent Court, and offered in evidence under 7 Geo. 4, c. 57, s. 76; held admissible, and that it was not necessary to go on to show that the proceedings under the former Act were complete, and the prisoner discharged, *Doe* v. *Hardy*, 6 Ad. & Ell. 335; *Doe* v. *Evans*, 1 C. & M. 450.

(*m*) *Delafield* v. *Freeman*, 6 Bing. 294. The assignment to the provisional assignee gives him a right to sue, and the 7 Geo. 4, c. 57, s. 16, is only affirmative, and it is not essential that he should previously obtain the order of the Court for that purpose. *Dance* v. *Wyatt*, 6 Bing. 486. And see *Doe* d. *Clark* v. *Spencer*, 3 Bing. 203. The assignment by the provisional assignee of an insolvent, does not vest a lease absolutely, until the assignee has done some unequivocal act to signify his assent; where the jury negatived any such act, and also found that he had not retained the lease an unreasonable time in order to ascertain whether it would prove beneficial to the creditors to accept it, held that he was not liable to the covenants. In this respect, he stands in the same situation as the assignees of a bankrupt. *Lindsay* v. *Limbert*, 12 Moore, 209. And see *Turner* v. *Richardson*, 7 East, 335. The 57th clause does not apply to the copy of an assignment where the insolvent and his effects have been assigned under the stat. 53 G. 2, c. 102, *Doe.* v. *Sellon* 6 Ad. & Ell. 328.

entered up in their names against the insolvent (*n*). But where money was due to the insolvent previous to his discharge in respect of the sale by him of an equitable estate, and the money was, after the discharge, received by the insolvent's agent, it was held that the assignee was entitled to recover (*o*); subject, however, to a lien on the part of the defendant, created by the insolvent's contract with him when the insolvent was *sui juris* (*p*). Proof by assignee.

To constitute a voluntary payment under the 7 Geo. 4, c. 57, s. 32, it must be a payment with knowledge of the insolvency, and also made voluntarily: where the plaintiff, an attorney, defending actions for the insolvent, had refused to go on unless money were furnished to him, and 20 *l.* had been paid him for the purpose, a sum exceeding the costs in the action, the Judge directed the jury that it was not a voluntary payment (*q*). Voluntary payment.

By sec. 46, the Court is authorized, on the prisoner's swearing to the truth of his petition and schedule, and executing a warrant of attorney as directed by the Act, to adjudge that the prisoner (*r*) shall be discharged (*s*) as to the several debts or sums of money due or claimed to be due at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule (*t*). Proof of discharge.

The schedule (*u*) is the test of discharge from a particular debt; but a

(*n*) *Hepper* v. *Marshal*, 2 Bingh. 372; and per Best, C. J. in *Twiss* v. *White*, 3 Bing. 486, under the stat. 1 G. 4, c. 119. The assignment under the st. 7 G. 4, c. 57, s. 11, extends to all the estate, debts, &c. to which he shall be entitled previous to his final discharge. It was held under the stat. 41 G. 3, c. 70, that the title of the assignee had no relation to the time when the estate vested in the clerk of the peace. *Doe* v. *Telling*, 2 East, 257.

(*o*) *Twiss* v. *White*, 3 Bing. 486.

(*p*) Ibid.

(*q*) *Troup* v. *Brooks*, 4 C. & P. 320. Under the stat. 7 Geo. 4, c. 57, s. 32, the payment of a debt to a creditor by an insolvent within three months before his imprisonment is included, and therefore void. *Herbert* v. *Wilcox*, 6 Bing. 203.

(*r*) A party in custody under an attachment for contempt for non-payment of costs, and under the criminal jurisdiction, held, not "a person in execution under a judgment" within the provisions of 48 G. 3, c. 123. *R.* v. *Clifford*, 8 D. & Ry. 58.

(*s*) Under the 7 G. 4, c. 57, s. 54, the Court is to issue a warrant to the gaoler for the insolvent's discharge. Under the stat. 53 G. 3, c. 102, s. 10, the order of Court delivered to the gaoler, was evidence of the discharge. *Neall* v. *Isaacs*, 4 B. & C. 335.

(*t*) By sec. 53, such discharge extends to process for contempts in nonpayment of costs and expenses, and also to costs of actions by creditors, incurred by the prisoner previous to the filing of his schedule. By sec. 52, such discharge extends to sums payable by way of annuity.

(*u*) An insolvent who inserts in the schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description as the statute requires, is discharged as to all parties to the bill though not named in the schedule, and also as to the original debt. *Boydell* v. *Champneys*, 2 M. & W. 433. Where the defendant was sued as joint maker of a promissory note for 14 *l.*, after being discharged under the Insolvent Act, having given no notice to the plaintiff, but in his schedule having stated that he had accepted several bills for *M.* the other joint maker, on which the plaintiff had a claim against him to the amount of 18 *l.*; held that if the defendant knew that the note was payable to the plaintiff, notice should have been given to him, but if the jury thought he did not know it, the body of the note being in the hand-writing of *M.*, it was not necessary. *Sharpe* v. *Gye*, 4 C. & P. 311. Where the acceptor of a bill, an insolvent, described the bill in his schedule correctly as to parties, date and amount, but misdescribed the parties in whose hands it then was, there being some evidence to show that he knew the true holder, held that it was properly a question for the jury to say whether he did so or not. *Levy* v. *Dolbell*, 1 M. & M. 202. Under the

Proof of discharge.

misdescription of the debt in the schedule will not be material when it was not intended to mislead, and could not have misled the creditor (*x*); such discharge will not extend to the whole debt, if the whole be not specified in the schedule (*y*). In an action by an insolvent after his discharge, the creditor is entitled to set off the difference between the amount really due and that specified in the schedule (*z*).

By sec. 61, no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against such prisoner (after an adjudication of discharge) for any debt or sum of money with respect to which such person shall have so become entitled (*a*) to his discharge; nor in any action upon any new contract, or security for payment thereof, except upon the judgment entered up according to the Act; and that if any such suit or action, &c. be brought, he may plead generally that he was duly discharged according to the Act by an order of adjudication, and that such order remains in force; to which the plaintiff may apply either generally, and deny the matters so pleaded, or specially, as he might have replied had the discharge been pleaded specially (*b*).

Where in an action against an insolvent the question is, whether the debt in respect of which he claims to have been discharged has been stated in the schedule, the identity of the debt, where a doubt exists, is a question of fact for the jury (*c*).

stat. 7 Geo. 4, c. 57, the defendant is discharged as to claims on bills if it appear that at the time of making out his schedule he did not know the holder; *secus* if he had been once informed, although he might have forgotten it. *Lewis* v. *Mason*, 4 C. & P. 322. The insolvent after his discharge signs a bill for the old debt, which is indorsed to the plaintiff for full value; in order to entitle the plaintiff to recover, the jury must be satisfied he took it *bonâ fide*, and without being conscious of the latent defect and for his own purposes. *Northam* v. *Latouche*, 4 C. & P. 140. On a general plea of discharge under the Insolvent Act, and replication denying the discharge, the filing of the petition not being in issue, need not be proved. *Andrews* v. *Pledger*, 4 C. & P. 174.

(*x*) *Wood* v. *Jowett*, 4 B. & C. 20.

(*y*) *Taylor* v. *Buchanan*, 4 B. & C. 419. If, being indebted to a party in two sums, he insert one only in his schedule, he is not discharged as to the other. *Tyers* v. *Stunt*, 7 Sc. 349.

(*z*) Ibid.

(*a*) Where the surety to an annuity bond, become insolvent, inserted the bond in his schedule, held, that under 1 G. 4, c. 114, s. 10, he could not be arrested for subsequent arrears. *Collins* v. *Lightfoot*, 5 B. & Cr. K. B. 581; and 8 D. & R. 330. Sec. 61 is confined to debts due from the insolvent at the time of his imprisonment; where, therefore, at that time, a liability only existed to a claim for unascertained damages, as upon a judgment by default in an action, although commenced prior to his imprisonment; held, that he might be taken in execution for the damages when assessed upon the writ of inquiry. *Wilmer* v. *White*, 6 Bing. 291.

(*b*) As to proof of discharge under former Insolvent Acts, see *Neale* v. *Isaacs*, 4 B. & C. 335; 6 D. & R. 464.

(*c*) Where on a plea of discharge under the Insolvent Act, in an action on a bill of exchange, it appeared that there were no other outstanding bills of like date or amount, but the names of the drawer and acceptor in the schedule were transposed; the Judge left it to the jury to say if they thought the bill declared on, and that intended to be described in the schedule, were the same, and if so, whether the misdescription was intended to deceive or mislead the holder, and likely to produce that effect. *Nias* v. *Nicholson*, 1 Ry. & M. C. 323. Where the insolvent stated in his schedule a debt to A. for goods sold, and for which he had accepted a bill drawn by A. for the amount; held a sufficient description within 1 G. 4, c. 119, s. 6. although the bill at the time had been indorsed to another, the insolvent being ignorant of that fact; the Act only requiring the statement of his debts to be made according to the party's "knowledge or belief." *Reeves* v. *Lambert*, 4 B. & C. 214. Where the insolvent had ordered coals of A. B. residing at N., but the invoice was made out in the name of the A. Coal Co., and in his schedule he had stated the debt as due to A. B. of N. for coals, and that the latter held notes in respect thereof, which were the subject of the subsequent action; held, that it was a sufficient description of the debt under the 1 G. 4, c. 119, s. 6, there being no evidence

An insolvent is liable to repay to a surety the arrears of an annuity which he had been called upon to pay after the discharge of the principal (*d*).

A party, after his discharge under an Insolvent Act, will be liable on a new agreement to pay the same debt (*e*). Liability on new promise.

An Insolvent Court has no jurisdiction to inquire whether an acceptance, on which the party was charged in execution, was a forgery (*f*). His not putting a debt due to him in his schedule is, it is said, conclusive against him in an action to recover it (*g*). Action by. An insolvent cannot, after taking the benefit of the Act, carry on a suit commenced before he took the benefit of the Act for the benefit of his creditors (*h*).

An assignment by an insolvent is void if made with the intention of petitioning the Court for his discharge, although made three months before the imprisonment (*i*).

INSPECTION.

With respect to the granting an inspection or copy of an instrument, preparatory to the trial, the application is made either, 1st, against a party, or, 2dly, against a third person.

The general rule as to parties is, that a party shall not be compelled to produce evidence against himself (*j*). Rule as to parties. And, therefore, where a plaintiff

of any intention to mislead, and the mode of describing the debt being calculated to notify to the plaintiffs the particular debt in question. *Forman* v. *Drew*, 4 B. & C. 15. A surety in an annuity bond was held to be protected by his discharge, under the stat. 1 G. 4, c. 119, from arrest for future arrears. *Collins* v. *Lightfoot*, 4 B. & C. 581.

(*d*) *Abbott* v. *Bruere*, 5 Bing. 8.

(*e*) *Sweenie* v. *Sharpe*, 4 Bing. 37.

(*f*) *Rice* v. *Lee*, 9 Moore, 593.

(*g*) *Nicholls* v. *Downes*, 4 C. & P. 330.

(*h*) *Swann* v. *Sutton*, 2 P. & D. 535, and see *Minchin* v. *Hart*, 1 Chitty's R. 215.

(*i*) *Beckie* v. *Smith*, 2 M. & W. 191, and see *Atkinson* v. *Brindall*, 2 Bing. N. C. 225; *Morgan* v. *Brundrett*, 5 B. & Ad. 297; *Doe* v. *Gillett*, 2 C. M. & R. 579. Where several executions being in at the same time on the insolvent's goods, which, with the landlord's claim, and for taxes, &c., would more than have absorbed the whole property, the insolvent consented to a proposal to assign over the whole of his property to the defendants, one the landlady, and the other one of the execution creditors, for the benefit of all his creditors, the defendants to pay off the execution creditors, and carry on the business to a certain time, whereby a surplus would be realised; held, that the assignment was not to be deemed voluntary and fraudulent within the Insolvent Acts, and that there was a sufficient consideration from the defendants. *Knight* v. *Fergusson*, 5 M. & W. 389.

(*j*) See the observations of Abbott, L. C. J., in *The King* v. *Sheriff of Chester*, 1 Chitty's R. 476. In trover for goods detained (beyond the period allowed) for a distress for rent due from a third party, the Court refused to compel the defendant to produce an agreement in his possession entered into by such third party, authorising the defendant to remain in possession of the distress, for the purpose of being inspected, and if necessary, stamped. *Lawrence* v. *Hooker*, 5 Bing. 6. Action by a corporation against their clerk for making false entries, the Court refused to order the defendant to have inspection of the books, he not having sworn that it was essential to his defence, and the plaintiff having furnished him with the item of charge to be considered as a particular, and offered him inspection of a particular item. *Imperial Gas Company* v. *Clarke*, 7 Bing. 95. In a suit by the vicar, and motion for the production of papers, admitted by the answer of one defendant to be in his possession, but which he contended related to the impropriate rectory and tithes, the Court, distinguishing between such deeds as related to the defendant's title, and those which were only collateral, refused the motion. *Collins* v. *Gresley*, 2 Y. & J. 491. Inspection was refused to a plaintiff in replevin of a deed to which he was no party, assigning the reversion of the demised premises to the avowant. *Brown* v. *Rose*, 6 Taunt. 305. In general an adverse claimant having no interest in title-deeds, has no right to inspect them. *Talbot* v. *Villebois*, 3 T. R. 142. The defendant, after settling a draft of articles of partnership, engrossed and executed a deed differing from the draft. The plaintiff refused to execute the deed, but commenced an action for breach of agreement to take him into partnership.

Inspection, when allowed.

moved to be allowed to inspect and take a copy of a writ in the possession of the defendant, late sheriff of Chester, to enable him to frame his declaration, the Court refused the application (*k*). But if the plaintiff be either an actual party, or a party in interest to an instrument in the defendant's possession, the Court will, if it be necessary, compel the production of it in order to be stamped, or that a copy may be taken, although the interest of the party does not appear, except by his own declaration, by which he claims an interest. In order, however, to obtain this rule the applicant must either be an *actual party* to the instrument, or a *party in interest* (*l*). Where one part only of an indenture was executed, the Court compelled the defendant, who had possession of it, to produce it for the inspection of the other party (*m*); for one part only having been executed, there was an implied agreement by the party who had the possession of it to produce it: and in such a case the Court will direct an inspection, although the plaintiff requires it for the purpose of discovering some defect in the deed (*n*).

So where an action is brought by a sailor for his wages, the Court will compel the master to produce the ship's articles, and give a copy (*o*).

And in general it seems that whenever the defendant holds a document as a trustee for the other, the Court will compel him to produce it for inspection, upon an action brought by the other party. Where the defendant was a stakeholder, the Court ordered him to produce a copy of a racing contract for the plaintiff (*p*).

Where a plaintiff declares on a specialty, the defendant is entitled, as of course, to oyer of the deed; and although the instrument be not declared upon, but is wanted for the purposes of evidence only, the Courts will compel the production, for the purpose of inspection, stamping, or taking a copy, upon the application of the party who has an interest in the instrument (*q*), although the practice was formerly to the contrary (*r*). According to the present practice, a Judge will, upon summons, order a copy of the instrument on which the action is founded, to be delivered to the defendant or his attorney, whenever the action is founded upon a written instrument, whether

The Court refused a motion for leave to inspect and copy the deed. *Ratcliff* v. *Bleasby*, 3 Bing. 48.

(*k*) *The King* v. *Sheriff of Chester*, 1 Chitty's R. 476. Note, that the plaintiff had neglected to call the defendant to return the writ into the court of Great Session at Chester.

(*l*) *Taylor* v. *Osborne*, 4 Taunt. 159, n. As between two persons admitting themselves to be tenants in common, a court of equity will order the production of title-deeds, in the hands of either, for the inspection of the other; but where one had sold his share, and was in possession as mortgagee of the vendee only, the Court held that they could not compel it, the rule being, that a mortgagee has no right to show his mortgagor's title. (*Lambert* v. *Rogers*, 4 Merivale, 489.) An heir cannot support a bill for title-deeds, without showing that they are in some way necessary to enable him to recover at law; he must rely on his title as heir; and if he cannot set aside the will he has nothing to do with the deeds. *Jones* v. *Jones*, 3 Merivale, 172.

(*m*) *Blakey* v. *Porter*, 1 Taunt. 386.

(*n*) *King* v. *King*, 4 Taunt. 666. The Court refused to compel the defendant who was in possession of a lease, on which the plaintiff brought an action, to permit a copy to be taken, although it appeared that the plaintiff had no copy or counterpart, and although the attorney who drew the lease and counterpart had absconded. *Lord Portmore* v. *Goring*, 4 Bing. 52. But note, it was not shown that no counterpart was in existence, and on that ground the Court decided. So where bought and sold notes are delivered by the broker, it seems that the vendor is entitled to an inspection of the note delivered to the vendee. Per Hullock, B., in *Grant* v. *Fletcher*, Lancaster Lent Assizes, 1826.

(*o*) 1 Taunt. 386; Abbott, C. S. 389.

(*p*) Barnes, 439.

(*q*) Tidd, 523.

(*r*) Ib. & Salk. 215, where the Court refused a copy of a note, in an action on a parol contract, of which the note was merely evidence.

it be a policy of insurance (*s*), bill of exchange, or special agreement or undertaking (*t*) in writing to pay the debt of another, if special ground be laid, as that the demand is of long standing, and the defendant has no copy of the instrument, or that there is reason to suspect its being forged (*u*); and it is not material whether the instrument be or be not stated in the declaration to be in writing. The rule laid down by Lord Mansfield on such occasions was, that wherever the defendant would be entitled to a discovery in equity, he should have it in a court of law (*v*). It has been stated that in an action between a Smithfield factor and a grazier, the Court ruled the plaintiff to show cause why he should not produce upon the trial his books of account of beasts sold, and of monies received on the defendant's account, and that no cause being shown, the rule was made absolute (*x*). On a new trial granted, the Court has allowed the inspection of a deed read on the former trial (*y*).

Of what documents.

When a party is ordered to produce the documents which bear upon the issue, he is not bound to produce such parts of documents as do not relate to the issue; but if the applicant insist that anything material has been withheld, the other party must, in analogy to the practice in the Court of Chancery, deny by affidavit that what he withholds is relevant (*z*).

It seems to be a general rule, that a Court will not compel a party to discover his evidence before trial, by the production of his books or other private documents (*a*). And the Court refused the application where the

(*s*) Tidd, 524, 3d ed. and see the st. 19 G. 2, c. 37, s. 6.

(*t*) Ib. *Barry* v. *Alexander*, 25 G. 2, Str. 1130. Where in an action on an agreement to take the plaintiff into the defendant's employment, the defendant pleaded, 1st, the general issue; 2nd, that there was no memorandum in writing, &c.; to which the plaintiff replied that there was such a writing; held, that the defendant was entitled to an inspection of it, as in any other case where there is only one copy of the contract, and where the party holding is to be considered a trustee for the production of it for the other. *Blogg* v. *Kent*, 6 Bing. 614. Where the plaintiff made affidavit that he sued the defendant to recover damages for a breach of agreement in not entering into partnership, pursuant to a partnership deed drawn up and signed by the plaintiff, but remaining in the custody of the defendant or his attorney, and that the plaintiff possessed neither copy nor counterpart of the deed; the Court granted a rule enabling the plaintiff to inspect the deed and take a copy, though the defendant swore he had not executed the deed. On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart. *Morrow* v. *Saunders*, 1 B. & B. 318; *Bateman* v. *Phillips*, 4 Taunt. 157. Upon a plea of letters patent not enrolled, the Court will direct a copy to be given. *R.* v. *Amery*, 1 T. R. 149.

(*u*) See Tidd's Prac. 610, 7th ed. *Barry* v. *Alexander*, 25 G. 3, K. B.

(*v*) Tidd, 524, cites *Barry* v. *Alexander*, Mich. 25 G. 3. On a bill filed for a discovery, it is not competent to the plaintiff to call for all the defendant's deeds indiscriminately; some specific deed or deeds should be pointed out, and the object of the party calling for them fully and clearly stated. *Shaw* v. *Shaw*, 12 Pri. 163. See *Worthington* v. *Stafford Canal Company*, Ib. 166.

(*x*) 2 Str. 1130.

(*y*) Where on the trial the defendant produced two deeds, one only of which was read, but the execution of the other was admitted; held, that upon a new trial being granted, the opposite party was entitled to have inspection of that instrument only which had been read. *Hewitt* v. *Pigott*, 7 Bing. 400. Where a party produces his title-deeds to defeat his adversary's claim, the Court will give the latter an opportunity of inspecting them. *Willis* v. *Farrer*, 2 Y. & J. 242.

(*z*) *Clifford* v. *Taylor*, 1 Taunt. 167; 1 Camp. 562.

(*a*) *Infra*, (*h*). In *Price* v. *Tavaré*, Bayley, J., refused an application made by the plaintiff to inspect and take a copy of an entry of a sale of peach-wood by the defendant to the plaintiff, supposed to have been made in the defendant's books; the plaintiff's affidavit did not state that such entry had been signed either by the parties or by any agent; and he observed upon the hardness of the defendant's situation if he were compellable to produce an entry which might be used as evidence against him, but which would not be evidence for him.

Of what documents.

object was to enable the defendant to plead in abatement the non-joinder of parties (*b*). In another case the Court refused a motion for the inspection of the bill of exchange on which the action was brought, and for impounding it in the hands of the prothonotary, on the suggestion of its being a forgery; for this is matter of defence on the trial (*c*).

In actions on policies of insurance, the Court, or a Judge at Chambers, at the instance of the underwriters, will order the assured to produce all papers relevant to the issue (*d*).

When refused.

Where the applicant is neither an actual party to the instrument, nor a party in interest, the Court will not compel the production of an instrument to be stamped (*e*). Where an action was brought on a bond, and the defendant, on a suggestion of forgery, moved that it might be examined in the hands of the plaintiff, by an officer from the Stamp-office, the Court refused the application, since it might be the means of convicting the party of a capital felony (*f*). And where each party has his own part of the instrument, the Court will not compel the defendant to produce his part or copy. If the plaintiff lose the bond on which the action is brought, the Court will not compel the defendant to produce his copy (*g*).

In general, the Court will not compel a party to discover the evidence before the trial, by the production of his books or other private instruments (*h*); nor will they grant a rule for the inspection of books or documents of a private nature in the hands of third persons (*i*).

Inspection of court-rolls and corporation books.

But though the law will not compel one who is not a party to the suit to permit the inspection of private books and documents, it is otherwise where the document can be considered to be of a public nature, in which the applicant has an interest in common with others, as in the case of court-rolls and corporation books (*j*). With respect to a tenant or member, the books are public books; they are common evidence, which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them has a right to inspect, and to use them as evidence of his rights; but with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. This was decided, after much consideration, in the case of *The Mayor of Southampton* v. *Greaves* (*k*), notwithstanding several modern cases, in which the granting such applications in the case of corporations seemed to have been considered as a matter of course (*l*). In that case the corporation brought an action against the defendant for tolls, and the Court denied the application to inspect. A similar application had been refused in an action of trespass, where the defendant justified

(*b*) *Beale* v. *Bird*, 2 D. & R. 419.

(*c*) *Hildyard* v. *Smith*, 1 Bing. 451.

(*d*) 1 Camp. 562; 1 Taunt. 47. 107.

(*e*) *Taylor* v. *Osborne*, 4 Taunt. 159, n.

(*f*) *Chetwynd* v. *Marnell*, 1 B. & P. 271.

(*g*) *Street* v. *Brown*, 6 Taunt. 302.

(*h*) Tidd, 525; 6 Mod. 364; but see 2 Burr. 2489.

(*i*) Tidd, 524; Ld. Raym. 705. 927; 1 Barnard, 466; Barnes, 296; C. T. Hardw. 130; 2 Bl. R. 850. But it seems that a stakeholder was compelled by the Court to produce an entry of a racing contract, that a copy might be taken. Barnes, 439. In *White* v. *Earl of Montgomery*, 2 Str. 1198, a third person, having possession of the bond sued on, was compelled to produce it. A bankrupt is not entitled, previous to the trial of an action by which he disputes the bankruptcy, to inspect the proceedings. Lofft, 80.

(*j*) Per Buller, J., *R.* v. *Holland*, 2 Stra. 260.

(*k*) 8 T. R. 590. See the opinions of Ld. Hardwicke, and of C. J. De Grey, there cited.

(*l*) *Mayor of Lynn* v. *Denton*, 1 T. R. 689; 3 T. R. 303. *Mayor of London* v. *Mayor of Lynn*, 1 H. B. 211.

Inspection of public books.

under the corporation of Ipswich, for distraining for a toll for repairing the quay (*m*), and in many other instances.

The Court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of a corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion (*n*).

But in an action of debt for a penalty under a bye-law, the defendant was allowed an inspection of the bye-law and of the corporation books; for as the law was made for the public good of the residents, the defendant could not be regarded as a stranger (*o*).

In an action between the impropriator and the parishioners, as to the right to a house, the Court refused to the former the inspection of the parish books, and copies of so much as regarded his title, saying that the case differed from that of copyholders, because all the tenants of the manor have an interest in the court-rolls, but the impropriator had a distinct interest from the parishioners; it was not a parochial right, but a title, which was in question, and therefore it was not reasonable that the parish-books should be produced, which would be to show the defendant's evidence (*p*).

On a question between two, as to the right to a manor, the Court refused to grant a rule for the production of the rolls at the trial, since it was out of the common case between two tenants (*q*).

In the case of *The King* v. *Algood* (*r*), in which most of the previous cases on the subject were referred to (*s*), it was held that a freehold tenant of a manor has no right to the inspection of the rolls, unless there be some cause depending. And where the question is between the lord and a stranger, inspection will not be granted (*t*); but a copyholder who claims an interest may have an inspection of so much of the rolls of a manor as concerns his own interest (*u*), although no cause be depending at the time. Upon a question between the parish of *St. Margaret* and *The Dean and Chapter of*

(*m*) Per Lawrence, J., 8 T. R. 595; *Hodges* v. *Atkis*, 3 Wils. 398.

(*n*) *The King* v. *Masters and Wardens of the Merchant Tailors' Company*, 2 B. & Ad. 115.

(*o*) *Harrison* v. *Williams*, 3 B. & C. 162.

(*p*) *Cox* v. *Copping*, 5 Mod. 395. *Semble*, S. C. with Anon. Ld. Raym. 337. See also *R.* v. *Worsenham*, Ld. Raym. 705; *The Queen* v. *Mead*, Ld. Raym. 927. And see the case of *May* v. *Gwynne*, 4 B. & A. 301. The Court will not compel the vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. *May* v. *Gwynne*, 4 B. & A. 301. In an action to try the validity of a church-rate, the Court granted an order for the plaintiff to inspect and copy the parish books, without any order as to the costs of a party attending to exhibit them. *Newell* v. *Simpkin*, 6 Bing. 565. A rated parishioner is entitled, under 22 Geo. 3, c. 83, s. 7, to inspect the accounts kept by the guardians of the poor, although the time for appealing may be gone by, and a *mandamus* granted. *R.* v. *Great Faringdon*, 9 B. & C. 541. On an indictment against the county for not repairing a bridge, it being a question whether the parish or county were liable, the Court refused to compel the former to produce books of certain trustees of lands and bridgewardens, elected by the inhabitants in vestry, and to whom the accounts were submitted, not being public but parochial books, and the application being, in fact, by one litigant party to compel the other to produce his own private books to make out a case against him. *R.* v. *Buckingham Justices*, 8 B. & C. 375.

(*q*) *Wood* v. *Whitcomb*, 12 Vin. Ab. 146, pl. 9.

(*r*) 7 T. R. 746.

(*s*) *R.* v. *Shelley*, 3 T. R. 141; *Hodson* v. *Parker*, 27 G. 2, C. B.; Barnes, 237; *Talbot* v. *Villebois*, Mich. 23 G. 3; *Roe* v. *Aylmer*, Barnes, 321; *Baldwin* v. *Tudye*, Ib.

(*t*) *Talbot* v. *Villebois*, 2 Str. 1223.

(*u*) *R.* v. *Lucas*, 10 East, 235; *Bateman* v. *Phillips*, 4 Taunt. 162.

Inspection of public books.

Westminster, as to the right of nominating the parish clerk, the Court refused an inspection of the parish-books to the dean and chapter (*x*).

So the Court has granted a *mandamus* for the inspection of county rates (*y*).

Upon the same principle, one who has an interest in any public books, whether Bank, East India, parish or custom-house books, has a right to inspect them when they are material, and to take copies of them (*z*). In *Gery* v. *Hopkins* (*a*), an order was made for the production of the books of the East India Company, in a cause between parties having stock there, since the books, the Court said, were the title of the buyers of stock; so the books of the commissioners of the lottery, and their numerical lists, are of a public nature, and ticket-holders may have an inspection of them by rule of court (*b*). But the East India Company, it was held, were not obliged to produce their private books or letters (*c*); nor any private books relating to the appointment of their servants (*d*); nor will the Court allow an inspection in such cases unless it be material (*e*); nor the inspection and copying of more than is material to the question (*f*); nor will the Court compel the production of public-books upon a question between parties who have no interest in them. It was held that the officer served with a *subpœnâ duces tecum*, in order to decide a wager between two persons as to the amount of the revenue, was not bound to produce the books (*g*).

Records of courts.

A party to a proceeding has usually a right to an inspection of those proceedings where it is necessary for the purposes of a civil suit. Where the plaintiff had been sued in the Court of Conservancy, London, and taken in execution, for which he brought an action of trespass, the Court granted a rule that he should be at liberty to inspect the books of proceedings, so far as they related to the cause against himself (*h*). And in an action for a malicious prosecution, where it was necessary, in order to support the action, that the plaintiff should have copies of the examinations before the justices, and of the warrant on which he was apprehended, the Court granted a rule accordingly, and directed that the originals should be produced at the trial (*i*).

(*x*) *Turner* v. *Gethin*, 12 Vin. Ab. 147, pl. 11.

(*y*) *R.* v. *Justices of Leicestershire*, 4 B. & C. 891. But application must first be made to the justices at their quarter sessions, Ib. But the Court will not grant a *mandamus* for the inspection of churchwardens' accounts, under 17 G. 2, c. 38, without special cause. *R.* v. *Clear*, 4 B. & C. 899. For the clause is not general, but is for the remedy of particular evils. See further, note (*i*) *supra*.

(*z*) 7 Mod. 129; 2 Str. 304; Barnes, 236; 1 Barnard, 455; 2 Str. 954. 1005.

(*a*) 7 Mod. 129; S. C. 2 Ld. Raym. 851; 1 Salk. 281. 285; 2 Salk. 555. 1446.

(*b*) *Scinotti* v. *Bumstead & others*, Hil. 36 G. 3; Tidd. Pr. 531, 3d edit.

(*c*) *Shelling* v. *Farmer*, 1 Str. 645.

(*d*) *Murray* v. *Thornhill*, 2 Str. 717.

(*e*) *Benson* v. *Port*, cited 1 Wils. 240; 1 Bl. R. 40; 1 Barnard, 455; 1 Str. 1223.

(*f*) Ib. and *Slade* v. *Walter*, 12 Vin. Ab. Ev. 146, pl. 8.

(*g*) *Atherfold* v. *Beard*, 2 T. R. 616.

(*h*) *Wilson* v. *Rogers*, 2 Str. 1242.

(*i*) *R.* v. *Smith*, 1 Str. 126. See *Welch* v. *Richards*, Barnes, 268. In *Herbert* v. *Ashburne*, 1 Wils. 297, the Court granted a rule for the inspection of the books of the sessions of the corporation of Kendall, upon a question whether the park lands were within the town or corporation of Kendall, on the ground that they were public books, which every one had a right to see. But in the case of *The King* v. *The Sheriff of Chester*, 1 Chitty's R. 479, Abbott, L. C. J. said, We grant mandamuses to inspect corporation books as a matter of right to burgesses who have an interest in the corporation, but I know of no right that this Court has to authorize a person to inspect the books of quarter sessions. In the case of the *King* v. *Purcell, Vice Chancellor of Oxford* 1 Wils. 239, that of *R.* v. *Berking*, 7 G. 1, was cited as a precedent of a rule granted by the Court of K. B. to inspect the books and records of the Court, where the indictment was found in a criminal case; but it appears from the statement

In criminal cases.

An inspection is never granted in a criminal case, because no one is bound to produce evidence against himself (*k*). Upon an information against one of nine trustees of a charity, incorporated by Act of Parliament, by the name of Surveyors of the Highways of Aylesbury, for executing his office without taking the oaths, the Court denied to the prosecutor (*l*) inspection and copies of their books of elections, and of their receipts and disbursements, because they were of a private nature, and it would be to make a man produce evidence against himself in a criminal case. Nor is it granted in criminal cases, at the instance of the defendant, in any case, with respect to any depositions or examinations of any kind which have taken place. And therefore where an information had been filed against Holland, upon the report of a board of inquiry in India, the Court refused the defendant's motion for an inspection, and said that they had no power to grant it (*m*).

It seems that a proceeding by *quo warranto* is not considered as a criminal one within the rule (*n*). The motion for leave to inspect books is made upon affidavit, stating the circumstances of the case, and that application has been made and refused (*o*). It seems that the Court will not grant the motion before issue joined, for till then it does not appear whether an inspection is necessary (*p*).

INTENTION.

Intention, when a conclusion of law.

WHERE an act has been done *voluntarily*, the particular intention with which it was done may either be *material* or *immaterial* to the legal charge or claim (*q*).

of Lee, C. J. ib. that that was the case of an indictment for exercising a trade without having served an apprenticeship, and that application being made that the name of the prosecutor should be disclosed, the Court refused the application, observing that the defendant might have a rule to take a copy of the record, when he might see on the back of the indictment who the prosecutor was. In *Edwards* v. *Vesey*, Cas. Temp. Hardw. 128, in an action brought for taking a silver cup of the plaintiff's under a distress upon a fine imposed on the plaintiff, being an under officer to the commissioners of lieutenancy for the city of London, a rule was made for the plaintiff to inspect the books and papers of rates and assessments of the lieutenancy.

(*k*) *R.* v. *Purnell*, 1 Bl. 37; 1 Wils. 239; per Buller, J. 7 T. R. 142; 1 Barnard, 455; 2 Str. 1005. 1223; 3 T. R. 303; 2 Taunt. 115. The grand jury may receive secondary evidence of the contents of the forged instrument, where from its being in the hands of the prisoner, or any other cause, it cannot be produced; and where a witness objects to producing deeds, if they are part of the evidence of the title to his estate, he cannot be compelled to produce them; but if not he may. *R.* v. *Hunter*, 3 C. & P. 592.

(*l*) *The Queen* v. *Mead*, Ld. Raym. 927; 12 Vin. Ab. 146, pl. 6; *R.* v. *Dr. Bridgman*, 2 Str. 1203; 1 Lord Raym. 705; 2 Str. 1005. 1210; 1 Wils. 329; 4 Burr. 2489; 1 Bl. R. 37. 351.

(*m*) *R.* v. *Holland*, 4 T. R. 691.

(*n*) See *R.* v. *Babb*, 3 T. R. 579.

(*o*) Tidd. Pr. 533, 3d edit.; 3 Wils. 399; Str. 1223.

(*p*) 3 Wils. 398; 1 Ld. Raym. 253; Carth. 421.

(*q*) It has been said, in the case of an action for an alleged libel, that if the fact be justified, the motive and intention are immaterial. Declaration for a libel imputing perjury; plea, that it was contained in an affidavit in defence of a charge of refusing to grant a licence; and held to be good, without any denial that it was done with intent to asperse the plaintiff, or that it was necessary for the defendant's defence, or that it was done with that intent. For P. C. if the matter of fact be justified, the manner is of no consequence. *Astley* v. *Young*, 2 Burr. 801. This is no doubt true, in all cases where by law the fact is by law constituted a peremptory bar; this is in effect but to say that the intention is immaterial where the law makes it immaterial; a simple truism: where however an act may be justifiable as of right, where done with one intention, but is wrongful and actionable if done with another intention, the reali ntention may be a question of fact, in other words the intention is traversable, although no doubt the maxim "*finis imponit nomen operi*," is usually of great weight. In *Paster* v. *The Bishop of Winchester*, Ch. Ca. 96. Vin. Ab. (X. b.), issue was joined on the question whether the primary intention of the party was to commit waste; and see *Doe* v. *Williams*, 11 East, 56; *supra*, tit. COPYHOLD. And *Lucas* v. *Nockells*, 10 Bing. 157. And see *Governor*

When a conclusion of law.

Where the intention is *material*, it is in some instances a conclusion of law which may be drawn by the Court either from intrinsic facts or extrinsic circumstances, but most usually it is a question of fact, under all circumstances, for the consideration of a jury.

The question of intention is a conclusion to be drawn by the Court from the circumstances, whenever, by virtue of any rule or principle of law, the conclusion is a necessary one from such circumstances. Thus in cases of homicide, the Courts frequently infer malice from the facts, without an express finding by the jury; in other words, malice arises by construction.

It is a rule of law (where a *general* felonious intention is sufficient to constitute the offence) that a man who commits one felony in attempting to commit another, cannot excuse himself, on the ground that he did not intend to commit the particular felony (*r*). Thus, if *A.* intend to shoot *B.*, miss him, but destroy *C.* against whom he had no malice, he is guilty of the murder of *C.*

But in such case the offence contemplated must be a felony: if a man intending to commit a bare trespass, were to shoot another, it would amount at most to the offence of manslaughter (*s*).

It seems that the rule is to be confined to cases where a *general* allegation of a malicious and felonious intention is sufficient, and that it does not extend to offences where a particular and specific intention is essential (*t*).

In the next place, although the fact itself or its circumstances may not supply any conclusive inference as to intention, independently of the finding of the jury, yet they may afford a *primâ facie* presumption, which on recognized legal principles ought to prevail, unless the presumption be rebutted by competent evidence.

The law constantly notices the universal principle of evidence, that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act (*u*).

In many cases, therefore, the allegation of intention, though essential to sustain the charge or claim, requires no other proof than that of the fact itself; the intention being the result or inference which the law draws from the act itself, in the absence of a sufficient legal justification or excuse. Thus in the case of a libel, the publication and noxious application of which have been proved, in the absence of evidence to repel the presumption, a malicious intention (*x*) is to be inferred without further proof. Where, on the

of Poor of Bristol v. *Wait*, 2 A. & E. 264. It has, however, frequently been held that a man may distrein for one service, and avow for another. *Infra*, tit. TRESPASS. The latter cases stand on a somewhat different principle: if a man having a right of way for one specific purpose, use it intentionally for another purpose when he would not have used it for the legal purpose, an actual wrong is done to the owner of the land, which has been used for a purpose foreign to the grant; but where a party has a power to distrein for either of two causes, the party distreined upon suffers no wrong, whether the distreinor intend to proceed for the one cause or the other, or distrein without any actual determination on the subject.

(*r*) East's P. C. 514.

(*s*) *R.* v. *Dobbs*, East's P. C. 513.

(*t*) Thus, if *A.* were to cut *B.* in attempting to murder *C.*, it seems, that *A.* would not be guilty within the stat. 7 W. 4, and 1 Vic. c. 85, for the indictment must allege a specific intention to murder or injure *C.*, which would be negatived by the evidence. If in that case *A.* had actually killed *B.* he would have been guilty of murder; but in order to constitute murder, a general malicious and felonious intention is sufficient, and it is not necessary that it should be specifically pointed at the individual.

(*u*) See Ld. Ellenborough's observations, 3 M. & S. 15.

(*x*) See Ld. Ellenborough's observations, *R.* v. *Phillips*, 6 East, 470. Where an act, in itself indifferent, becomes criminal

contrary, the act itself is indifferent, and is innocent or criminal according to the intention of the agent, the intention, like any other matter of fact, requires extrinsic proof.

When a conclusion of law.

Where a party disposes of forged bank-notes, it is an inference of law that he intended to defraud the Bank (*y*); and yet, if the jury do not draw the conclusion, but merely find the facts, it seems that the Court cannot.

In the absence of any principle or rule of law, by virtue of which either a conclusive inference or any presumption as to intention ought to be drawn from the act or its circumstances, the specific intention of the agent is a matter of fact on which the jury are to exercise their discretion on the evidence before them, as in ordinary cases, civil as well as criminal (*z*). Thus on a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independently of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence.

Where the particular intention is essential, evidence of former attempts with that intention is admissible to prove the intent (*a*). It is a general rule, that whenever the fact of intention is required to be established by collateral evidence, it may be rebutted by contrary evidence (*b*).

Primary and collateral intention.

A doubt has existed whether a criminal agent who effects the particular mischief prohibited, but who has a different and primary object in view, can be guilty of an intention to effect the particular mischief, which is but ancillary to the principal purpose. This difficulty seems to have arisen from considering that as a question of law which is in strictness a mere question of *fact*. If the prisoner did in fact intend the particular mischief, it can be no better defence in point of law (*c*) than of morals that he also intended some other, and perhaps greater injury. Whether he intends the particular consequence, is a question of fact for the jury. A man, it seems, *intends* that consequence which he contemplates, and which he expects to result from his act, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does; in this respect, the legal sense of the term intention does not differ from its usual and ordinary meaning. It is therefore a question for the jury, whether the agent did not, in attempting to attain his primary

if it be done with a particular intent, then the intention must be alleged and proved; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof, the law implies a criminal intention. Per Lord Mansfield, 5 Burr. 2661. Starkie on Libel, 2d edit.

(*y*) *R.* v. *Mazagora*, 2 B. & C. 261; S. P. *R.* v. *Sheppard*, Russ. & Ry. 169.

(*z*) Bac. Ab. Trial, G.; 1 Hale, 229.

(*a*) *R.* v. *Voke*, Russ. & Ry. C. C. 531. An indictment charging a joint administering of sulphuric acid to several horses, held to be supported by proof of mixing a quantity with corn, and dividing it amongst them; but to make such an act criminal, it must appear to have been done with the intent charged, and not under a mistaken notion of improving the appearance of their skins; and to show the intent, other acts of the party may be shown. *R.* v. *Mogg*, 4 Carr. & P. C. 364. See *Donolly's Case*, and tit. COIN—FORGERY.

(*b*) Per Ld. Ellenborough, *R.* v. *Phillips*, 6 East, 475.

(*c*) See Post. 439.

Primary and collateral intention.

object, also intend the collateral mischief which was the necessary or even natural consequence of the means used (*d*).

In *Williams's* case, where the prisoner was indicted for cutting the clothes of the prosecutrix with intent to spoil them, it appeared that the principal object of the prisoner was to injure the person. But Mr. J. Buller left it as a question for the jury, whether the prisoner made the assault with intent to spoil the clothes; informing them that they might consider whether a person who intended the end, *i. e.* the injury to person, did not also intend the means by which it was to be attained (*e*).

In the case of *Coke* and *Woodburne* (*f*), who were indicted under the Coventry Act for wounding Mr. Crisp, with intent to maim him, it clearly appeared that the primary object was to murder him; but the jury finding that they contemplated the maiming as ancillary to the murder, the prisoners were convicted and executed. In a recent case (*g*), it appeared that the prisoner, in order to facilitate the commission of a rape, cut the private parts of the prosecutrix with a penknife; it was left by the learned Judge to the jury, whether the prisoner, although he probably meant to commit a rape, did not also intend to do the prosecutrix a grievous bodily harm, and that the intention might be inferred from the act itself. The Judges were unanimously of opinion that the conviction was right (*h*).

With a view to civil compensation for a loss which must fall on one or other of two (in a moral sense) innocent parties, it is just and politic that the loss should fall on him who voluntarily did the act, or who might and ought to have prevented the loss from happening (*i*);—to make a man criminal there must usually be either malice or some culpable want of reasonable care and caution.

(*d*) The intention in such cases seems, in the common use of the word, to depend, not upon the necessity of the connection between the act and the consequence, but on the contemplation and expectation of the agent, that the consequence will result from the act. He may not *intend* the consequence, although it be the necessary and certain result of the act; as where one ignorantly administers to another deadly poison, supposing it to be a wholesome medicine, he does not intend the death, although it be the certain consequence of the act. So he may intend a consequence, although that consequence *cannot* result from the act; as where one supposing that which is in its nature perfectly harmless to be poison, administers it under the *expectation* that it will occasion death, there he *intends* death, although it cannot result from the act. It is obvious that in these cases the *intention* is identified with the *expectation* of the particular result which exists in the mind of the agent. Where the party in doing an act contemplates and *expects* any one consequence, or any number of consequences from his act, in common parlance as well as legal construction he intends them all. If a man, intending to get rid of a particular piece of evidence against him, were to burn the document, would it not be a manifest absurdity to say, that he did not *intend* to burn the paper or parchment on which the evidence was written, and that he merely intended to rid himself of the writing which it contained? Equally absurd would it be in point of law, were the publisher of libels on the characters of individuals to insist that his object was not to defame others, which was a mere collateral incident, but to profit by the sale of his libels.

(*e*) Leach, 597. The jury found the prisoner guilty, but the Judges are said to have held, that to bring the case within the stat. 6 G. 1, c. 23 (which was made to prevent a particular and mischievous practice by the weavers, of destroying foreign manufactures introduced into this country), it was necessary that the primary intention should be to destroy the clothes. There were, however, other objections which were fatal to the prosecution.

(*f*) 6 St. Tr. 212.

(*g*) *R.* v. *Cox*, cor. Graham, B., Chelmsford Assizes, 1818, and afterwards by all the Judges, under the stat. 43 Geo. 3, c. 58.

(*h*) The cutting off part of a living sheep, with intent to steal, supports an indictment for killing with intent, &c. if the cutting off must occasion the sheep's death. *R.* v. *Clay*, 1 Russ. & Ry. C. C. 387.

(*i*) Though a man do a lawful thing, yet if any damage do thereby befal another he shall answer it, if he *could have avoided it*. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies.

INTEREST OF MONEY.

The stat. 3 & 4 W. 4, c. 42, s. 28, enacts, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law. Section 29 enacts, that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass, de bonis esportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of the Act.

General rule.

Interest, independently of the above Act, is in general recoverable, in addition to the principal sum, upon an express promise, or where a contract may be implied from circumstances, but not otherwise (*j*).

Evidence of a contract.

Interest is recoverable wherever the intention of the parties that it should be paid can be inferred from the circumstances, the particular mode of dealing adopted by the parties, or the usage of the trade (*k*) in which they

If a man shoot at birds and hurt another unawares, an action lies. If I have land through which a river runs to your mill, and I lop the sallows growing by the river side, which accidentally stop the water so as your mill is injured, an action lies. If I am building my own house, and a piece of timber falls upon my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.* P. C. *Lambert* v. *Bessey*, Ray. 421, and see *Guilbert* v. *Stone*, Style, 72. *Weaver* v. *Ward*, Hob. 134. But it is a rule that ignorance of the law is no excuse for a violation of the law, though no moral blame attach.

(*j*) In *Arnott* v. *Redfern*, 3 Bing. 353, Best, C. J. said, "the rule (that is, the negative part of it) merely prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts, and thereby checks the extension of credit, which is often ruinous both to tradesmen and customers."

(*k*) *Eddowes* v. *Hopkins*, Doug. 375. Upon an undertaking to pay a sum on the arrival of money in this country from abroad, which was, in reference to certain instructions, to be in discharge of a bill in the hands of the plaintiff, and due from the party on whose account the remittance was to be made, held that the plaintiff could not recover interest on the amount, from the time of the money having come to the defendant's hands. *Hare* v. *Richards*, 7 Bing. 254, and 5 M. & P. 35; and see *De Haviland* v. *Bowerbank*, 1 Camp. 51. A contract to pay interest upon the balance at the end of each year, including interest, is unobjectionable. *Newall* v. *Jones*, 1 M. & M. 449, and 4 C. & P. 124. The defendant, a prisoner in France, by a written instrument, promised in one month after his arrival in England to pay the plaintiff or order £. sterling, for value received. He arrived in England in 1814; a demand was made in 1818, and in 1819 an action was commenced, which was continued until 1828, when the cause was tried; held, that the same being payable upon a contingency, and the instrument, in its language, leading to the conclusion that the parties did not intend that interest should be payable up to the time of the principal becoming due, the Court refused to depart from the rule, that interest is not due on money secured by a written instrument, unless it appeared to be so intended on the face of it, or is implied from mercantile usage. *Page* v. *Newman*, 9 B. & C.

Evidence of a contract.

dealt. As where interest has been allowed on former balances of account (*l*); and where it has been the custom, on advances by bankers to the defendant, to allow interest on the balances struck from time to time on the whole balance, such interest may be recovered (*m*). So, if the customer knew that such was the practice of the house (*n*), otherwise the Court will not allow the banker more than simple interest upon sums actually advanced (*o*). It is not recoverable from a mere stakeholder (*p*).

Written securities.

2dly, It is recoverable where a bond, bill of exchange, or promissory note, has been given (*q*), although no day of payment be specified, for then the money becomes due immediately (*r*), and although the money by the terms of the security be payable on demand, in which case interest runs from the day of the demand (*s*); and if no demand be proved, from the issuing of the writ (*t*). If the bill or note specify that interest is payable, it is payable from the date, but otherwise from the time only when it becomes due (*u*). Where the maker promised by the note to pay interest on demand, it was held that this meant from the date (*v*). Interest is recoverable from the drawer of a bill, from the time of notice of dishonour (*x*). So if a bill of exchange be given, although it turns out to be void (*y*); for the intention of the parties to

378. Where the defendants bound themselves by an instrument in the nature of a bond, but without penalty or any stipulation as to interest, to pay certain sums at certain periods to be delivered to a third party, in goods, held that the instrument not being a mercantile contract, nor one on which there existed any usage as to interest, it did not carry interest. *Foster* v. *Weston*, 6 Bing. 709.

(*l*) *Nicholl* v. *Thomson*, 1 Camp. 52. And see *Chalie* v. *The Duke of York*, 6 Esp. C. 45.

(*m*) *Bruce* v. *Hunter*, 3 Camp. 467.

(*n*) *Moore* v. *Voughton*, 1 Starkie's C. 487.

(*o*) *Dawes* v. *Pinner*, 2 Camp. 482, n.; cor. Ld. Ellenborough.

(*p*) Where the defendant, an auctioneer, received a deposit on the sale of premises, and the title being disputed, received notice from the vendor to invest it in Government securities, but without procuring any authority or concurrence of the vendee; held, that being a mere stakeholder, and liable to be called on to pay it over at any time to the party entitled, he was not liable to pay interest, although it appeared that he had mixed it up with his own money at his banker's, of which, after leaving sufficient to answer calls, the residue, including 19-20ths of the deposit, was laid out in securities producing interest. *Harrington* v. *Hoggart*, 1 B. & Ad. 577. Where the contract of sale expressly stated that the auctioneer was agent for the vendor, and there was no proof that he had due notice of the contract having been rescinded, the vendor having failed to make a good title, held that the auctioneer, in an action to recover back the deposit, was not liable for interest. *Gaby* v. *Driver*, 2 Y. & J. 549. And see *Spittle* v. *Lavender*, 2 B. & B. 452; and *Burrell* v. *Jones*, 3 B. & B. 47.

(*q*) *Vernon* v. *Cholmondely*, Bunb. 119. *Robinson* v. *Bland*, 2 Burr. 1077. 1085. In an action of trover for a bill of exchange, the jury may give interest by way of damages, though no special damage be alleged in the declaration. *Paine* v. *Pritchard*, 2 C. & P. 558. Bill payable six months after date, with lawful interest; interest payable from date. *Doman* v. *Dibdin*, 1 Ry. & M. 381. Bond in penalty of 120 *l.* conditioned for payment of 120 *l.*; plaintiff entitled to recover interest as damages, beyond the amount of the penalty. *Francis* v. *Wilson*, 1 Ry. & M. C. 105. See *Ld. Lonsdale* v. *Church*, 2 T. R. 388. *M'Clure* v. *Dunkin*, 1 East, 436. *Hilhouse* v. *Davis*, 1 M. & S. 169. *Wilde* v. *Clarke*, 6 T. R. 603. Bayley, J., in the case of *Cameron* v. *Smith*, 2 B. & A. 308, said that in an action on a bill, interest being in the nature of damages, the jury might disallow it, in case they were of opinion that the delay in payment had been occasioned by the default of the holder. And by the late statute 3 & 4 W. 4, c. 42, the giving interest is discretionary with the jury.

(*r*) *Farquhar* v. *Morris*, 7 T. R. 124; and per Lord Ellenborough, 15 East, 225. But in *Hogan* v. *Page*, 1 B. & P. 337, it was held that interest was not payable on a single bond.

(*s*) *Parker* v. *Hutchinson*, 3 Ves. 183. *Upton* v. *Lord Ferrers*, 5 Ves. 803. *Blaney* v. *Hendrick*, 2 W. B. 761.

(*t*) *Pierce* v. *Fothergill*, 2 Bing. N. C. 167.

(*u*) *Orr* v. *Churchill*, 1 H. B. 227. *Kennerly* v. *Nash*, 1 Starkie's C. 452. *Doman* v. *Dibdin*, Ry. & Mo. 381.

(*v*) *Hopper* v. *Richmond*, 1 Starkie's C. 508, cor. Lord Ellenborough.

(*x*) *Walker* v. *Barnes*, 5 Taunt. 240.

(*y*) *Robinson* v. *Bland*, 2 Burr. 1077.

contract for interest may be inferred from that circumstance (*z*). So where goods sold and delivered were to be paid for by a bill at a certain date, on which interest would have run (*a*); and it was held that interest might be recovered as part of the estimated value of the goods, upon the common count for goods sold and delivered (*b*). But where there was an agreement in writing that the price of goods sold and delivered should be paid for at a price specified, it was held that interest was not recoverable after the expiration of the credit (*c*). So interest is recoverable in an action on a judgment, where the debt itself on which the action was founded bore interest (*d*).

Evidence of a contract to pay interest.

In a late case the Court held, that interest was not recoverable except upon an express contract or an implied one; as in the case of mercantile securities, or where a promise could be implied from the usage of trade, or from the particular circumstances of the case (*e*).

(*z*) Ibid. And see Lord Ellenborough's observations, 15 East, 227.

(*a*) *Marshall* v. *Poole*, 13 East, 98; note, the agreement for the sale was in writing; as also in *Porter* v. *Palsgrave*, 2 Camp. 472; *Becher* v. *Jones*, 2 Camp. 428; *Boyce* v. *Warbarton*, Ibid. 480. *Farr* v. *Ward*, 3 M. & W. 23.

(*b*) But in other cases interest seems to have been recovered as damages, as in the case of money lent, *Trelawney* v. *Colman*, 1 B. & A. 90; or upon a promissory note. See *Slack* v. *Lowell*, 3 Taunt. 157, where the jury, in a similar case, gave the price and interest as damages, and the Court of C. P. would not set aside the verdict.

(*c*) *Gordon* v. *Swan*, 12 East, 419; the declaration was in *assumpsit* for goods sold and delivered. In *Blaney* v. *Hendrick*, 3 Wils. 205, it was held by Gould, Blackstone, and Nares, Js. (*absente* Eyre, C. J.) that interest might be recovered on an account stated from the day on which it was stated; but that no interest could be recovered in respect of money owing for goods sold and delivered. And in *Mountford* v. *Willis*, 2 B. & P. 337, it was held that interest was recoverable for goods bargained and sold, a time being limited by the agreement (which was in writing) for the payment.

(*d*) *Arnott* v. *Redfern*, 3 Bing. 353. So in affirming a judgment on a writ of error in the Exchequer. Tidd, 1231, 7th edit.; 2 Camp. 428, n.; 13 East, 78; 3 Taunt. 157; 4 Taunt. 298. In an action of debt upon an Irish judgment, a jury ought to give interest or not, as they find that the plaintiff has or has not used proper diligence to obtain payment. *Bann* v. *Dalzell*, M. & M. 228, and 3 C. & P. 376. So (*semble*), in general where the claim to interest does not rest on express contract. Ib. See *Laing* v. *Stone*, Ib. in the note; and *Du Belloix* v. *Waterpark*, 1 D. & R. 16. *Entwisle* v. *Shepherd*, 2 T. R. 78. On an indemnity given against charges on the sale of land with sureties, the purchaser having been called on to pay the arrears of an annuity, but in the absence of the principal residing abroad, the jury having found neglect in suing the sureties, it was held that interest was not recoverable on the sums paid. *Anderson* v. *Arrowsmith*, 2 P. & D. 403.

(*e*) *Higgins* v. *Sargent*, 2 B. & C. 348. The question was whether, in an action of covenant on a policy of insurance on a life, interest was due from the day when the sum insured for became payable, and the Court held that it was not. Abbott, C. J. said, "it is now established as a general principle that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others." He afterwards observed, "inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract, express or implied, to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest" Bayley, J., held, that as interest was not due by law for money lent, to be repaid either on demand or at given time (*Calton* v. *Bragg*, 15 East, 224), it followed that interest was not due for money payable at a certain time after an event, and that the circumstance of its being due by virtue of a contract under seal, made no difference. Holroyd, J.: "It is clearly established by the later authorities, that unless interest be payable by the consent of the parties, express or implied, from the usage of trade (as in the case of bills of exchange), or other circumstances, it is not due at common law. In *De Haviland* v. *Bowerbank*, 1 Camp. 50, Lord Ellenborough was of opinion that where money of the plaintiff had come to the hands of the defendant, to establish a right of interest upon it, there

Where it cannot be recovered.

So interest is recoverable if the money has been used; as where an agent pays the money of his principal into his banker's hands, and uses it as his own (*f*).

It has been held, subject to the above exceptions, that interest is not recoverable upon a sale of goods (*g*), or upon money lent (*h*), or money paid, or money had and received (*i*); nor upon the balance of an account stated (*k*); nor upon a policy of insurance (*l*); nor upon an agreement for retaining tithes, no day having been fixed for the payment (*m*).

It has in some instances been held, that though interest be not recover-

should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon* and *Swan*, 12 East, 410, the same noble and learned Judge said, that the giving of interest should be limited to bills of exchange, and such like instruments, and agreements reserving interest. In the latter case, although the money was payable at a particular day, nonpayment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain, payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or show cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the nonpayment of the debt. Where, indeed, the interest becomes payable by virtue of a contract, express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to show that he had paid the principal sum advanced. Here there being no contract, either express or implied, to pay interest, it was no part of the debt, but could only be recovered by way of damages for detaining the debt Inasmuch, therefore, as it appears that if the plaintiff had pursued that remedy which by the common law is specifically applicable to his case, he could not have recovered interest, I think that he ought not to be permitted to recover interest by way of damages, in an action of covenant." In a very late case (Easter Term, 1829), the Court of K. B. held. that interest was not recoverable on a written promise to pay money on a day certain, which had been made abroad, and which had been declared on as a promissory note, but which in point of law was not a promissory note, and where the plaintiff had recovered on the account stated. Contrary to the above rule, laid down in *Higgins* v. *Sargent*, interest has formerly been allowed on a sum awarded to be paid on a certain day. *Pinhorn* v. *Tuckington*, 3 Camp. 468; and see *Chalie* v. *Duke of York*, 6 Esp. C. 46; *Swinford* v. *Burn*, Gow, 9.

(*f*) *Rogers* v. *Boehm & Others*, 2 Esp. C. 702; cor. Ld. Kenyon. And see as to assignees, *Travers* v. *Townsend*, 1 Bro. C. C. 384; Executors of *Franklin* v. *Frith*, 3 Bro. C. C. 433; Partners, Pothier Traité du Contrat. c. 7, n. 116; 2 Atk. 106. See also *Willis* v. *Commissioners of Appeals*, &c. 5 East, 22.

(*g*) *Calton* v. *Bragg*, 15 East, 223. *Gordon* v. *Swan*, 2 Camp. 429; 12 East, 419.

(*h*) Ibid. And 5 East, 22. *De Haviland* v. *Bowerbank*, 1 Camp. 50. But see *Trelawney* v. *Thomas*, 1 H. B. 303, where it was allowed on money advanced for the use of another.

(*i*) Ibid. And *De Bernales* v. *Fuller & Others*, 2 Camp. 427; 14 East, 490, n. where the money had been paid into the defendant's hands for the plaintiff's use, and applied by the former to another purpose; and see *Crockford* v. *Winter*, 1 Camp. 129, where the rule was held to extend to money obtained by fraud.

(*k*) 6 Esp. C. 45. *Nichol* v. *Thompson*, 1 Camp. 52. But see *Blaney* v. *Hendrick*, 2 Bl. 761; 3 Wils. 205; where the rule for allowing interest was extended to all liquidated sums, although the balance there arose on an account stated for goods sold and delivered. And in *Pinhorn* v. *Tuckington*, 3 Camp. 468, Lord Ellenborough held, that where money due on a balance of account was awarded to be paid on a particular time and place, interest ran after a demand duly made See also *Marquis of Anglesea* v. *Chafey*, per Abbott, J. Dorchester Spring Ass. 1818. Manning's Index, 185. And see 1 East, 400; 1 M. & S. 173; Vin. Ab. tit. *Arbitration*, C. 2.

(*l*) *Kingston* v. *Mackintosh*, 1 Camp. 518. And per Le Blanc, J. in *De Bernales* v. *Fuller*, 2 Camp. 427. And per Ld. Ellenborough in *De Haviland* v. *Bowerbank*, 1 Camp. 50, and *supra*.

(*m*) *Shipley* v. *Hammond*, 5 Esp. C. 114; but it was said that it would have been otherwise had a day been appointed for payment.

able *eo nomine*, it is recoverable as damages (*n*). If, however, on grounds of general policy, which may not be unattended with inconvenience in particular cases, a general rule be laid down which excludes a direct claim to interest, it would be contrary to the same general principle of policy to allow interest to be recovered indirectly under another description.

A trader pledges goods on a promise to pay interest; the creditor is entitled to interest up to the date of the commission (*o*).

Where a defendant sued upon a security, carrying interest, pays money into Court sufficient to cover the principal, with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed, and a jury on trial is bound to give him damages for the interest accruing between the commencement of the action and the payment into Court (*p*).

INTERPLEADER ACT.

By the 1 & 2 Will. 4, c. 58, s. 7, all rules, orders, matters, and decisions to be made and done in pursuance of the Act, except affidavits, may, together with the declaration in the cause, be entered of record.

JURISDICTION.

As to the jurisdiction of an inferior court, where the amount is reduced by a set off: see Str. 1191; 2 Wils. 68; 3 Wils. 48. By payment: 1 Taunt. 60; 7 Moore, 68; 1 B. & P. 223; 8 East, 28. A statute which enacts that if any difference shall arise, it shall be decided by commissioners, &c., does not, without express words, oust the jurisdiction of the superior courts. *Lord Shaftesbury* v. *Russell*, 1 B. & C. 666. See tit. AWARD.

(*n*) *De Bernales* v. *Wood*, 3 Camp. 258; where in an action to recover a deposit on an agreement for the sale of an estate, it was alleged by way of special damage that the plaintiff had lost or been deprived of the sum deposited; and Ld. Ellenborough held, that the plaintiff was entitled to recover interest as special damage. In *Marshall* v. *Poole*, 13 East, 98, the Court said that the interest subsequent to the day appointed for payment, might be considered as part of the stipulated price of the goods. In the case of *Arnott* v. *Redfern*, 3 Bing. 353, which was an action on a Scotch judgment, on a claim for work and labour on a contract made in England, and where the Scotch Court had allowed interest; the Court sustained the verdict on the judgment, on the ground that even in England, where a debt is wrongfully withheld after the plaintiff has endeavoured to obtain judgment, the jury may give interest in the shape of damages. And the case of *Lee* v. *Munn*, 8 Taunt. 45, was cited, where it was held, that an auctioneer who had had a deposit in his hands for four years could not be compelled to pay interest, because the plaintiff had made no demand on him for repayment of the deposit. And also the case of *Eddowes* v. *Hopkins*, Doug. 376, where Ld. Mansfield held, that in cases of long delay, and under vexatious and oppressive circumstances, juries in their discretion might allow interest. Also the cases of *Blackmore* v. *Fleming*, 7 T. R. 446; *Craven* v. *Ticknell*, 1 Ves. j. 60; and *Hilhouse* v. *Davis*, 1 M. & S. 169. But in *Page* v. *Newman*, 9 B. & C. 381, the Court of King's Bench expressed an opinion that it would be more convenient to adhere to a general rule, than to leave it open to inquiry, in each particular case, whether the delay had been attended with vexatious and oppressive circumstances. Ld. Tenterden observed, that if the rule were to be adopted it might frequently be made a question at *Nisi Prius*, whether proper means had been used to obtain payment of the debt, and such as the party ought to have used, which would be productive of much inconvenience.

(*o*) *Crosley's Case*, 7 Vin. Ab. 110. But a mortgagee shall have his interest run upon a bankrupt's estate, because he hath a right in *rem*; but as to other interest, it ceaseth on the bankruptcy. Per King, Chanc., 7 Vin. Ab. 110.

(*p*) *Kidd* v. *Walker*, 2 B. & A. 705. On an award directing payment of money interest may be recovered by action, but not by motion for attachment. *Churcher, Gent. one, &c.* v. *Stringer, Gent. one, &c.* 2 B. & Ad. 777.

JURY ACT.

6 GEO. 4, c. 50; motions to regulate the trial must be made at *Nisi Prius*. 7 Taunt. 390.

JUSTICES.

IN actions against justices of the peace and peace officers (*q*), may be considered,—

I. *The proofs in an action against a justice of the peace, &c.*
   1. Of notice of action, p. 580.
   2. Of the commencement of the action, p. 583.
   3. Of the cause of action, within the county, &c. p. 584.
   4. Where a conviction has been quashed, ibid.

II. *Proofs in defence by justices*, p. 585.

III. *By constables, &c., acting under a warrant*, p. 594.

IV. *By constables, &c., acting without warrant*, p. 600.

Proof of notice of action.

1. *Notice of action.*—By the stat. 24 Geo. 2, c. 44, s. 1, no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any justice of the peace for anything by him *done in the execution of his office* (*r*), until notice in writing of such *intended writ or process* (*s*) shall have been *delivered* (*t*) to him, or left at the usual place of his abode by the *attorney* (*u*) or agent for the party who intends to sue, or cause the same to be sued out or served, at least *one calendar month* (*x*) before the suing out or serving the same; in which notice shall be clearly and explicitly contained the *cause of action* (*y*) which such party hath or claimeth to have against such justice of the peace; on the back of which notice shall be *indorsed the name of such attorney* (*z*), or agent, together with the *place of* his abode.

Proof of notice, when necessary.

Done in the execution of his office.—The object of the Legislature was to enable the magistrate to tender amends for the *wrong* done; the statute therefore supposes a wrong to have been done in consequence of some excess, or want of authority; for where the justice has not exceeded his authority the enactment is useless. Hence, if the subject-matter be within the *jurisdiction* of the magistrate, and he intend *bonâ fide* (*a*) to act as a magistrate at the time, he is within the protection of this statute, although he acts erroneously (*b*). The statute applies, unless the act be wholly *aliene* to the jurisdiction, and done *diverso intuitu* (*c*).

(*q*) For actions against officers of excise &c. see the title.

(*r*) *Infra*, 580.

(*s*) *Infra*, 581.

(*t*) *Infra*, ib.

(*u*) *Infra*, ib.

(*x*) *Infra*, 583.

(*y*) *Infra*, 581.

(*z*) *Infra*, 582.

(*a*) It seems that the question of *bona fides* is in all such cases one of fact for the jury. *Wedge* v. *Berkeley*, 6 A. & E. 663.

(*b*) See *Weller* v. *Toke*, 9 East, 364; where one magistrate made an order in a case where the authority of two was necessary. So in *Prestidge* v. *Woodman*, 1 B. & C. 12, where a magistrate acted on a subject-matter of complaint, the facts of which arose locally beyond the limits of his jurisdiction. And the distinction was taken between a magistrate and constable in that respect, for a constable is not protected unless he act in obedience to the warrant; *Money* v. *Leach*, 3 Burr. 1742; but a magistrate in all cases where he acts in execution of his office. And see *Gaby* v. *The Wilts and Berks Canal Company*, 3 M. & S. 580. And see Ld. Kenyon's observations, *Greenway* v. *Hurd*, 4 T. R. 553; and Ld. Tenterden's, in *Beechey* v. *Sides*, 9 B. & C. 809.

(*c*) Per Ld. Ellenborough 9 East, 365,

Notice, when necessary.

And where the subject-matter is within the jurisdiction of the magistrate, it will be presumed that he acted as a justice (*d*); and therefore, where one who was lord of a manor, and also a justice of the peace, seized a gun in the house of an unqualified person, it was presumed that he acted as a justice, and notice was held to be necessary (*e*).

Where an action was brought to recover a penalty for acting as a magistrate without a qualification (*f*), it was held that the defendant was not entitled to notice, the question being whether he *was* a magistrate at all (*g*).

Proof of service.

The plaintiff must prove that the notice was delivered to the defendant, or was left at his usual place of abode by the plaintiff's agent or attorney. The notice is usually proved by evidence of the service of a duplicate original (*h*); if a single original has been served, notice should be given to produce it.

Form of the notice.

Of such intended writ or process.—As the notice was prescribed by the Act in order to introduce a strictness of proceeding in favour of magistrates (*i*), it must be precise according to the terms of the Act. The writ or process must be specified (*k*), as well as the cause of action.

Notice of an action *on the case* will not support an action of *trespass* (*l*);

& P. C. *Briggs* v. *Evelyn*, 2 H. B. 115. And therefore, if a single magistrate commit the mother of a bastard for not filiating a child, although jurisdiction by the stat. 18 Eliz. c. 3, s. 2, is given to two magistrates, acting jointly, and not to a single one, he is within the protection of the statute. *Weller* v. *Toke*, 9 East, 364. So where by a local Act of Parliament notice was required of any action for anything done in *pursuance* of the Act, it was held that a magistrate was entitled to notice who had acted under colour of the Act, although he had exceeded his jurisdiction. *Graves* v. *Arnold*, 3 Camp. 242. And see *Styles* v. *Cox*, Vaugh. 111. So where a magistrate committed a man for being on the shafts of a cart standing still, the Act authorising a commitment in the case of riding on them only. *Bird* v. *Gunston*, cited in *Cook* v. *Leonard*, 6 B. & C. 354. Where an Act requires notice before action brought, in respect of anything done in pursuance of or in execution of its provisions, those latter words are not confined to acts strictly in pursuance of the Act of Parliament, but extend to all acts done *bonâ fide*, which may *reasonably be presumed* to be done in pursuance of the Act; but not where there is no colour for supposing that the act done is authorised: where, therefore, the defendants, being officers acting under a local paving Act, had ordered the plaintiffs to remove a dromedary and monkeys, which were exhibited in the streets, out of the town, and they were removed into a stable, and had thereby ceased to be any nuisance, but the defendants afterwards had attempted forcibly to remove them thence; held, that there being no reasonable ground for supposing that the Act authorised them in so doing, they were not entitled to notice of action. *Cook* v. *Leonard*, 6 B. & C. 351. And see *Lawton* v. *Miller*, cited 1b. *Moryan* v. *Palmer*, 2 B. & C. 729. And *Irving* v. *Wilson*, 4 T. R. 485. *Charlesworth* v. *Rudgard*, 1 C. M. & R. 505. So in an action for acting as a magistrate without qualification. *Wright* v. *Horton*, Holt's C. 458. So where a disturbance having taken place on the discharge of a prisoner, the defendant, a magistrate, at a place out of sight of the disturbance, seized the plaintiff, who was wholly unconnected with the transaction. *James* v. *Saunders*, 10 Bing. 429.

(*d*) 2 H. B. 114.

(*e*) *Briggs* v. *Evelyn*, 2 H. B. 114. The stat. 5 Ann. c. 14, empowers a justice to seize an engine for the destruction of game in the hands of an unqualified person.

(*f*) Under the stat. 18 G. 2, c. 20.

(*g*) Per Wood, B., *Wright* v. *Horton*, 1 Holt's C. 458.

(*h*) Vide *supra*, 110, and tit. NOTICE.

(*i*) Per Ld. Kenyon, 7 T. R. 835. *Taylor* v. *Fenwick*, 7 T. R. 635.

(*k*) *Lovelace* v. *Curry*, 7 T. R. 631. It is not necessary to name all the parties intended to be included in the action, or to state whether it will be joint or several. *Box* v. *Jones*, 5 Price, 178.

(*l*) *Strickland* v. *Ward*, 7 T. R. 631, in note. But in that case, it is to be observed, the notice did not state the process *at all*, and therefore was clearly defective on that ground, and *qu.* whether the description of the *form* of action might not be rejected as surplusage, the notice containing a true description of the process and cause of action. See the observations of Ld. Loughborough, C. J., and Gould, J. in *Wood* v. *Folliott*, cited 3 B. & P. 552, in the note, who seem to have been of that opinion. In *Sabine* v. *De Burgh*, 2 Camp. 198, Ld. Ellenborough, in allusion to the case of *Lovelace*

Form of the notice.

but notice of a bill of Middlesex has been held to be sufficient, without specifying whether case or trespass (*m*).

Where a notice of the intended process and cause of action was duly served, and the plaintiff having issued a writ of *quo minus* against the justice only, which in a few days he abandoned, and issued a writ against the justice and the constable; held, that the notice was sufficient to warrant the latter writ, and proceedings thereupon (*n*).

No evidence can be received of any cause of action which is not specified in the notice (*o*).

Indorsed with the *name* of such attorney (*p*) or agent, together with the *place* of his *abode* (*q*).—An indorsement of the initial letter of the christian name, together with the surname, is sufficient (*r*).

It is sufficient if the attorney describe himself of the town where he resides, as of Birmingham (*s*), provided the description purport to indicate the residence of the attorney; it is otherwise where the notice does not describe the residence; thus, the indorsement "given under my hand at Durham," without any other notification of residence or abode, was held to be insufficient (*t*), being a mere description, not of residence, but of the place of signature.

A notice, describing the plaintiff's attorney as of New-Inn, *London*, instead of New-Inn, *Westminster*, was held to be insufficient (*u*).

v. *Curry*, said, "I do not disapprove of any thing laid down in that case, but I am not disposed to carry it farther, lest actions of this kind should be entirely defeated."

(*m*) *Sabine* v. *De Burgh*, 2 Camp. 196. And notice stating arrest and imprisonment, and that plaintiff was compelled to pay a sum of money to obtain his discharge, and that *a precept called a latitat* would be issued against him for the said imprisonment, is sufficient. *Robson* v. *Spearman*, 3 B. & A. 493.

(*n*) *Jones* v. *Simpson*, 1 Cr. & J. 174, and 1 Tyrw. 35. And see *Agar* v. *Morgan*, 2 Pri. 126; and *Bax* v. *Jones*, 5 Pri. 168.

(*o*) 24 Geo. 2, c. 44, s. 5. A notice to the magistrate mentions imprisonment only as the cause of action, the declaration being for a battery and imprisonment, the variance is not material, except that it precludes the plaintiff from giving evidence of a battery. *Robson* v. *Spearman*, 3 B. & A. 493. Where the notice was of action for seizure of goods under a warrant directed to J. Birche, and it appeared that the goods were seized under a warrant directed to the constable of Halifax, and not to J. Birche; it was held, that the notice was insufficient. *Aked* v. *Stocks & others*, 4 Bing. 509. It is sufficient to inform the defendant substantially of the cause of complaint. *Jones* v. *Bird*, 5 B. & A. 844.

(*p*) In the case of *Sabine* v. *De Burgh*, 2 Camp. 196, the attorney who had indorsed and served the notice was asked, on cross-examination, whether he had at the time taken out his certificate, and he answered, that he had ordered his clerk to take it out, and had given him money for that purpose; and Lord Ellenborough held that this was sufficient evidence of his being qualified to act as an attorney. It does not appear whether, in that case, the witness had indorsed the notice as an *attorney*, specifically, or merely as *agent*; and *qu.* whether, as the words of the stat. are *attorney or agent*, it is essential that he should actually be an attorney.

(*q*) It is enough to indorse the attorney's place of business, though he do not reside there. *Roberts* v. *Williams*, 2 C. M. & R. 561. And it need not be the attorney on the record. *Ib.*

(*r*) *Mayhew* v. *Locke*, 7 Taunt. 63. So, *semble*, is the surname without the christian name. *James* v. *Swift*, 4 B. & C. 681; per Holroyd, J.

(*s*) *Osborn* v. *Gough*, 3 B. & P. 551. *Wood* v. *Folliott*, ibid. 552. In the latter case, which was under the stat. 23 Geo. 3, c. 70, s. 30, which requires that the notice shall contain the name and place of abode of the person who is to bring such action, and the action being brought by three owners of a ship, who were described as William Wood, of Rotherhithe, in the county of Surrey, merchant; Alexander Wood, *late* of the same place, mariner; and Osborn Deverson, *late* of the same place, mariner; it was held that the description was sufficient. But it seems that in the case of London, or a very large town, such as Manchester, the town generally would not be sufficient. Per Thompson, B. in *Crooke* v. *Currie*, Tidd, 28 (*n*).

(*t*) *Taylor* v. *Fenwick*, 7 T. R. 635; 6 Esp. C. 138.

(*u*) *Stears* v. *Smith*, 6 Esp. C. 138. But see *Mills* v. *Collett*, 6 Bing. 90.

At least one calendar month before the suing out or serving the same.—For this purpose, and also to show that the action was commenced within six calendar months, the plaintiff must prove the commencement of the action (*x*); the day on which notice is served is to be included (*y*). Time of the notice.

2. *The commencement of the action within six months.*—By sec. 8 of the same stat. no action shall be brought against any justice of the peace for anything done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid (*z*), unless commenced within six calendar months after the act committed. This must be proved as usual by the production of the writ, or an examined copy of the return (*a*). Commencement of the action.

The suing out the common process of a bill of Middlesex, *latitat*, or *capias quare clausum fregit*, was considered to be the commencement of the action (*b*). But the true time of suing out the writ may be proved in opposition to the *teste*, as where it is sued out in vacation, and bears date as of the preceding term (*c*). The memorandum upon the record, where the proceeding was by bill, also showed the commencement of the action within time (*d*).

The plaintiff must not only show that he sued out a writ within the time, but also that he proceeded upon that writ.

In *Weston* v. *Fournier*, the notice of action was served on the 10th of March 1809, a writ of *latitat* was sued on the 20th of May following, an *alias* writ was sued out February 6th, 1810, and the memorandum of the record was of Hilary 1810. It was objected, that the first writ had not been served, and that as it had not been returned, the *alias* writ, which was after the memorandum on the record, could not be connected with it in continuance; and the Court held that the plaintiff had been properly nonsuited upon this objection (*e*); for there was no service of the first writ, and it was not returned (*f*).

(*x*) *Infra*, tit. TIME.

(*y*) *Castle* v. *Burditt*, 3 T. R. 623. See tit. HUNDRED, and TIME.

(*z*) *Infra*, 600. This clause of the Act (observes Abbott, J. C., in *Parton* v. *Williams*, 3 B. & A. 333) was intended for the benefit of those who, intending to act right, by mistake act wrong. As where a constable, directed by a warrant to take the goods of *A.*, by mistake takes those of *B. Ib.* So in case of a variance as to the description of goods taken. *Smith* v. *Wiltshire*, 2 B. & B. 619. The true test in all such cases seems to be, that acted on in *Parton* v. *Williams*, viz., whether the party was actuated by an honest belief that he was discharging his duty. In the case of *Alcock* v. *Andrews*, 2 Esp. C. 542 (*n*), Ld. Kenyon lays down the distinction to be between cases where the constable acts *virtute officii*, and those where he acts *colore officii*; and that where the act is of such a nature that the office gives him no authority to do it, he is not to be regarded as an officer. See below, 600. A patrol employed to take up disorderly persons, who is not a constable, is not a *peace officer*. *Cliffe* v. *Littlemore*, 5 Esp. C. 39.

(*a*) *Supra*, tit. HUNDRED; *infra*, tit. TIME. By the stat. 2 W. 4, c. 39, s. 12, every writ bears date on the day when it is issued.

(*b*) Willes, 257; 2 Bl. 925; Burr. 964.

(*c*) *Johnson* v. *Smith*, Burr. 260; B. N. P. 195. And see tit. TIME.

(*d*) See tit. TIME, and *supra*, tit. HUNDRED. Although the commencement of an action cannot be legally proved except by the production of the writ, &c. (per Le Blanc, J. in *Matthew* v. *Haigh*, 4 Esp. C. 100); yet as *against a plaintiff*, proof of the delivery of a declaration by him, at a particular time, will be evidence that the action subsisted at that time. (*Matthew* v. *Haigh*, 4 Esp. C. 100, per Le Blanc, J.; and *Harris* v. *Orme*, 2 Camp. 497, in the note.) But *semble*, this would not be sufficient evidence in an action against a magistrate; for the delivery of a declaration is the plaintiff's own act; and although it might operate as an admission against himself, would scarcely be binding on a defendant; but see further, tit. TIME.

(*e*) 14 East, 491. Note, the imprisonment continued till July; but it was held that the plaintiff was bound to proceed within six months after *notice*. See *Harris* v. *Woolford*, 6 T. R. 617; and *Stanway* v. *Perry*, 2 B. & P. 157; and tit. TIME, and LIMITATIONS.

(*f*) Bayley, J. observed, that the suing

Commencement of the action.

Where several writs are sued out, it is necessary to show that the first has been returned (*g*); but where one only has been sued out, it is sufficient to prove it, without proving the return, provided the plaintiff has declared within a year afterwards (*h*).

Cause of action.

3. Where the cause of action is a continuing one, by imprisonment, it is sufficient to show that the action was commenced within six months of the end of such imprisonment (*i*). But if the plaintiff gives notice pending the imprisonment, he is bound to proceed within six months of the notice; for as to any subsequent cause of action, there is no notice (*k*).

Trespass or trover for seizing goods must be brought within the time limited from the original seizure (*l*).

The cause of action must be proved to have arisen within the county (*m*). The trespass or other cause of action is to be established by proving the authority of the magistrate given to the bailiff or constable, either by evidence of an oral or written direction; by the production and proof of the warrant, if it be in the plaintiff's power, or if not, by serving the person in possession of it with a *subpœnâ duces tecum*, to produce it, or giving notice to the defendant to produce it, and by giving parol evidence of it after proof that it is in his possession, and his omission to produce it.

In actions against a constable who has acted in obedience to the warrant of a magistrate, if his neglect or refusal to produce the warrant, and grant a copy of it, be relied upon, the plaintiff must prove a demand of the warrant (*n*).

In case of conviction quashed.

4. By the Stat. 43 Geo. 3, c. 141, in all actions brought against any justice of the peace on account of any conviction made by virtue of any Act of Parliament, or by reason of any thing done or commanded to be done by such justice for the levying of any penalty, apprehending any party, or for or about the carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff in such action, besides the value and amount of the penalty which may have been levied upon the plaintiff, in case any levy thereof shall have been made, shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which shall be in an action upon the case only), that such acts were done *maliciously*, and without any *reasonable or probable cause*.

This statute applies to those cases only where a conviction has been quashed (*o*). To entitle himself to greater damages than two-pence, the plaintiff must *prove* that the act of the magistrate was malicious, and with-

out of the second writ was at least *primâ facie* evidence to show that the first had not been *served*. 14 East, 493.

(*g*) *Parsons* v. *King*, 7 T. R. 6. *Harris* v. *Woolford*, 6 T. R. 617; *Stanway* v. *Perry*, 2 B. & P. 157; *Smith* v. *Bower*, 3 T. R. 662. See tit. LIMITATIONS.—TIME.

(*h*) *Parsons* v. *King*, 7 T. R. 6.

(*i*) *Massey* v. *Johnson*, 12 East, 67. *Pickersgill* v. *Palmer*, B. N. P. 24; for the whole is one entire trespass.

(*k*) *Weston* v. *Fournier*, 14 East, 491.

(*l*) *Godin* v. *Ferris*, 2 H. B. 14. *Saunders* v. *Saunders*, 2 East, 254. P. C. *Smith* v. *Wiltshire*, 2 B. & B. 619. So in the case of a custom-house officer, even although a suit for condemnation be pending in the Exchequer. *Godin* v. *Ferris*, 2 H. B. 14.

(*m*) 21 Jac. 1, c. 12, s. 5.

(*n*) Vid. *infra*, 595.

(*o*) *Massey* v. *Johnson*, 12 East, 67. Where, in an action of *trespass*, it appeared to be doubtful whether there had been a conviction or not, the Court would not, on motion to set aside the nonsuit of the plaintiff (on the ground that the action ought to have been laid in case), listen to an affida-

out reasonable or probable cause; and the question is not whether there was reasonable or probable cause *in fact*, but whether it *appeared to the magistrate* that there was such cause, for it does not follow that he acted maliciously, although there was no reasonable or probable cause in fact. For this purpose, what passed before the magistrate relating to the conviction is proper and necessary evidence (*p*). In case of conviction quashed.

II. By the stat. 21 Jac. 1, c. 12, s. 5, if any action shall be brought against any justice of the peace, mayor or bailiff of a city or town corporate, headborough, portreeve, constable, tithing-man, churchwarden, or overseer of the poor, and their deputies, or any other who by their aid, or by their commandment (*q*), shall do anything concerning their office (*r*), concerning anything by them done by virtue of their office, such action must be laid within the county where the trespass was committed. The defendant may plead the general issue, and give the special matter in evidence (*s*). Proofs by justices in defence. Venue. General issue.

It seems to be a settled rule, that a conviction still subsisting, and valid upon the face of it (*t*), on a subject within the jurisdiction of the defendant

vit that there had, in fact, been a conviction, but granted a new trial. See also *Gray* v. *Cookson*, 16 East, 15. *Rogers* v. *Jones*, R. & M. C. 129. After the conviction has been quashed, the action must be in case, and not in trespass; but the general rule (which still governs cases which are not within the statute) is, that an action for a commitment under a warrant must be in trespass, and not in case. *Morgan* v. *Hughes*, 2 T. R. 225.

(*p*) *Burley* v. *Bethune*, 5 Taunt. 583.

(*q*) A constable who aids a parish officer in levying a distress for poors-rates is not liable in trespass, although a demand of a warrant was duly made upon him, (but *not on the overseer*,) in pursuance of the statute. *Clarke* v. *Davey*, 4 Moore, 465. Parish officers sued for goods sold and delivered to the poor, are not within the stat. *Blanchard* v. *Bramble*, 3 M. & C. 131.

(*r*) Acts done by unqualified justices, are not actually void. *Margate Pier Comp.* v. *Harrison*, 3 B. & A. 266. And the justices are not trespassers. *Ib.*

(*s*) If the defendant obtain a verdict, or the plaintiff become nonsuited, or suffer any discontinuance, the defendant, by the same statute, is entitled to double costs, on a certificate from the Judge that he was such officer at the time of the trespass, and acting in the execution of his office. The certificate may be granted after the trial. *Harper* v. *Carr*, 7 T. R. 449. By the st. 43 G. 3, c. 85, s. 6, the Act is extended to all persons holding or exercising any public employment, or any office, station or capacity, civil or military, in or out of the kingdom, and who by virtue of any act or law within the kingdom, or any act, law, ordinance or lawful authority in any foreign possession of his Majesty, have or may hereafter have by virtue of such employment, office, station or capacity, authority to commit persons to safe custody. The local venue, as in case of other offences committed abroad, is dispensed with. Commissioners of Requests, with power to commit for contempt, are not within the statute. *Mackey* v. *Gooden*, 1 Dowl. P. C. 463.

(*t*) In *Mann* v. *Davers*, 3 B. & A. 103, where the information, on a conviction charging the plaintiff with having unlawfully returned without a certificate from the parish to which he had been removed, followed the words of the stat. 17 G. 2, c. 5; it was held that the conviction was good, and supplied a defence to an action against the magistrate. *Secus*, where the conviction is apparently erroneous, though it has not been quashed. Thus it was held, that a magistrate could not defend himself on a conviction which alleged that the plaintiff drove TO hire, instead of FOR hire, *Cloud* v. *Turfery*, 2 Bing. 318. So if the conviction vary from the form prescribed by a statute; *Goss* v. *Jackson*, 3 Esp. C. 198, per Lord Kenyon. His Lordship referred to the case of *Davidson* v. *Gill*, 1 East's R. 64, where the Court held that an order for stopping up an old footway must pursue the form given by the statute, which directed that the form *shall* be used, &c. See also *R.* v. *Taylor*, 7 D. & R. 623, where a conviction against an apprentice was held to be bad, both because the form given by the stat. 3 G. 4, c. 23, was not pursued, and because the conviction did not show that the party was an apprentice within the stat. 4 Geo. 4, c. 29, s. 2. In general, where there is a defect in jurisdiction, no appeal is necessary. *R.* v. *Chilvers Coton*, 8 T. R. 178. *Attorney-general* v. *Lord Hotham*, 1 Turn. 219. A conviction not stating the offence to have been proved on oath, is bad. *Exparte Aldridge*, 2 B. & C. 600. So, if the adjudication exceed the cause of complaint. *R.* v. *Soper*, 3 B. & C. 857. An order by justices for payment of double value of goods fraudulently removed to prevent a distress, must show on the face of it that

as a magistrate, is a legal bar to an action for anything done under such a conviction (*u*). The principles on which this position rests have already been considered (*v*).

Defence by a justice under a conviction.

It is otherwise where the subject-matter is not within the jurisdiction of the magistrate (*x*), or where it appears from the conviction itself that he has been guilty of an excess of jurisdiction (*y*). As where the defendant

the party removing the goods was tenant. *R.* v. *Davies*, 5 B. & Ad. 551. See also *R.* v *Walsh*, 1 Ad. & Ell. 481; *Fawcett* v. *Fowlis*, 7 R. & C. 394.

(*u*) Vide *supra*, Vol. I. tit. JUDGMENT. *Strickland* v. *Ward*, ibid. *Gray* v. *Cookson*, ibid.; and 16 East, 21.

(*v*) *Supra*, Vol. I. tit. JUDGMENT; 7 T. R. 361. *Massey* v. *Johnson*, 12 East, 81; 16 East, 21. What Judges of the particular matter have adjudged is not traversable, per Holt, C. J. *Groenvelt* v. *Burwell*, Salk. 396. And if a justice of the peace record that upon his view as a fact which is no fact, he cannot be drawn in question either by action or indictment. 12 Co. 23; 27 Ass. 19; Salk. 397. But if a constable commit a man for a breach of the peace in his presence, the fact is traversable, for he has no judicial authority; he does not commit for punishment, but for safe custody. So leather-searchers, under an Act of Parliament, authorizing them to seize leather insufficiently dried, are liable in trespass for seizing leather which turns out to be sufficiently dried. *Warne* v. *Varley & others*, 6 T. R. 443. The Court of K. B. has no power to review the reasons of justices of the peace, on which they form their judgments in granting licences, &c.; but if it clearly appear that the justices have been partially, maliciously or corruptly influenced, and have abused the trust reposed in them, they are liable to a prosecution by information or indictment, or even possibly by action, if the malice be very gross and injurious; per Lord Mansfield. Justices are not liable for what they do at sessions. Staunf. 173. Unless in case of manifest oppression and abuse of power. 2 Barnard, 249; Burn's J. tit. Sessions. See tit. TRESPASS.

(*x*) *Terry* v. *Huntingdon*, Hardr. 480. See the cases cited in the next note.

(*y*) Where justices decide on a matter not within their jurisdiction they are liable in an action. Per Hale, C. B. *Terry* v. *Huntington*, Hardr. 480. And special jurisdictions may be circumscribed, 1st, as to place; 2dly, persons; 3dly, subject-matter. *Ibid.* And if they give judgment on matters arising in another place, or in any matter beyond their jurisdiction, all is void, as *coram non judice*. *Ibid.* See Cowp. 640. 8 East. 404. *Baldwin* v. *Blackmore*, 1 Burr. 595; 2 Bl. R. 1146. So if justices of a county act in a franchise of exclusive jurisdiction. *Talbot* v. *Hubbie*, Str. 1154; 2 Tau. 557. In order to justify magistrates in granting authority to collect a composition in lieu of stat. duty, it should be made to appear on oath before both magistrates that the road can be more effectually repaired by such composition. *Stanley* v. *Fielden*, 5 B. & A. 425. A magistrate is a trespasser who grants a warrant of distress upon documents laid before him, which are the acts of other magistrates, if the want of jurisdiction be manifest; per Bayley, J. *Ib.* So if a magistrate levy under an order for payment of wages to one employed to keep possession of goods seized under a *fi. fa.*; for such a person is not a labourer within the stat. 22 G. 3, c. 19. *Branwell* v. *Pennecke*, 7 B. & C. 536; and per Holroyd, J. it should appear on the warrant that he is a labourer. So a conviction will be bad unless it appear on the face of the conviction that the fact was done within the local jurisdiction of the magistrate. *R.* v. *Hazell*, 13 East, 139; *R.* v. *Chandler*, 14 East, 274. So in the case of an order by justices; *R.* v. *Hulcott*, 6 T. R. 587; where an order for the discharge of a servant was held to be *void* for not stating that he was a servant in husbandry. *A.* contracted with *B.* to build a wall for a certain price within a certain time, but having performed part refused to go on; complaint being made before a magistrate under 4 Geo. 4, c. 34, the information stating the contract, the magistrate convicted *B.*, and committed him. On trespass brought against the magistrate, the Court held that the conviction and commitment did not supply a defence, for the information showed that he had not jurisdiction. And per Bayley, J. if an information laid before a justice alleges that which is within his jurisdiction, he may act upon it, unless the party against whom the information is laid proves the real facts of the case, which take it out of the jurisdiction. *Lancaster* v. *Greaves*, 9 B. & C. 626. Where a member applied against a friendly society under 49 Geo. 3, c. 125, for improperly refusing relief, it was held that upon the construction of the 3d section the justices before whom the proceedings are had must be both residing within the county, &c. within which the society is held, and that one only being so resident they had not jurisdiction. *Sharp* v. *Aspinall*, 10 B. & C. 47. *Note*, that the defect of jurisdiction appeared on the face of the defendants, (the magistrates) pleas to an action of trespass. A conviction reciting an agreement to weave at certain prices,

gave in evidence four separate convictions of the plaintiff for selling bread on the same Sunday (*z*). For the Court were of opinion that no more than one penalty could be incurred for selling bread on the same Sunday, and therefore that the levying under the last three convictions was illegal (*a*). Defence by a justice under a conviction.

In such a case it is not essential for the plaintiff to prove that the conviction has been quashed, for it is wholly void (*b*). So where the defendant, being a justice of the peace, having convicted the plaintiff of destroying game, committed him to prison without first endeavouring to levy the penalty, the plaintiff having effects on which a distress might have been levied (*c*).

It seems to be perfectly well settled, that if the magistrate have general jurisdiction over the subject-matter, evidence is inadmissible to show that he came to an erroneous conclusion in the particular case (*d*), for that is properly the subject of an appeal.

and alleging a neglect of the work, held not to be a contracting to serve within the 4 Geo. 4, c. 34; the conviction therefore was bad, as without jurisdiction. *Hardy* v. *Ryle*, 9 B. & C. 603. A conviction of two persons jointly of an assault under the 9 G. 4, c. 31, imposing a single joint fine on both, instead of a separate one on each, is bad. *Morgan* v. *Brown*, 4 Ad. & Ell. 515. A conviction for having kept open a beer shop at times prohibited by the justices in session, which does not aver that the justices made such order, nor at what time the shop was kept open, is bad. *Newman* v. *Hardwicke*, 3 N. & P. 368. It seems that a conviction which is bad in form, though confirmed at the sessions on appeal, cannot be enforced. *R.* v. *Boultbee*, 4 Ad. & Ell. 498. Justices at sessions cannot quash for a defect in a conviction not mentioned in the notice of appeal. *Ib.*

(*z*) Under the stat. 29 C. 1, c. 27.

(*a*) *Crepps* v. *Durden*, Cowp. 640. There the want of jurisdiction appeared on the face of the conviction. See the observations of Lord Ellenborough, and of Bayley, J. in *Gray* v. *Cookson*, 16 East, 21.

(*b*) *Ibid.*

(*c*) *Hill* v. *Bateman*, 2 Str. 710. *Robson* v. *Spearman*, 3 B. & A. 493.

(*d*) *Gray* v. *Cookson*, 16 East, 21; *Strickland* v. *Ward*, 7 T. R. 631. In *Brittain* v. *Kinnaird*, 1 B. & B. 432, in trespass against a magistrate for taking and detaining a vessel, it was held that a conviction of the defendants under the Bumboat Act was conclusive evidence that the vessel in question was a boat within the meaning of the Act, and properly condemned. See *R.* v. *Mitton*, 3 Esp. C. 201; where Lord Mansfield observed, We cannot hear objections to the conviction which do not appear on the face of it, in a motion in arrest of judgment, for disobedience of an order made on it. In *ex parte Gill*, 7 East, 376, the Court held that they had no authority to discharge one who had been convicted by two magistrates for having absented himself as an apprentice from his master's service, the conviction being apparently regular, although he swore that on coming of age he had avoided the indentures before the offence alleged, and had insisted on that fact before the magistrates. Where a warrant was granted by a magistrate, on a conviction for not doing statute duty on a road in the township of Ingleby, in the parish of Arncliffe, it was held that it could not be objected on an action brought, that the plaintiff was not, as an occupier of lands in the township of Arncliffe, subject to the repair of roads in Ingleby, for that might have been objected on the hearing before the magistrate, or on an appeal. *Fawcett* v. *Fowlis*, 7 B. & C. 394; and *qu.* whether it could be objected that the surveyor had been improperly appointed for the whole parish. The case is distinguishable from those where it has been held that one who is not an occupier of lands in or an inhabitant of a parish may maintain trespass for a distress for rates; in such cases there is an entire want of jurisdiction; here the plaintiff having lands within the parish was *primâ facie* liable; there was a surveyor for the whole parish, and the plaintiff was *primâ facie* liable. Had there been separate surveyors for the two townships, there would have been a total defect of jurisdiction. Per Holroyd, J. See also *Lowther* v. Lord *Radnor*, 8 East, 113. Where an order for wages alleges that it was made on a hearing, and upon examination on oath, a plaintiff in replevin cannot, in his plea to a cognizance founded on the order, aver that the servant did not duly make oath. *Wilson* v. *Weller*, 1 B. & B. 57. And it seems that replevin does not lie in such a case. In trespass against two magistrates for giving the plaintiff's landlord possession of a farm under the stat. 11 Geo. 2, c. 19, s. 16, a record of their proceedings under the Act, setting forth all that was necessary to give them jurisdiction, is a conclusive answer. *Basten* v. *Carew*, 3 B. & C. 653. Where a justice committed a party

Defence under a conviction.

Upon a complaint or information before a magistrate of a matter over which he possesses jurisdiction, and consequently where he has a right to enter upon the inquiry, it is for him to decide upon the evidence adduced as to the truth of those facts; and when he has done so, it is, upon the ordinary principle of jurisprudence, to be presumed that he has decided rightly in law and in fact. It is not to be supposed that he has decided contrary to his conscience and belief in matter of fact, for the purpose of extending his jurisdiction; and it would be contrary to the policy and principles of law, to allow him to be treated as a trespasser for an error in judgment (*e*).

If a magistrate make an order corruptly, and against the evidence, but in a case where he has jurisdiction, a different remedy is open to the party injured (*f*), by appeal (where one is given), or by a criminal information or indictment against the magistrate, for the corrupt and malicious act (*g*). The whole difference seems to lie between a *want* of jurisdiction in the subject-matter, and an *abuse* of that jurisdiction. These principles seem to be now fully established by the case of *Gray* v. *Cookson* (*h*), where the magistrate

charged, under 7 & 8 Geo. 4, c. 30, with cutting down a tree growing on premises in his own occupation, belonging to another person, held that in the absence of all proof of malice, he could not be charged as having acted without jurisdiction, and liable in an action of trespass and false imprisonment; if the trees were excepted in the lease the tenant might be a trespasser, and if liable in trespass it is by no means clear that he might not be liable criminally. *Mills* v. *Collett*, 6 Bing. 85, and 3 M. & P. 242. Where upon a conviction by justices, under the stat. 9 Geo. 4, c. 3, s. 27, of a common assault, there was nothing on the face of it showing any attempt to commit felony, which it was in the discretion of the justices to find, the Court refused a *certiorari*. Anon. 1 B. & Ad. 382. And see *Brittain* v. *Kinnaird*, 1 B. & B. 482. In the case of *Terry* v. *Huntington*, Hard. 480, where the commissioners of excise had exceeded their authority, in adjudging low wines to be strong wines, it seems that evidence was admitted in proof of the fact, in order to negative the authority of the commissioners, in an action of trover brought to recover the value of goods levied under a warrant of the commissioners; vide *infra*. And see *Fullers* v. *Fotch*, Holt. R. 287; Carth. 346.

(*e*) See *Sutton* v. *Johnston*, 1 T. R. 493. 16 East, 21. It is an universal rule, that where a magistrate has jurisdiction he is not responsible in any form of action for mere mistake in matters of law. *Mills* v. *Collett*, 6 Bing. 85.

(*f*) See the observations of Lawrence, J. 8 East, 119, *Lowther* v. *Earl of Radnor and another*. In that case the defendants having (as justices) made an order upon the plaintiff for the payment of wages to Sopp, alleged in the order to be due to him for work and labour in digging and steaning a well, the plaintiff having made default in appearing after summons, the order was confirmed on appeal by the plaintiff to the sessions. The defendants then issued a warrant of distress, on the execution of which the action was founded; a verdict was found for the plaintiff, subject to a case, in which were stated the terms of a *special contract* between the plaintiff and Sopp, as to the making the well. But the Court were clearly of opinion that the plaintiff could not make the defendants trespassers by showing that the real facts of the case would not support the complaint, without showing that such facts were proved before them at the time; and Grose, J. doubted whether the Court could look beyond the order itself. The case was ultimately decided on the ground that the defendants had jurisdiction under the stat. 20 Geo. 2, c. 19 (and see 31 Geo. 2, c. 11, s. 3), to make the order in question.

(*g*) Vide *supra*, note (*v*).

(*h*) 16 East, 13—23. But note, that in giving judgment, Lord Ellenborough delivered the opinion of the Court, that the apprenticeship, which was for a less term than seven years, and therefore voidable by the stat. 5 Eliz. c. 4, had not been actually avoided by an act of delinquency committed by the apprentice in running away from his master. See the cases cited by Mr. Buller, Cowp. 642, where Gould, J. is said to have ruled in two instances, one in Shropshire and one in Lancashire, that although a conviction under the game laws was good in point of form, yet, that as in truth the party was not subject to the game laws, the plaintiff was entitled to a verdict. These decisions, however, appear to be wholly inconsistent with the principles on which the authority of the *res judicata* depends. See Vol. I. tit. JUDGMENT, and see *Brittain* v. *Kinnaird*, 1 B. & B. 432. *Supra*, 587, note (*d*).

having made an order as against an apprentice, it was held that the want of jurisdiction could not be established against him in an action of trespass, by evidence of the previous dissolution of the apprenticeship. But though evidence be not admissible to show that a magistrate came to a wrong conclusion as to the particular facts, where the subject-matter was generally within the scope of his jurisdiction; still it seems that evidence is admissible to show such a total defect of jurisdiction as excluded the power to inquire into the particular case: if the circumstances were such as wholly to exclude the power of inquiry in the particular case, the order or conviction will not operate as a defence; for a magistrate cannot give himself jurisdiction by finding that as a fact which is not a fact (*i*). Thus if one be rated to the poor who is neither an inhabitant nor occupier of land within the parish, and his goods be distrained for the rate, he may maintain an action against the person levying (*j*). But in general magistrates cannot be affected as trespassers, if the facts stated before them were such as they had jurisdiction to inquire into, and nothing appeared to contradict such statement. And therefore where magistrates levied money of a friendly society under warrants, after complaint made, and hearing, for the relief of one of the members, no defence being made; it was held, that they were not liable in trespass, although they had in truth no jurisdiction, the rules of the society containing an arbitration clause (*k*). Defence under a conviction.

Before the stat. 21 Jac. 1, when a defence of this nature was specially pleaded, the practice was, as appears from the entries, to set out the information, and all the proceedings before the justices (*l*). And that statute did not alter the nature of the defence, but merely took away the necessity of pleading it specially (*m*). It seems, however, that proof of the conviction, especially where it recites the previous proceedings and shows them to be regular, would be deemed sufficient (*n*). The warrant of commitment must Proof of the conviction.

(*i*) Per Lawrence, J., *Welsh* v. *Nash*, 8 East, 403; and see the observations of the Court in *Fawcett* v. *Fowlis*, 7 B. & C. 394.

(*j*) *Lord Amherst* v. *Lord Somers*, 2 T. R. 372. *Nichols* v. *Walker*, Cro. Car. 394; *Milward* v. *Caffin*, 2 Blacks. 1331; and per Lord Tenterden in *Fawcett* v. *Fowlis*, 7 B. & C. 394; *Weaver* v. *Price*, 3 B. & Ad. 409.

(*k*) *Pike* v. *Carter*, 3 Bing. 78; and see *Lowther* v. *Earl of Radnor*, 8 East, 13.

(*l*) See Cowp. 647.

(*m*) Per Lord Mansfield, C. J., in *Crepps* v. *Durden*, 2 Cowp. 649.

(*n*) In the case of *Hill* v. *Bateman*, 2 Str. 710, *supra*, the Court held, that where such actions are brought against justices of the peace, they are obliged to show the regularity of their convictions; and the informations laid before them, on which their convictions are grounded, must be produced and proved in Court. But though the point does not appear to have been expressly decided, it is probable that where all the proceedings are stated on the face of the conviction, and appear to be regular, the recital itself would be deemed to be at least *primâ facie* evidence of the facts recited. See *Strickland* v. *Ward*, 7 T. R. 631; *Brittain* v. *Kinnaird*, 1 B. & B. 432; *R.* v. *Picton*, 2 East, 196. In *Bucklesbank* v. *Smith*, 2 Burr. 656, all the proceedings were regularly proved in evidence; and see *Gray* v. *Cookson*, 16 East, 21. But it seems that where no summary form is given by a particular statute, if the conviction did not show that the proceedings were regular, as if it did not show that the defendant was summoned or was present, the defect would be fatal, and could not, as it seems, be supplied by extrinsic evidence. On this ground convictions have been frequently quashed in the Court of K. B. In *R.* v. *Dyer*, 1 Salk. 181, Lord Holt says, "These summary jurisdictions ought to be held strictly to form, and every thing ought to appear regular in them." And in several instances convictions have been quashed for not showing that the defendant was summoned, or had an opportunity of defending himself. *R.* v. *Hawker*, Cold. 391. *R.* v. *Mallinson*, 2 Burr. 681. *Stanbury* v. *Bolt*, cited Cowp. 642. *R.* v. *Hall*, 6 D. & R. 84. *R.* v. *Simpson*, 10 Mod. 345. See also the cases of *Buchanan* v. *Rucker*, 9 East, 192; *Cavan* v. *Stewart*, 1 Starkie's C. 525; where colonial judgments were held to be inoperative, for want of showing that

Proof of the conviction.

also be produced and proved, and evidence given (if there be no internal reference) to connect it with the conviction (*f*).

the defendants against whom they had been obtained had been effectually summoned. In *Stanbury* v. *Bolt*, cor. Fortescue, J., Trin. 11 G. 1, cited Cowp. 642, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the party had been summoned, and the conviction was adjudged void for that reason only. And though the proceedings should on the face of the conviction appear to be regular, yet it seems that the party convicted would be at liberty to show that there was in fact no information, summons, or appearance. Where a statute gives a summary form of conviction, which does not state the previous proceedings, it seems to be more doubtful whether extrinsic proof of an information and summons is not requisite to support the conviction and the proceedings under it. In the case of *Doe* d. *Lord Thanet* v. *Gartham* (which is shortly reported in 1 Bingh. 357), the plaintiff sought to recover a schoolhouse, &c. after a sentence of expulsion pronounced against the defendant by the visitors and feoffees of the school (the lessors of the plaintiff), but there was nothing to show that the defendant had been summoned to answer the charges made against him. Bayley, J., saved the point, and the Court of Common Pleas afterwards held that the plaintiff was not entitled to recover; and see *R.* v. *Dr. Gaskin*, 8 T R. 209; and Lord Kenyon's observations in *Harper* v. *Carr*. 7 T. R. 275. In the late case of *Dingsdale* v. *Clarke*, the Court of K. B. held, that where the statute prescribed a summary form of conviction, reciting that the party had been duly convicted, it was sufficient for the magistrate to prove the recorded conviction, without proof of any previous steps.

(*f*) Where *T. O.* laid an information against the plaintiff on a charge of vagrancy, the plaintiff was examined and heard upon the charge, and the magistrate made out a warrant of commitment which falsely recited that the plaintiff had been charged on the oath of *T. S.*, and *T. S.* negatived the fact in evidence, and a conviction was drawn up a month afterwards, but dated on the day of commitment, it was held that the imprisonment was sufficiently connected with the conviction, however informally the conviction and warrant were drawn; and that the allegation in the warrant as to the oath of *T. S.* might be rejected as surplusage. *Massey* v. *Johnson*, 12 East, 67. A warrant of commitment is sufficient, if it substantially exhibit the *corpus delicti*, though it does not state the cause with the technical precision of an indictment. A commitment for treasonable practices is legal. *R.* v. *Despard*, 7 T. R. 736. And a commitment for embezzlement is sufficient, if it show in substance an offence which warrants a commitment, though it does not state the act to have been done feloniously. *R.* v. *Croker*, 2 Chitty's R. 138. Where the prisoner was committed under a warrant of execution, which recited that he had been committed for two months, or until he paid a penalty of 5 *l.*, for an offence under the st. 1 & 2 G. 4, c. 118, s. 33, without stating how the penalty was to be distributed, and to whom paid; the Court refused to discharge the defendant out of custody, saying, that the warrant did not require the same certainty as a conviction, and that they were bound to presume that there had been a legal conviction to support the warrant. *R.* v. *Rogers*, 1 D. & R. 156; 5 D. & R. 260; 1 R. & M. 129. And see *R.* v. *Helps*, 3 M. & S. 331. And the warrant need not state the circumstances on which the conviction or order is founded; that at least is not necessary where the warrant refers to the conviction or an order. *Coster* v. *Wilson*, 3 M. & W. 411. A warrant committing a collector of rates for a parish to gaol, there to remain until he should have made a true account, and until the amount should be paid over by him or his sureties, was held to be good, notwithstanding the conclusion directing the gaoler to detain him unless he should be discharged by due course of law. *Goff's Case*, 3 M. & S. 203. But a commitment ought to show the authority of the party committing. *R.* v. *York*, 5 Burr. 2684. The 5th exception was, that the warrant of commitment did not show that Sir J. Fielding, who made it, was a justice of the peace. And the commitment will be bad if it do not substantially show an offence charged, where the warrant is previous to conviction and an offence committed, and the legal duration of imprisonment, where the commitment is in execution. A commitment was held to be defective which stated that the defendant with force and arms made an assault on, &c. with intent feloniously to steal and carry away, for it did not charge any felony within the stat. 7 G. 2, c. 22; 5 T. R. 169; *R.* v. *Remnant*, Nolan, 205; and see *Branwell* v. *Penneck*, 7 B. & C. 533; *supra*, 386, note (*y*). A commitment in execution of a rogue and vagabond under the stat. 23 G. 3, c. 88, is bad, unless it state that the defendant was apprehended with the implements of housebreaking upon him at the time of such apprehension. *R.* v. *Brown*, 8 T. R. 26. So a warrant setting out the grounds of commitment in the disjunctive is bad. *R.* v. *Evered*, Cald. 26. A commitment in execution must state that the party has been convicted; it is insufficient to state that he was charged on oath with the offence. *R.* v. *Cooper*, 6 T. R. 509. A commitment for punishment for a contempt is bad, which does not specify a time certain. *R.* v. *James*, 5 B. & A. 894. And see *Ex parte Page*, 1 B. & A. 568.

Proof of the conviction.

In general, an order or warrant of commitment by a magistrate must be in writing (*g*); but an order to detain in custody one convicted under the statute 13 G. 3, c. 80, of killing game on a Sunday, and detained by order of a magistrate until the return of a warrant of distress, may be by parol (*h*). So also an order of a magistrate for the detainer of a prisoner, in order to his further examination on a charge of felony, may be by parol, and without showing any particular cause for which he was to be examined (*i*). If the commitment was upon a warrant granted in defect of goods upon which a distress might be made, the defendant should prove the conviction, or demand of the penalty, the warrant of distress and return to it, and the warrant of committal (*j*).

R. v. *Payne*, 4 D. & R. 72. So where the commitment was until he shall pay a sum due for the maintenance of a bastard child and legal fees, or be otherwise delivered by due course of law, where the time ought to have been limited to three months. *Robson* v. *Spearman*, 3 B. & A. 493. So of a general commitment until the putative father pay two several sums, one for maintenance, the other for costs. *In Re Addis*, 1 B. & C. 87. So a commitment for maliciously carrying away a post from a fence is bad; for it is no offence under the stat. 1 G. 4, c. 56, unless the party charged has wilfully or maliciously committed the damage, injury or spoil alleged. *R.* v. *Harpur*, 1 D. & R. 222. A conviction under the stat. 17 G. 2, c. 38, of a late overseer, for refusing and neglecting to deliver over *a parish book*, which adjudges that he be committed until he deliver up all and every the books concerning his said office of overseer, belonging to the parish, is void as to the excess, and a warrant of commitment is void *in toto*. *Groome* v. *Forrester*, 5 M. & S. 314. The conviction produced and proved will not justify the commitment, unless the offences stated be identical. Where the conviction stated an offence against the stat. 6 G. 3, c. 48, and the commitment was for an offence against the stat. 15 C. 2, c. 2. it was held to be insufficient. *Rogers* v. *Jones*, 3 B. & C. 409; and it seems that the guilt of the plaintiff is not evidence in mitigation. S. C. 1 Ry. & M. 129. But in some cases, as under the stat. 7 & 8 G. 4, c. 30, s. 39, it is expressly provided, that no warrant of commitment shall be held to be void by reason of any defect therein, provided it be alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. See *Daniel* v. *Phillips*, 1 C. M. & R. 662. And where the commitment, after a regular conviction for destroying fish in the prosecutor's pond, stated merely a conviction for fishing, &c. without stating any offence in law, it was held that the conviction, though good, supplied no defence. *Wickes* v. *Clutterbuck*, 2 Bingh. 483. In trespass and false imprisonment against a justice, held, that assuming that he had power to commit a person refusing to give evidence, where a specific charge is made, and before the party can be brought into contempt, he ought to be fully apprised that there is such charge under inquiry before the justice; where both the warrant and the evidence were silent upon that point, the Court refused to disturb the verdict which had been found for the plaintiff; and considering the facts not sufficient to raise the general question, abstained from giving any opinion on that point. *Cropper* v. *Horton*, 8 D. & Ry. 166. See *Bennett* v. *Watson*, 3 M. & S. 1. A warrant issued at the right time is not avoided by too early a date. *Newman* v. *Hardwicke*, 3 N. & P. 368.

(*g*) 2 Haw. c. 16, s. 13. Where a statute requires a warrant, a commitment without a written one is bad, unless it be for a temporary detention until the warrant is made out. *Hutchinson* v. *Lowndes*, 4 B. & Ad. 118. So a commitment for contempt must be in writing. *Mayhew* v. *Locke*, 2 Marsh. 377.

(*h*) *Still* v. *Walls*, 7 East, 533.

(*i*) 1 Hale, P. C. 585; 2 Hale, P. C. 120. In *Scavage* v. *Tatham*, Cro. Eliz. 829; 2 Haw. c. 16, s. 12; it was held that the party could not be detained for sixteen days, and that the space of three days was a reasonable time. Yet it seems that detention for even a longer space of time might be justifiable under special circumstances. See also *Kendall* v. *Roe*, 12 Howell's St. Tr. 1376. The practice, it has been said, is to commit from three days to three days, by a written mittimus. 1 Chitty's C. L. 75; Burn's J., tit. *Examination*, 816. A warrant of commitment for re-examination, for an unreasonable length of time, is void. *Davies* v. *Capper*, 10 B. & C. 28. A magistrate cannot justify a detention without conviction, to enable the party to settle with the complainant. *Bridgett* v. *Coyney*, 1 M. & Ry. 211. The reasonableness is a question for the jury. *Cave* v. *Mountain*, 1 Scott, N. S. 132. Although, on a charge of feloniously cutting trees, they turn out to be under the value of 20*s*. *Ibid.*

(*j*) By the stat. 5 G. 4, c. 18, s. 1, where a penalty is payable on conviction, the magi-

Proof of the conviction, &c.

It is no objection to the conviction that it has been drawn up in regular form since the time of conviction, or even since the commencement of the action (*h*). But it is otherwise in case of an order of justices (*l*), or warrant of commitment, which cannot be made out so as to justify a preceding commitment (*m*). And it seems that mere want of form in the proceedings will be immaterial, provided they show that the plaintiff was convicted of the offence for which the warrant afterwards issued (*n*). Where the warrant recited a charge on the oath of *T. S.*, and the conviction purported to be founded on the oath of *S. O.*, it was held that the recital in the warrant might be rejected as surplusage, and that it might be considered as a valid commitment under the conviction as to the remainder (*o*). It should appear on the face of the proceedings, not only that the party has been convicted of an offence within the jurisdiction of the magistrate, but also that the proceedings against him were regular; that there was an information against him (*p*) on oath, where such an information is required, and that he ap-

strate is authorized to direct the defendant to be detained in custody until the return of the distress warrant, unless the offender shall give sufficient security to the satisfaction of the magistrates for his appearance on the return-day of the warrant, such day not being more than eight days from the taking such security. And if it shall appear by *confession* or *otherwise*, to the satisfaction of the justice, that the offender has not sufficient goods within his jurisdiction whereon to levy all such penalties, costs and charges, the justice may at his discretion, without issuing a distress warrant, commit, as on a return of *nulla bona*.

(*k*) *Gray* v. *Cookson*, 16 East, 21, where Ld. Ellenborough says, "I have always considered, that if a conviction were produced at the trial, which would justify the conviction, it would be sufficient." And see *Massey* v. *Johnson*, 12 East, 67.

(*l*) *R.* v. *Justices of Cheshire*, 5 B. & Ad. 438.

(*m*) *Hutchinson* v. *Lowndes*, 4 B. & Ad. 118. *Qu.* as to the suspension or revocation of an order or warrant. *Barons* v. *Luscombe*, 3 Ad. & Ell. 589.

(*n*) *Massey* v. *Johnson*, 12 East, 67. But it must appear to the Court that the party has been legally convicted of the offence stated on the face of the conviction. In the case of *Moult* v. *Jenkings*, *cor.* Eyre, C. J., cited Cowp. 642, upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing, and Eyre, C. J. said, that if the nature of the oaths had not been specified in the conviction, so that they might appear to the Court, the conviction would have been void. And in *Cole's Case* (Sir W. Jones, 170), it was held by the whole Court, that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void as *coram non judice*. So in *Goss* v. *Jackson*, 3 Esp. C. 198, it was held by Ld. Kenyon, that a conviction under the stat. 33 G. 3, c. 84, which varied from the form given by the statute, was void; but note, that in that case the order had not been served on the party convicted, and no demand had been made of the penalty before distress made, as the statute requires. See also *Davidson* v. *Gill*, 1 East, 64, where it was held that an order of justices, under the stat. 13 G. 3, c. 78, s. 19, for stopping up an old footway, and setting out a new one, which did not follow the form prescribed in the schedule, and set forth the length and breadth of the new footway, was defective, and that the objection might be taken in a collateral proceeding; for the statute requires that the form set forth in the schedule *shall* be used on all occasions. But the general rule is, that a party shall not take advantage of a defect in a collateral proceeding, where he might have taken the objection by way of appeal. *Supra*, Vol. I. tit. JUDGMENT. *R.* v. *Grandon*, Cowp. 315. Upon an indictment for disobeying an order of sessions, the Court held that they could hear no objections to the order which did not appear on the face of it; and that where a court, having competent jurisdiction has pronounced an order, as long as it remains in force it must be obeyed. *R.* v. *Mitton*, 3 Esp. C. 200. Otherwise, where the defect of jurisdiction appears on the face of the previous conviction or indictment. *R.* v. *Hollis*, 2 Starkie's C. 536.

(*o*) *Massey* v. *Johnson*, 12 East, 67. But it was proved in fact, that *S. O.* had given information on oath; and Le Blanc, J. observed, that the case would have assumed a very different shape had there been no information on oath on which to found the proceedings.

(*p*) See *Massey* v. *Johnson*, 12 East, 67; and see Vol. I. tit. JUDGMENT. If a magistrate maliciously grant a warrant to apprehend and commit a party for felony, without any information against him, he is a trespasser, for there is a false imprison-

peared to answer the charge, or at least was summoned (*q*). And it seems that even supposing the proceedings to be apparently regular, evidence would be admissible to impeach the judgment in this respect (*r*).

Evidence in answer to a conviction, &c.

Although a legal adjudication by a magistrate is, so long as it subsists, a bar to an action of trespass in respect of any act done by virtue of it, yet it seems to be clear, upon principles already adverted to (*s*), that the plaintiff may rebut the evidence of a conviction, or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it (*t*); or in case of a distress or commitment under a conviction, that he was never summoned, and therefore had no opportunity to make his defence (*u*).

Justification under a commitment.

If the defendant justify under a commitment by him as a justice of the peace, as in case of felony, he should be prepared to prove the information on oath, the proceedings upon it, and the warrant of commitment. If he has committed for a contempt committed against him in the execution of his office, he should be prepared to prove the circumstances of the contempt, and a committal by warrant, specifying the offence (*x*). Under a commitment for refusing to be bound over as a witness at the assizes or sessions, the defendant should prove the informations, examinations, and depositions, the calling on the plaintiff to enter into the recognizance, his refusal, and the warrant of committal (*y*). If the warrant direct an imprisonment not authorized by law, it will not be available in defence (*z*).

Evidence in answer to a conviction.

In the case of *Terry* v. *Huntington* (*a*), the Court seem to have been of opinion, that in an action of trespass the plaintiff might show that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, *i. e.* in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray* v. *Cookson*: in these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where the question of jurisdiction arises upon matter of fact in the course of a cause,

ment by some one, the party having been committed to prison without any charge having been made; and it is an imprisonment by the justice, and not by the constable, who was bound to obey the warrant. *Morgan* v. *Hughes*, 2 T. R. 225.

(*q*) 12 East, 82; 7 T. R. 275. In *Stanbury* v. *Bolt*, *cor.* Fortescue, J. Trin. 11 G. 1, cited Cowp. 642, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned, and the conviction was adjudged void for that reason only.

(*r*) See the observations of Le Blanc, J., 12 East, 81, 2; and *supra*, Vol. I. tit. JUDGMENT.

(*s*) *Supra*, Vol. I., tit. JUDGMENT; Vol. II. tit. FRAUD.

(*t*) *Morgan* v. *Hughes*, 2 T. R. 225.

(*u*) *Harper* v. *Carr*, 7 T. R. 275. And see the cases, Vol. I. tit. JUDGMENT; also *Stanbury* v. *Bolt*, *supra*, 589.

(*x*) *Mayhew* v. *Locke*, 2 Marsh, 377.

(*y*) See *Bennett* v. *Watson*, 3 M. & S. 1.

(*z*) A commitment of a putative father of a bastard, until he should pay a sum due for the maintenance of a bastard child, &c. or until he should be otherwise delivered by due course of law, is bad; the stat. 49 Geo. 3, c. 68, s. 3, merely authorizing a commitment for three months, unless, &c. *Woburn* v. *Shearman*, 3 B. & A. 493, and vide *supra*.

(*a*) Hardr. 480.

Evidence in answer to a conviction.

and therefore necessarily becomes the proper subject for adjudication in the cause. If in the case of *Terry* v. *Huntington* it had appeared on the face of the information that the subject-matter of the proceeding was *low wines*, whereas the statute gave jurisdiction in case of *strong wines* only, the commissioners would clearly have acted illegally in proceeding to adjudicate where they had no power by the statute to adjudicate at all. But if the information related to *strong wines* only, a subject-matter over which they had jurisdiction, they were bound to proceed; and then, whether the subject-matter of the complaint, upon the evidence, came within the meaning of the statute, they were bound judicially to decide.

Where justices were proceeding upon a summary conviction under the game laws, it was held that as exercising a judicial authority their proceedings ought not to be private, and that they were not warranted in removing the plaintiff, and were therefore liable to an action of trespass (*y*).

But no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission (*z*).

If an Act of Parliament give a justice of the peace jurisdiction over an offence, it impliedly authorizes him to grant a warrant to bring before him a person charged with that offence (*a*).

Tender of amends.

If amends have been tendered within a month after notice, and such tender has been pleaded, it is a question for the jury whether the amends so tendered were sufficient (*b*).

Where the defendant has paid money into Court (*c*), having neglected to tender amends, or having tendered insufficient amends, the proceedings are the same as in other cases where money is paid into Court.

Defence by a constable, &c. under a warrant.

III. Before the statute 24 Geo. 2, c. 44, an officer charged with the execution of a magistrate's warrant was placed in a perilous situation; he was liable to an indictment if he refused to execute a warrant, and to a vexatious action if he did. In order to his relief the above statute was made, the object of which was to substitute the magistrate by whom the warrant was granted, and who was supposed to be cognizant of the legality of it, in lieu of the officer, who was merely the instrument to execute it, and probably ignorant of the grounds on which it issued (*d*).

By the stat. 24 Geo. 2, c. 44, s. 6, no action (*e*) shall be brought against

(*y*) *Daubny* v. *Cooper*, 10 B. & C. 237.

(*z*) *Collier, Gent. one, &c.* v. *Hicks*, 2 B. & Ad. 663.

(*a*) *Bane* v. *Methuen*, 2 Bing. 63.

(*b*) 24 Geo. 2, c. 44, s. 2. The tender may be pleaded, with the plea of not guilty, or any other pleas, by leave of the Court. Ibid. If the jury find the amends to be sufficient, they are to find for the defendant in such case; or if the plaintiff be nonsuited, or discontinue, or judgment be given for the defendant on demurrer, he is entitled to like costs as if he had pleaded the general issue only. But where the tender of 40*s.* was admitted by the replication, and the notice of action was for taking goods of the value of 40*s.* only, the plaintiff was nonsuited. *Stringer* v. *Martyr*, 6 Esp. C. 134.

(*c*) 24 Geo. 2, c. 44, s. 4.

(*d*) See the observations of Lawrence, J. 5 East, 477. *Jones* v. *Vaughan*.

(*e*) This clause embraces actions of *tort* only, and does not extend to an action brought against an officer for money had and received, which has been levied by him under a conviction which was afterwards quashed. *Feltham* v. *Terry*, East. T. 13 Geo. 3, K. B.; B. N. P. 24. See also *Irving* v. *Wilson*, 4 T. R. 485. *Wallace* v. *Smith*, 5 East, 122. It is now settled, although it had been doubted, (see Lord Kenyon's observations in *Harper* v. *Carr*, 7 T. R. 270), that the statute does not extend to actions of replevin. *Fletcher* v. *Wilkins*, 6 East, 283; for there would be great inconvenience in depriving the subject of his remedy by replevin; it might happen that no damages could compensate for the loss of the particular chattel, of which the party might be for ever deprived, if he could not sue in replevin. *Milward* v. *Caffin*, 2 Bl. R. 1330. See also *Waterhouse* v. *Keen*, 4 B. & C. 200.

any constable (*f*), headborough, or other officer (*g*), or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace (*h*), until demand has been made, or left at the usual place of his abode, by the party intending to bring such action, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and in case, after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as aforesaid, without making the justice of the peace who signed or sealed the said warrant (*i*) defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice of the peace; and if such action be brought jointly against such justice of the peace, and such constable, &c.; then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction. Defence by constables under a warrant, &c.

The defendant in order to avail himself of this clause must produce and prove the warrant (*k*), by evidence of the justice's handwriting, &c., and show that he acted in *obedience* to it (*l*). The principal test for ascertaining whether the defendant has acted in obedience to the warrant is to inquire whether the magistrate would be liable for the act of the defendant, for where he would not be liable, the officer is not within the protection of the statute (*m*). As where a bailiff, on a warrant to take up a *disorderly* person

(*f*) Evidence of parties acting as constables or watchmen, is *primâ facie* evidence of their being such, so as to entitle them to the benefit of any provision extended to them in that capacity. *Bulter* v. *Ford*, 1 C. & M. 662; 3 Tyr. 667, and *supra*, tit. CHARACTER.

(*g*) Churchwardens and overseers of the poor, acting under a warrant of distress for a poor's-rate, are within these words, when sued in actions to which the statute extends. *Harper* v. *Carr*, 7 T. R. 271. So is a gaoler who detains a prisoner under a magistrate's warrant. *Butt* v. *Newman*, Gow. 97. Where by statute commissioners had authority to appoint constables, watchmen and other officers requiring a month's notice of the cause of action for anything done or to be done by virtue of the Act, to the clerk of the commissioners, before any action brought, it was held to extend to acts done by constables and watchmen. *Bulter* v. *Ford*, C. & M. 662. 3 Tyr. 677.

(*h*) The Act does not extend to a warrant granted by a Judge of the Court of K. B. *Gladwell* v. *Blake*, 1 C. M. & R. 636.

(*i*) The general requisites of a warrant are, 1st. That it be under the *hand and seal* of the justice. 2 Co. Ins. p. 52. 2 Hale, 111. 2dly. It must express the *date* in order to show that it was prior to the arrest. 2 Hale, 111; Dalt. c. 117–121. But the *place*, it seems, need not be stated, although it must be averred in pleading; the county, however, ought at all events to be set forth in the margin, if not in the body. 2 Haw. c. 13, s. 23; Dalt. c. 117. 3dly. Must state the *offence*, which may be done generally, in case of treason or felony; in other cases it seems that the special cause should be set forth, so far at least as to show the nature of the offence, and the jurisdiction of the magistrate; 2 Haw. c. 13, s. 25; 2 Hale, 111. It ought not to be *general* to answer such matters as shall be objected against him, for then it will not appear whether the offence be within the jurisdiction of the magistrate, or whether it be bailable or not. 2 Ins. 52. 591; 2 Hale, 111. Hence a general warrant to arrest all persons suspected of an offence (*Swallowes's Case*, 24 C. 1; 2 Hale, 112), or to search all suspected houses (2 Haw. c. 13, s. 17), or to seize persons guilty of a specified offence, is illegal. (Ibid. and see *Money* v. *Leach*, Burr. 1742. *Entick* v. *Carrington*, 2 Wils. 275; 11 St. Tr. 321.) And 4thly, the warrant may be general, to bring the party before any justice of peace of the county, or special, to bring him before the justice who granted it; 2 Hale, 112, *Foster's Case*, 5 Co. 59, b. In the former case, it seems to be in the election of the officer to go before whom he pleases. Adjudged, 5 Co. 59, b. *Foster's Case*, against the opinion of Fineux, 21 H. 7, 21, a. 2 Hale, 112.

(*k*) As to the form of warrant, vide *supra*, note (*i*).

(*l*) See 3 Burr. 1707.

(*m*) Per Ld. Mansfield, 3 Burr. 1768. B. N. P. 24. 1 Bl. 555. 2 M. & S. 260. The constable is not discharged, unless the party grieved has a remedy once against the magistrate. *Sly* v. *Stevenson*, 2 C. & P.

Defence under a warrant.

under the Vagrant Act (*l*), takes up one who is not so (*m*), or being authorized to apprehend the author, printer or publisher of a libel, executes it on one who is neither the author, printer or publisher (*n*). So where bailiffs, in order to levy a poor's rate under a warrant of distress, break and enter a house, and break the windows (*o*); or where a bailiff executes a warrant in a place beyond the limits of its legal operation (*p*). Or in general where the officer exceeds his authority in the execution of the warrant, or executes it in an illegal manner (*q*).

84. *Parton* v. *Williams*, 3 B. & A. 333. The clause was intended to protect the officer in those cases only where the justice remains liable; per Abbott, C. J. 1b. And see *Cotton* v. *Kadwell*, 2 N. & M. 399. It does not apply where the officer being directed to seize specified things takes others. *Crozier* v. *Cundy*, 6 B. & C. 232; or exceeds the locallimits of jurisdiction. *Mitton* v. *Green*, 5 East, 233; or uses unnecessary violence. *Bell* v. *Dockly*, 2 M. & S. 259.

(*l*) 17 Geo. 2.

(*m*) 3 Burr. 1767.

(*n*) *Money* v. *Leach & others*, Burr. 1742; note, the warrant under the hand and seal of Ld. Halifax, one of his Majesty's principal secretaries of state, directed the defendants to bring the author, &c. before him, but they discharged the plaintiff by the Earl's order, without carrying the defendant before him. In *Entick* v. *Carrington*, (2 Wils. 275,) it was observed by the Court, that the defendants had not taken a constable with them, as directed by the warrant, and that they had not pursued the warrant in the execution thereof, inasmuch as they had carried the plaintiff and his books before Lord Stanhope, and not before Lord Halifax, as directed by the warrant, which was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally, and therefore, and also because the Court held that a Secretary of State is not a justice of the peace, it was decided that neither a Secretary of State, nor the messengers, were within the stat. 24 Geo. 2, c. 44.

(*o*) *Bell* v. *Oakley & others*, 2 M. & S. 259.

(*p*) *Dawson* or *Lawson* v. *Clarke*, 3 Burr. 1761. 1767; *Milton* v. *Green*, 5 East, 233. A constable cannot justify the execution of a warrant except within the district or place for which he is appointed. Where a warrant to search for nets was directed "to the constable of Shipborne, to Samuel Carter, and to all other officers of the peace in the county of Kent," it was held that the defendant, who was borsholder of Little Peckham, which adjoined to Shipborne, could not justify the execution of the warrant in Shipborne, being neither constable of Shipborne, nor Samuel Carter; and the general description, it was held, was to be construed "*reddendo singula singulis*," as directed to each constable in his own district. *Blatches* v. *Kemp*, 1 H. B. 15, in note, cor. Ld. Mansfield. And see 2 Ld. Raym. 1296; *The Queen* v. *Tooley*, 1 Salk. 175; Case of the village of Chorley, Fost. 312; 2 Bl. R. 1135, *Hill* v. *Barnes*. The reason is, that if the execution of warrants were granted to mere strangers, force would often be repelled with force, and infinite mischief would attend the departure from the ancient rules of local magistracy. But if a warrant be directed to a constable by name, he may execute it anywhere within the scope of the warrant and the jurisdiction of the justice (Ibid. and Bac. Ab. tit. *Constable*, D.) In Westminster constables are to be appointed out of different parishes for the whole city and liberty, by 29 Geo. 2, c. 25; and in London, by ancient custom, the constables of the twenty-six wards have power to execute warrants throughout the city. (Bac. Ab. Ed. 6, tit. *Constable*, D.) And now, by the stat. 5 G. 4, c. 18, s. 6, a constable or other peace officer may execute any warrant of any justice or magistrate within the jurisdiction for which such justice or magistrate shall have acted in granting or indorsing such warrant, as if such warrant had been addressed to such constable or other peace officer specially by his name, notwithstanding the parish or place in which such warrant shall be granted shall not be the parish, township, hamlet or place for which he shall be constable or peace officer, provided the same be within the jurisdiction of the justice or magistrate so granting or indorsing such warrant. The effect of this statute is, it has been held, to put warrants addressed to peace officers in their official character on the same footing on which warrants specially directed to them formerly stood; it does not oblige but authorizes officers to execute the power. *Gimbert* v. *Coyney*, 1 M'Clel. & Y. 409. A constable to whom a warrant is directed may, for special cause only, as sickness, execute it by deputy. Ibid. Roll. Ab. 591; Moor, 845; Cromp. 222; 3 Bull. 77; 3 Burr. 1259.

(*q*) See 2 Hale, 115; 2 Haw. c. 13, s. 28. Bailiffs and constables sworn as, and commonly known to be, officers, are not bound to show their warrant to the party, but private persons to whom warrants are directed, and even sworn and known officers if they act beyond their own precincts, are bound to show their warrants if demanded. (2 Haw. c. 15, s. 28; 6 Co. 54; 9 Co. 69; 1 Hale, 583; 2 Hale, 116.) So in executing a warrant of distress of a justice of the peace to levy a penalty, they must show the warrant if required, and suffer a copy to be

It is said that if the defendant act in obedience to the warrant he is under the protection of the statute, not only where the magistrate wants jurisdic- Defence under a warrant.

taken, by the stat. 27 Geo. 2, c. 28. It is enough for a sworn and known officer to say, "I arrest you for felony, &c. in the King's name." (2 Hale, 116, 8 Edw. 4, 14 a; 14 Hen. 7, 9 b.; 9 Co. R. 69, *Mackally's Case.*) It may be executed in a franchise within the county, for it is the King's suit, in which a *non omittas* is virtually included. 2 Hale, 116. But before the late statute it could not be executed out of the officer's precinct, unless specially directed to him. 2 Haw. c. 16, s. 30; and *supra*, note (*p*).—After the arrest he must bring the party to gaol, or to the magistrate, according to the import of the warrant. 2 Hale, 113, and *supra*, 595, note (*i*). But if the time be unseasonable, or if there be danger of rescue, or if the party be sick, and not able at the present to be brought before a justice, the constable may secure him till the next day, or till such time as may, under the circumstances, be seasonable. 2 Ed. 4, 9 & 10; and 2 Hale, 120. And after he has brought him before the justice, the party is still in his custody until the justice discharge or bail him, or till he be actually committed. 10 H. 4, 7 a.; and 2. Hale, 120.—Doors can *in no case* be broken, without *previous notification* of the cause, and request to admit. 2 Haw. c. 14, s. 1; 2 Hale, 116, 7; Fost. 320. A constable may justify the breaking of doors on a warrant to arrest for felony; and even on a warrant to arrest for breach of the peace, an officer may break open the doors of the party. Dalt. c. 78; 1 Hale, 582; 2 Hale, 117; 2 Haw. c. 14, s. 3. So he may, under a warrant of a justice to levy a forfeiture in execution, on any stat. which gives the whole or any part of the forfeiture to the King. 2 Haw. c. 14, s. 5. So under a warrant to arrest for felony, or breach of the peace, the officer may break the doors of another house. 2 Hale, 117; 5 Co. R. 93; Fost. 319. But if the felon be not there, he is a trespasser. *Semaine's Case*, ibid.—An officer may lawfully break open doors after proper notice, and refusal, under a warrant to search for stolen goods, and although no stolen goods be found there. 2 Hale, 157. But it is there said that the owner is justified, or otherwise, according to the event; and see *Bostock* v. *Saunders*, Bl. 912; S. C. 3 Wils. 434. This, however, seems to have been overruled in the case of *Cooper* v. *Booth*, 3 Esp. C. 135; and vide *infra*, 600. Where one *known* to have committed treason or felony, or to have given a grievous wound, is pursued, even by a private person, *without warrant*, he may break open doors to take the offender; but it seems that *no one* would be justified in doing this *without a warrant*, on mere suspicion. See 2 Haw. c. 17, s. 7, and the authorities there cited; Fost. 321; 1 Hale, 582. A demand of admission is necessary in execution of process for a misdemeanor. *Launock* v. *Brown*, 2 B. & A. 592. Doors may be broken after notification, in order to arrest on the Speaker's warrant, for a contempt of the House of Commons. *Burdett* v. *Abbott*, 5 Dow, 165; 14 East, 1; 4 Taunt. 401. A sheriff in executing civil process against the person of *A. B.* is justified or not in entering the house of a stranger, to take *A. B.*, according to the event. *Johnson* v. *Leigh*, 6 Taunt. 246. It seems that in the execution of civil mesne process the officer is justified in breaking an *inner door*, though the defendant be not there at the time; but a previous demand of admittance is necessary. *Ratcliffe* v. *Burton*, 3 B. & P. 223. It is necessary to show that such a breaking was necessary before a resort is had to violence. Ibid.; and see *White* v. *Wiltshire*, Palmer, 54. So no demand of a warrant is necessary where overseers distraining under a poor's rate, sell within four days goods in possession of the bailiffs of a landlord under a distress for rent. *Whitby* v. *Robert*, M. & Y. 107; *Kay* v. *Grover*, 7 Bing. 312. Or in case of an excessive distress for a poor's rate. *Sturch* v. *Clark*, 4 B. & Ad. 113. It is stated to have been held that a constable who acts without warrant, and not upon the view, is not within the statute. *Ballinger* v. *Ferris*, 1 M. & W. 630, cor. Lord Abinger, qu. It seems to be a general rule applicable to all such enactments, that they enure to the protection of a party who acted under an honest *bonâ fide* belief that he was acting in execution of powers conferred upon him, although he may have mistaken the extent of that power, or have exceeded it, or failed to comply with the directions of the statute. *Smith* v. *Shaw*, 10 B. & C. 284, and see *Daniel* v. *Wilson*, 5 T. R. 1. Where a landlord apprehended his late tenant for lopping trees under a supposed custom, and gave him in custody for an alleged offence against the Malicious Trespass Act (7 & 8 G. 4, c. 30), it was held that a month's notice of action was necessary if he acted under the *bonâ fide* belief that he was acting under the statute. *Beechy* v. *Sides*, 9 B. & C. 806; *Reed* v. *Cowmeadow*, 6 A. & E. 661; see also *Cooke* v. *Clarke*, 10 Bing. 19; *Wells* v. *Ody*, 2 C. M. & R. 128. Where the justices granting a warrant for a poor's rate, cautioned the officer not to take goods under a distress for rent, which notwithstanding was done by him; held, in an action for trespass by the landlord, that the justice having jurisdiction, and being compellable to issue the warrant, the officer was not within sec. 6 of the 24 Geo. 2, c. 44, although there had been no demand of perusal and copy of the warrant. This section was intended to protect officers, where the magistrate issuing

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tion over the subject-matter, but also where the warrant itself is illegal. For the policy on which this clause of the Act was founded requires that an officer who really acts in obedience to the warrant of a magistrate, shall be protected (*r*), and he is not to judge of the legality of the warrant. A warrant recited a complaint upon oath, that a quantity of sugar had been stolen from a ship in the Thames, and that there was just cause to suspect that the same goods were knowingly concealed or deposited in the premises occupied by Price & Co. (the plaintiffs), and then directed the defendants to search for and secure the said goods. The defendants under this warrant seized a quantity of sugar which they found on the premises of the plaintiffs, but which turned out to be the property of the plaintiffs. The Court held that this seizure was made in obedience to the warrant, for the defendants had executed it in the only way in which it was capable of being executed, that is, by making it attach on all goods which fell within the description contained in it; they had acted with as much precision in the execution of the warrant as the magistrate had done in the granting of it (*s*).

Where the defendant has acted in obedience to such a warrant, it is incumbent on the plaintiff to prove (*t*) that a demand has been made, or left at the usual place of the defendant's abode, by himself or his attorney, in writing (*u*), signed by the party demanding the same, of the perusal and copy of such warrant (*v*). A written demand signed by the attorney is sufficient (*x*).

The defendant may answer such proof by evidence that he did grant the plaintiff a perusal and copy of the warrant within the six days prescribed by the statute, or even at a subsequent time, provided it were before the commencement of the action (*y*), and will then be entitled to a verdict, notwithstanding any defect of jurisdiction in the magistrate (*z*).

If the officer fail to bring himself within the protection of the statute, he stands in the same situation as at common law; and the rule seems to be that the officer is justified in executing a warrant, legal in itself, granted by one who had a general jurisdiction over the subject-matter, although it was erroneously or corruptly granted in the particular case (*a*). It would mani-

the warrant, would have been liable in case the officer had acted strictly pursuant to it. *Kay v. Grover*, 7 Bing. 312, and 5 M. & P. 140; and see *Parton* v. *Williams*, 3 B. & A. 330, and *Crozier* v. *Cundy*, 6 B. & C. 232.

(*r*) See the observations of the Court, 2 B. & P. 161, *Price* v. *Messenger*; but *qu.* whether the officer would be protected where he was directed by the warrant to do that which was *manifestly illegal*. See the observations of Eyre, C. J., 2 Wils. 291; and 4 Bl. Comm. 291. The words of the statute are, *notwithstanding any defect in jurisdiction in any such justice*. See Lord Eldon's observations, 2 B. & P. 161. If a magistrate by his warrant direct it to be executed in *G.*, the constable is justified in executing it there, though the place be beyond the magistrate's jurisdiction; per Lord Ellenborough, 5 East, 237.

(*s*) *Price* v. *Messenger & others*, 2 B. & P. 158.

(*t*) Such proof is usually given as part of the plaintiff's original case; but it seems to be competent to him to rely on proof of the trespass in the first instance, and to prove the demand in reply. See *Price* v. *Messenger*, 3 Esp. C. 96. Where the defendant justified as under a distress for a poor's rate, and the question was merely in respect of parochiality; it was held that the defendant, admitting the demand of a copy of the warrant, was entitled to begin. *Burrel* v. *Nicholson*, 1 M. & R. 304.

(*u*) As to proof of the service of the notice, vide *supra*, 581.

(*v*) By the stat. 22 G. 2, c. 44, s. 5.

(*x*) *Jory* v. *Orchard*, 2 B. & P. 39.

(*y*) *Jones* v. *Vaughan*, 5 East, 448.

(*z*) If the magistrate be joined, and a verdict be given against him, then by the stat. 22 G. 2, c. 44, s. 6, the plaintiff shall recover his costs against him, to be taxed in such a manner as to include the costs which the plaintiff is liable to pay to the defendant, for whom the verdict is so found.

(*a*) 2 Haw. c. 13, s. 11. *Terry* v. *Huntington*, Hardr. 484; Bac. Ab. tit. *Con-*

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festly be unjust, that a mere ministerial officer, who was bound at his peril to execute the process, should suffer for doing what he supposed to be perfectly legal in the execution of a warrant apparently valid, and which was rendered illegal by facts not within his knowledge. But it is a general principle of law, that where courts of justice *assume a jurisdiction* which they do not possess, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice*; and where there is no jurisdiction there is no Judge, and the proceeding is as nothing (*b*). And therefore where a justice on a conviction on the Game Laws issued a warrant of commitment to prison, without first endeavouring to levy the penalty on the goods of the party convicted, it was held that the constable who had executed the warrant was justified, although the justice was a trespasser (*c*). So if a justice were maliciously to grant a warrant of commitment for felony, without information on oath (*d*). But it was held, that if a justice had no authority to apprehend a party in respect of the matter specified in the warrant, but only to issue a summons, then there being no pretence for the jurisdiction, the warrant would be no justification to the officer (*e*). So if it appear on the face of the warrant that the *offence* is one over which the justice of peace had no jurisdiction (*f*). So if he issue a warrant to bring the party before him, at a place out of the county for which he is a justice (*g*). So if the warrant on the face of it be void and illegal for uncertainty; as, if it be a general warrant to apprehend all persons suspected of a particular offence, without naming any; for it is the duty of the magistrate, and not of the officer, whose duty is ministerial, to judge of the grounds of suspicion; and whether a particular person be guilty or not, is a fact to be decided on a subsequent trial (*h*). So a churchwarden or overseer is a trespasser in executing a warrant of distress under a rate illegally made, as in an extra-parochial place, for there was no jurisdiction (*i*).

It has been laid down by Lord Hale (*j*), that although an officer who under the warrant of a justice of the peace breaks open doors to search for stolen goods, is justified, although none be eventually found, yet that the owner is justified or not, according to the event; and in *Bostock* v. *Saunders* (*k*), on similar grounds, it was held that an excise officer was liable in trespass for

stable, D. *Hill* v. *Bateman*, Str. 710. The contrary has been asserted, and the case 10 H. 7, 17, has been much relied on as an authority for the assertion. There it was held that one who by the order of a bishop arrested another for saying that he was not bound to pay tithes, was a trespasser, as it could not be justified by the stat. 2 Hen. 4, c. 15, which authorizes bishops to arrest for heresy. The answer is, that there the order itself was *manifestly illegal*; besides, it was not in writing. See 2 Haw. c. 13, s. 11.

(*b*) P. C. in *Perkin* v. *Proctor & another*, 2 Wils. 384; case of the Marshalsea, 10 Rep. 76, a. b. As where a rate is unduly made, the warrant of justices will not excuse the churchwardens of the poor, who distrain for it. *Nicholls* v. *Walker & Carter*, Cro. Car. 395. See *Brown* v. *Compton*, 8 T. R. 422, in which the case of *Orby* v. *Hales*, 1 Ld. Ray. 3, was overruled. But see p. 598, note (*r*).

(*c*) *Hill* v. *Bateman*, Str. 710.

(*d*) *Morgan* v. *Hughes*, 2 T. R. 225. But a magistrate may grant a warrant on reasonable suspicion, although there be no direct charge on oath. *Elsee* v. *Smith*, 1 D. & R. 202.

(*e*) *Shergold* v. *Holloway*, Str. 1002; 2 Sess. C. 100. So if a justice of the peace make a warrant to arrest for a debt. *Moore* v. *James*, Willes, 122.

(*f*) Bac. Ab. tit. *Constable*, D. 14. Hen 8, 16. Cromp. 147, 8, 9.

(*g*) Ibid.

(*h*) 4 Bl. Comm. 291; 3 Burr. 1372; 1 Bl. R. 562; 11 St. Tr. 307. 321; Comm. Jour. 22 & 25; Ass. 1766; 2 Wils.

(*i*) *Nicholls* v. *Walker*, 2 Roll. Ab. 560; 2 Hale, 119; Cro. Car. 394. Vide *supra*, 598, note (*r*).

(*j*) 2 Hale, 150.

(*k*) 2 Bl. R. 912, and 3 Wils. 434.

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breaking and entering the plaintiff's house under a warrant of commissioners, granted upon his own information, to search for tea suspected to have been concealed there (*l*), none having in fact been found. But in a subsequent and similar case (*m*) it was held that since the warrant was granted upon the judgment of the commissioners, warranted by oath, the action was not maintainable. The commissioners had authority to issue the warrant; it was legal when it was issued, and when it was executed; and (Ld. Mansfield observed) it would be a solecism to say that the legal execution of a legal warrant could be a trespass. It was also held, that it was not incumbent on the defendant to prove at the trial that he had reasonable or probable grounds for laying the information; for by the Act the oath of the officer is made evidence of the truth of the fact; and the probability of the suspicion is left to be judged of by the magistrate.

Where an officer has improperly allowed one committed in execution till payment of a fine to go at large, he may afterwards retake him (*n*).

A warrant to levy rent due to a gas-light company, without a previous summons and hearing by the magistrate, is illegal, although a summons and hearing are not in terms required by the Act; and the party suing out the warrant cannot justify under it, although it would have protected the clerk to the company or an officer (*o*).

By a constable, &c. without a warrant.

IV. A constable who acts without a warrant, or who does not act in obedience to the warrant, is, it has been held, within the protection of the 8th sect. of the stat. 24 G. 2, c. 44 (*p*); and the words in the stat. 21 J. 1, c. 12, s. 5, by *virtue of their office*, apply to all cases where the party intends to act in the character of a constable, although he acts improperly, for where he really acts in the course of his office he wants no protection from the statute (*q*). And therefore, if a constable, of his own authority, and without

(*l*) Under the stat. 10 G. 1, c. 10, s. 13, which enacts, that in case any officer, &c. shall suspect any tea, &c. to be concealed, with intent to defraud, &c., on oath made to the commissioners, &c. setting forth the grounds of his suspicion, it shall be lawful for them to authorize the officer to enter such house, &c. See also as to warrants to search for stolen goods, the statute 22 G. 3, c. 58.

(*m*) *Cooper* v. *Booth*, 3 Esp. C. 135.

(*n*) *Brett* v. *Jones*, 1 Gow. 99, cor. Dallas, C. J.

(*o*) *Painter* v. *Liv. Gas Light Comp.*, 3 Ad. & Ell. 433; and see *Webb* v. *Batchelour*, 1 Vent. 273; Freeman, 396. 407. 457. 488. *R.* v. *Benn*, Vent. 273. *Harper* v. *Carr*, 7 T. R. 275.

(*p*) As where a constable, acting under a warrant to seize the goods of *A.*, seizes those of *B.*, the action must be brought within six months. *Parton* v. *Williams*, 3 B. & A. 330, overruling the case of *Postlethwaite* v. *Gibson & another*, 3 Esp. C. 226. And see *Theobald* v. *Crichmore*, 1 B, A. 227; *infra*, note (*q*). And *Smith* v. *Wiltshire*, 5 Moore, 322; where constables under a warrant to seize black, seized coloured kerseymere cloths.

(*q*) Per Abbott, L. C. J. 2 Starkie's C. 445; and see *Alcock* v. *Andrews*, 2 Esp. C. 541; where Ld. Kenyon observed, that where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. And see *Theobald* v. *Crichmore*, 1 B. & A. 227; where a constable, who had broke into a house to levy a church-rate, granted under the stat. 53 Geo. 3, c. 127, was held to be within the 12th section, which requires an action for anything done in pursuance of the Act to be brought within three months; and Ld. Ellenborough observed, that the object of the clause was clearly to protect persons acting illegally, but in supposed pursuance of the statute, with a *bonâ fide* intention of discharging their duty. Where watchmen having reasonable ground of suspicion that a felony had been committed by the plaintiff, went to his house to apprehend him, but beat him, and used more violence than was necessary, it was held that they were protected by a clause requiring notice previously to an action for anything done under the statute. *Bulter* v. *Ford*, 1 C. & M. 662; 3 Tyr. 677. Reasonableness of belief is a question for the jury. *Wedge* v. *Berkeley*, 6 A. & E. 663. A constable who acts only under colour of his office, or to discharge an old grudge, is not entitled to notice. *Wedge* v. *Berkeley*, 6 A. & E. 667.

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any warrant, and without any reasonable or probable cause, arrest a party on a charge of felony, and carry him before a magistrate, the *venue* must be laid in the proper county (*r*); and he cannot without a warrant justify an arrest for a breach of the peace which is not committed within his own view (*s*), unless a wound has been given which is likely to occasion death (*t*); but it is a justification to show that the plaintiff was committed to his custody on a legal charge, provided he acted *bonâ fide* and without collusion (*u*). If there be no evidence of collusion, in such a case he is in point of law entitled to a verdict (*x*). It seems, however, that a constable is not bound to act on a charge made by another, in respect of an offence committed in the absence of the constable (*y*). And if a reasonable charge be made, it is a good defence to him under the general issue, although he afterwards, and on further inquiry, discharges the accused without taking him before a magistrate (*z*), and although it afterwards turn out that the charge was wholly unfounded (*a*). So

(*r*) Under the stat. 21 Jac. 1. c. 12, s. 5. *Staight* v. *Gee & Garver*, 2 Starkie's C. 445.

(*s*) *Coupey* v. *Henley & others*, 2 Esp. C. 540; 2 Haw. c. 13, s. 8. Where an affray takes place in the presence of a constable, he may either keep the parties in custody until the fray be over, or carry them immediately before a magistrate. *Churchill* v. *Matthews*, 2 Sel. N. P. 911. If any one stand in the way of a constable to hinder him from preventing a breach of the peace, the constable is justified in taking him into custody, but not in striking him. *Levy* v. *Edwards*, 1 C. & P. 40. And see *White* v. *Edmunds*, Peake's C. 89, and *infra*. Where a party read a notice in church during an interval when no part of the church service was going on, it was held that though a constable was justified in removing or detaining him till the church service was over, he could not afterwards detain him to carry him before a magistrate. See 1 W. & M. c. 18, s. 18. *Williams* v. *Glenister*, 2 B. & C. 699. Using loud words in the street, though disorderly, is not an offence which warrants a peace officer in taking the party into custody. *Hardy* v. *Murphy*, 2 Esp. C. 294; and see *Booth* v. *Henley*, 2 C. & P. 288. A police officer is not justified under 10 Geo. 4, c. 44, s. 7 (Police Act), in laying hold of and removing a person in a crowd, merely because he was conversing with a known reputed thief. *Stocker* v. *Carter*, 4 C. & P. 477. The London Police Act, which warrants the apprehension of suspected persons or reputed thieves, does not warrant an apprehension on mere suspicion of a particular felony. *Cowles* v. *Dunbar*, 1 M. & M. 37. A watchman cannot justify collaring a person who was turning against the wall of a public street for a particular occasion, to prevent him from so doing. *Booth* v. *Henley*, 2 C. & P. 288.

(*t*) *Ibid.*

(*u*) *White* v. *Taylor and Simcoe*, 4 Esp. C. 80. *Hobbs* v. *Branscomb*, 3 Camp. 420. *Cowles* v. *Dunbar*, 1 M. & M. 37. In the former case the defendant Simcoe had made a malicious charge of felony against the plaintiff to the defendant Taylor, a constable at the watch-house, who committed him upon it to the Compter. On an action of trespass, Taylor was acquitted, and Simcoe found guilty. In *Isaacs* v. *Brand*, 2 Starkie's C. 167, Lord Ellenborough intimated his opinion in point of law, that a charge made by a principal thief, on his apprehension, against a party for receiving the goods, did not authorize an arrest by the officer without a warrant; but it was left to the jury to say whether there was probable cause. In *Hill* v. *Yates*, 2 Moore, 80, where a constable acted under the statute 15 C. 2, c. 2, s. 2, which authorizes a constable to arrest persons whom he suspects to be conveying a burthen of young trees, it was said that the question of probable cause was for the Judges, and that it could not be left to the jury. To kill an officer who takes another into custody on a mere charge and without warrant, is murder, though the charge does not specify all the particulars necessary to constitute felony. *R.* v. *Ford*, Russ. & Ry. C. C. L. 329.

(*x*) Per Le Blanc, J. in *White* v. *Taylor and Simcoe*, 4 Esp. C. 80.

(*y*) *Ibid.*

(*z*) *M'Cloughan* v. *Clayton and another*, Lancaster Summer Assizes, 1816, cor. Bayley, J. 2 Starkie's C. 445; and 1 Holt, C. 478.

(*a*) *White* v. *Taylor*, 4 Esp. C. 80. *M'Cloughan* v. *Clayton*, 1 Holt. C. 478. In *Samuel* v. *Payne*, Doug. 345, Ld. Mansfield said, "If a man charge another with felony, and require an officer to take him into custody, it would be most mischievous if the officer were first bound to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable." In that case, after a search warrant granted, no goods having been found, the defendant who first made the charge, and Payne a

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although no specific charge be made to the constable, yet if a felony has been committed, and information of the felony, and its circumstances, has been communicated to the constable, but no specific charge is made against any one, he will be justified in arresting a party whom he suspects to have committed the felony, but who turns out to be innocent, provided he acted *bonâ fide* in pursuit of a supposed felon (*b*). And though no felony has in fact been committed, nor any charge made, yet if a constable has reasonable ground for suspecting that another has committed a felony, or that he is about to commit one, he may detain that person for the purpose of investigation (*c*). But he is bound to carry such person before a justice to be examined as soon as he reasonably can (*d*).

constable, and his assistant, arrested the plaintiff on a Saturday, he was detained till Monday, and then discharged, after examination before a magistrate; there was a verdict against all three; but the Court afterwards held that the charge was a sufficient justification to the constable and his assistant, and cited *Ward's Case*, Clayton, 44, pl. 76; 2 Hale's P. C. 84. 89. 91; and Haw. b. 2, c. 12, s. 13.

(*b*) *Ledwith* v. *Catchpole*, Cald. 291. Smith had lost linens; Stevens came with Smith to the defendant, a marshalman to the Lord Mayor, and Stevens informed the defendant that one Madox had put the linens into a hackney coach at a public house; that the plaintiff put his head into the coach there; that afterwards the coach stopped at another house, and that the plaintiff met it there. Smith suspecting the plaintiff to have been concerned in the theft, took the defendant on a Sunday to the plaintiff, in order to have him apprehended, but when they came neither Smith nor any other person charged the plaintiff with felony; Smith said, "I have lost some cloth, but I do not say it was he who stole it; I know nothing of that; but stolen it was." The defendant then arrested the plaintiff, who was discharged the next day by the magistrate. The defendant pleaded the general issue, and the plaintiff had a verdict for 20*l.*; but the Court granted a new trial. Lord Mansfield observed, "the first question is, whether a felony has been committed or not? And then the fundamental distinction is, that if a felony has been actually committed, a private person may, as well as a peace officer, arrest; if not, the question always turns upon this, was the arrest *bonâ fide*; was this act done fairly, and in pursuit of an offender, or by design, or malice and ill-will? Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons are usually taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon such suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing. It is of great consequence to the police of the country; I think there should be a new trial." Note, that Buller, J. doubted whether the constable was justifiable, since to hold that he was, would imply that he was to some purposes a judicial officer, which he said was going farther than had yet been adjudged him; *tamen qu.* for to a certain extent, even a private person is justified, or not, in arresting, according to the particular circumstances of suspicion on which he must exercise his discretion. See Haw. b. 3, c. 12, s. 2; and 4 Taunt. 34. *Secus*, in case of misdemeanor. *Fox* v. *Gaunt*, 3 B. & Ad. 798. A constable arrests *B.*, a respectable person, on information by *A.* that *B.* had robbed him; in confirmation of which a supposed intercepted letter is shown him; held, that it was properly left to the jury to say whether the circumstances afforded reasonable ground for the arrest, and whether the jury in his situation would have so acted. *Davis* v. *Russell*, 5 Bing. 354.

(*c*) *Wright* v. *Const and others*, 4 B. & C. 596. *Davis* v. *Russell*, 5 Bing. 354. A plea that the constable detained the plaintiff for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses, and bringing them to prove the *felony*, was held to be bad on demurrer. And the Court seem to have been of opinion, that the handcuffing a party so arrested, could not be justified without showing an attempt to escape, or that it was otherwise necessary. 4 B. & C. 596.

(*d*) *Beckwith* v. *Philby*, 6 B. & C. 635. Whether the constable had reasonable cause for suspicion was a question of fact for the jury; per Lord Tenterden, C. J. Ib. Watchmen and beadles may at common law arrest and detain for examination persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there be no proof of a felony having been committed. *Lawrence* v. *Hedger*, 3 Taunt. 14. Watchmen may imprison any person who encourages prisoners in their custody to resist. *White* v. *Edmonds*, Peake's C. 89. The London

Venue.

Although one who acts in aid of a constable is within the protection of the stat. 21 J. 1, c. 12, s. 5 (*e*), as to the *venue*, and as to his defence under the general issue; yet one who is the prime mover, and who sets the constable in motion, by making a complaint and charge to him, is not within the statute (*f*); and where there is a doubt whether a private person acted as the prime mover, or merely acted in aid of the constable who undertook to act as of his own authority, is a question of fact for the jury (*g*).

Defence by a private person, without warrant.

A private person may, as well as a constable, justify the arrest of one actually guilty of treason or felony (*h*), or who has given a wound likely to prove mortal. A defendant cannot justify in aid of an officer who had himself no authority to do the act (*i*).

If a felony has been committed, although not by the party arrested, a private person may justify the arrest, if he acted *bonâ fide* upon fair and sufficient grounds of suspicion (*k*); such defence must, however, be specially pleaded (*l*). Where no treason or felony has been committed, or dangerous wound given by *any one*, it seems that a private person cannot at

Police Act, 3 G. 4, c. 55, s. 21, which authorizes the apprehension of *suspected persons*, applies to *reputed thieves* only, and not to persons suspected of particular thefts. *Cowles* v. *Dunbar*, 1 M. & M. 8. Where, under the 21 J. 1, c. 12, s. 5, two of the defendants in an action of trespass and false imprisonment, being constables and acting in aid of the other defendant, were entitled to an acquittal; held, that the plea stating them to be acting in aid of the other defendant, and not he in aid of them, the protection did not extend to him. *Bond* v. *Rust*, 2 C. & P. 342.

(*e*) *Supra*, 600.

(*f*) *Mac Cloughan* v. *Clayton*, 1 Holt's C. 478; 2 Starkie's C. 445. Because, as is said, the person who puts the constable in motion, is *primâ facie* a trespasser, and therefore ought to allege and prove the truth of the suggestions on which he induced the constable to act. And though two of the defendants, being constables, are within the statute, and entitled to an acquittal by reason of a wrong *venue*, another defendant, who pleads that the other defendants, as constables, acted in his aid, not being a constable, is not entitled to an acquittal, as acting in their aid. *Bond* v. *Rush*, 2 C. & P. 342. *A.* being robbed, suspects *B.* and delivers him in charge to a constable present; trespass is maintainable against *A.* *Stonehouse* v. *Elliot*, 6 T. R. 315. Where a stat. authorised a constable to arrest on the information of another, but the defendant, instead of merely giving information to the constable, *directed* him to arrest, it was held that he acted as principal, and was not entitled to notice, although he acted *bonâ fide*. *Hopkins* v. *Crowe*, 4 A. & E. 774.

(*g*) *Staight* v. *Gee and Carver*, 2 Starkie's C. 445; where it was so left to the jury by Abbott, L. C. J. *Bond* v. *Rust*, 2 C. & P. 342. Where a prosecutor having obtained a warrant points out the party to the constables, he acts in their aid. *Nathan* v. *Cohen*, 3 Camp. 257; per Ld. Ellenborough.

(*h*) Haw. b. 2, c. 12, s. 15. It is there said, that a private person who is not himself induced to believe that the party is guilty, would not be justified in arresting him by command of a constable.

(*i*) A constable seizing a person by the direction of a custom-house officer, who had himself no power to seize, is not within the protection of the Custom-house Act. *Norton* v. *Miller*, 2 Chitty, 140.

(*k*) See Haw. b. 2, c. 12, s. 8, 9, 10, &c. where a number of justifying causes of suspicion are enumerated, some of which are very large and indefinite, such as "Common fame,"—"Keeping company with persons of scandalous reputation,"—"Behaving in such a manner as to betray a consciousness of guilt." It is laid down as essential, that the party himself who arrests must be induced by the grounds of suspicion to believe the party arrested to be guilty. See Lord Mansfield's observations in *Ledwith* v. *Catchpole*, Cald. 201. Whether the grounds of suspicion are sufficient to justify the party so arresting seems to be a question of law. (Haw. b. 2, c. 12, s. 18; 2 Inst. 52; 2 Hale, 78; Finch, 340. *Mure* v. *Kay*, 4 Taunt. 34.) And the grounds must be set forth in pleading the justification, in order that the Court may judge whether the suspicion was reasonable (Ibid.); and unless the plea set forth the causes of suspicion with certainty, it will be bad on demurrer. Ibid. The plea will be bad, unless it show a felony committed. If a constable join in a plea with one who gave the defendant in charge, if it be bad for one, it will be bad for both; and per Best, C. J., there is no difference between seizing a man and ordering him to be seized. *Hedges* v. *Chapman*, 2 Bing. 523.

(*l*) See the last note; and *Mure* v. *Kay*, 4 Taunt. 34.

common law justify an arrest upon suspicion (*m*); except, indeed, where the hue and cry has been raised, and there is no reason to suppose that it is groundless (*n*). A private person cannot arrest for any offence inferior to felony, not committed within his view (*o*); but if an affray be committed in his presence, he may stay the affrayers till the heat be over, and then deliver them to the constable (*p*), and also stop those who are going to join either party (*q*). So also a private person may at common law lawfully lay hold of one committing treason or felony, or doing any act which would manifestly endanger the life of another, and detain him till it may reasonably be supposed that he has changed his purpose (*r*); or may justify the breaking into the house of another for the purpose of preventing him from committing felony (*s*).

KNOWLEDGE.

See tit. COIN.—FORGERY.—NEGLIGENCE.—NOTICE.

LANDLORD AND TENANT.

See EJECTMENT.—USE AND OCCUPATION.—WASTE.

LARCINY.

Particulars of proof.

UPON an indictment for larciny (*t*) it is necessary to prove, in ordinary cases, 1st. A *caption* and *asportation*; 2dly. With a *felonious intention*; 3d. Of the *goods and chattels of another*, as described in the indictment. And where there has been a *bailment* of the goods to the prisoner by the owner, it is further necessary to prove, either, 1st, a felonious intent on the part of the prisoner, *in procuring the delivery* to him, which defeats the bailment,

(*m*) See Lord Mansfield's observations in *Ledwith* v. *Catchpole*, Cald 291. Lord Tenterden's, in *Beckwith* v. *Philby*, 6 B. & C. 635. A *private person*, without warrant, may arrest, 1st, If there be a felony done; 2dly, if the party arresting has probable cause, which is traversable; 3dly, the arrest must be by the party suspecting. *Sir Anthony Ashley's Case*, 12 Co. 92. In trespass and false imprisonment upon a charge of felony, held that evidence showing that the defendant had reasonable grounds of suspicion was admissible in reduction of damages. *Chinn* v. *Morris*, 1 Ry. & M. 244.

(*n*) Haw. b. 2, c. 12, c. 16. The Hue and Cry is the pursuit of an offender from town to town till he be taken; which all who are present when a felony is committed, or dangerous wound given, are by the common as well as statute law bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 Inst. 116, 7; 1 Hale, 588; 2 Hale, 99. 102; Haw. b. 2, c. 12, s. 5. As to the mode of raising the Hue and Cry, see Haw. b. 2, c. 12, s. 6. But in the case of *Guppy* v. *Brittlebank*, 5 Price, 525, where the defendant pleaded the general issue, and a justification that the plaintiff, at Ashborne fair, tendered a forged note to *T. M.*, and that the plaintiff had probable cause to suspect, and did suspect, that the plaintiff had feloniously uttered the note, knowing it to be forged; wherefore the defendant, &c., and verdict thereon for the defendant, the Court held that the arrest, though without warrant, was justifiable. Suspicion that a party has on a former occasion committed a misdemeanor, will not justify a private person in apprehending him without a warrant. *Fox* v. *Gaunt*, 3 B. & Ad. 798.

(*o*) But see *Guppy* v. *Brittlebank*, 5 Price, 525, *supra*.

(*p*) Haw. b. 2, c. 13, s. 8.

(*q*) Ibid. b. 1, c. 63.

(*r*) Ibid. b. 2, c. 12, s. 19.

(*s*) *Handcock* v. *Baker*, 2 B. & P. 260. The defendant in that case had broken into the plaintiff's house, to prevent him from committing murder on his wife; Chambre, J. said, it is lawful for a private person to do anything to prevent the perpetration of a felony.

(*t*) See the different definitions of larciny, East's P. C. 533. The true meaning of larciny is, "the felonious taking the goods of another, without his consent and against his will, with intent to convert them to the use of the taker." Per Grose, J., in delivering the opinion of the Court. *Hammon's Case*, Leach, 1089. See 4th Report of the Criminal Law Commissioners.

or that the delivery was procured *by force or duress*; or, 2dly, that before the asportation the *bailment* had been *determined* by the tortious act of the bailee; or, 3dly, that the bailment had been *determined* according to the intention of the parties. Particulars of proof.

1st. A caption and asportation: the latter seems necessarily to include the former, although the converse is not true, for there may be a taking into the possession without an asportation or removal. To constitute a caption, the property must have been taken into the possession of the prisoner. Therefore, where the prisoner cut the girdle of another, and in consequence the purse fell to the ground, but was not otherwise taken possession of by the prisoner, it was held to be no felony (*u*); but a momentary possession is sufficient (*v*). It need not be by force (*x*); and it is not purged by a redelivery (*y*); any the least removal is sufficient to constitute an *asportation* (*z*). As if plate be taken out of a trunk and laid beside it (*a*); or the goods be removed from one end of the waggon to the other (*b*); or an earring be forced by violence from the ear, and fall upon the hair (*c*); or a bag be lifted from the bottom of the boot of a coach, though not taken out (*d*). Proof that the skins of sheep were taken, and the carcases left, is evidence of the stealing of the sheep (*e*). The pulling of wool from the back of a lamb is a sufficient asportation (*f*). There must, however, be an actual and complete *removal* of the thing from the place, after it has been taken into the possession of the prisoner. And, therefore, the setting a bale of goods on one end without removing it to a different place, is not an asportation (*g*); and where a purse taken by the prisoner from the pocket of another, remained still attached by a string to keys in the pocket, it was held that the asportation was not complete (*h*); and so it was held where goods remained attached by a string to part of the shop (*i*). Caption and asportation.

A caption and asportation by the hand of one, is that of all who are present aiding and abetting (*k*); and it is not essential to prove that they were done immediately and directly by the prisoner; it is sufficient to show that he committed the act by means of an innocent instrument (*l*). After the goods have once been stolen the prisoner is guilty of a fresh felony wherever he carries the goods, for the property is not altered; and therefore, where

(*u*) 1 Haw. c. 54; 1 Hale's P. C. 502; Dalt. 100; Cromp. 34.

(*v*) *R.* v. *Peat*, Leach, 367; Hale, 533; 3 Inst. 69.

(*x*) East's P. C. 687.

(*y*) 3 Inst. 69; Staun. 27; 1 Hale, P. C. 533.

(*z*) 1 Haw. c. 33.

(*a*) Kel. 31; 1 Hale, P. C. 508.

(*b*) *R.* v. *Corslet*, Leach, 272; S. C. East's P. C. 556.

(*c*) *R.* v. *Lapier*, Leach, 360; 1 Haw. c. 33; 3 Inst. 108, 109; 2 Vent. 215; 7 Ass. 39; 1 Hale's P. C. 508; Dalis. 21; Cromp. 30. *R.* v. *Simpson*, Kel. 31.

(*d*) *R.* v. *Walsh*, Moody's C. C. 14.

(*e*) *R.* v. *Rawlins*, East's P. C. 607. Upon an indictment on 14 Geo. 3, c. 6, charging the party in one count with stealing, and in a second with killing a sheep, with intent to steal the whole of the carcase, it appearing that the sheep had been killed with intent to steal the fat, held that the prisoner might be convicted on the second count; but that there being no evidence of any removal of the animal whilst living, the first count could not be supported. *Williams's Case*, 1 Ry. & M. C. 107. S. P. as to stealing lambs, *Loom's Case*, ib. 160.

(*f*) *R.* v. *Martin*, Leach, 205.

(*g*) *R.* v. *Cherry*, East's P. C. 556.

(*h*) *R.* v. *Wilkinson*, 1 Hale's P. C. 508; East's P. C. 556.

(*i*) *Cherry's Case*, East's P. C. 556. *Farrell's Case*, Leach's C. C. L. 266; East's P. C. 557. *Secus*, where a mail-bag was lifted from the bottom of the boot of the coach, although not entirely removed from the boot. *R.* v. *Walsh*, 1 R. & M. (C. C. L.)

(*k*) See tit. ACCESSORY.

(*l*) See tit. ACCESSORY; East's P. C. 555; 1 Haw. c. 33, s. 8; 1 Hale's P. C. 507; 3 Ins. 108.

Felonicè. goods are stolen in one county and carried into another, the prisoner is guilty of a felony in the latter county.

2dly, That the taking was *felonious*.—It is the peculiar province of the jury to decide upon the *intention* of the prisoner (*m*). The question, whether a particular taking was felonious, is a question of law, arising principally upon the intention of the prisoner, as found by the jury. The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own use (*n*). It is sufficient if the prisoner intend to appropriate the value of the chattel, and not the chattel itself, to his own use; as where the owner of goods steals them from his own servant or bailee, in order to charge him with the amount (*o*). The intention must exist at the time of the taking, and no subsequent felonious intention will render the previous taking felonious; as, where goods are removed by the prisoner during a fire, with intent to preserve them for the owner, and he *afterwards* determines to appropriate them to his own use (*p*); or where a bailment is procured without any felonious intent on the part of the bailee, and he afterwards, and before the determination of the bailment, converts the property (*q*). The usual indication of a felonious intent is the secrecy and privacy with which the act is done, and the asserting a dominion over the property by the prisoner, or the actual conversion of it, by sale or otherwise, to his own use. On the other hand, the inference of a felonious intent may be rebutted by evidence to prove that the taking was in joke; was by mistake; was accidental; that the goods had been lost by the owner, and found by the prisoner (*r*).

(*m*) East's P. C. 685; Summ. 61; 1 Hale's P. C. 504. Secreting a letter, containing bills, with the intention merely of cheating the revenue of the postage, is not within the 52 Geo. 3, c. 143, s. 2; *Sharp's Case*, 1 Ry. & M. C. 125. Where the prisoner took by violence from a gamekeeper wires and a pheasant, which he had set, and which the latter had found and seized, and were claimed by the prisoner as his own, held that it was for the jury to say, whether he took them under a *bonâ fide* impression that he was only getting back his own property, however he might be liable to penalties for having them in his possession. *R.* v. *Hall*, 3 C. & P. 409. Where the jury found that the prisoner's intention, *ab initio*, was to get goods out of the prosecutor's (a tradesman) possession, upon a pretended sale for cash, and then clandestinely to remove them, and convert them to his own use, it was held to be a felonious taking. *Campbell's Case*, 1 Ry. & M. 179. So where the jury found that the prisoner never intended to pay for oxen which he had bargained for for ready money, and the owner had not consented to their being taken away. *Gilbert's Case*, 1 Ry. & M. 185. *Pratt's Case*, ib. 250.

(*n*) See the case of *R.* v. *Morfit & Conway*, cor. Abbott, J. Maidstone Lent Assizes, 1816, and afterwards by the Judges. It was there held that the taking of oats by a servant, with intent to give them to the master's horses, from the granary of the master, by means of a false key, was a felony. See Burn's J. by Chetw. vol. 3, p. 176. So it was decided by Thompson, C. B. that the taking a horse by stealth from the stable of a prosecutor, and destroying it by throwing it down into a coal-pit, in order to defeat a prosecution founded on a former larciny in stealing the same horse, amounted to a felony. But where the prisoner took the horses of the prosecutor with intent to ride them, and then to leave them without returning them, it was held to be trespass only. *Dissentiente* Grose, and *dubitante* Ld. Alvanley, *R.* v. *Strong & Phillips*, 3 Burn, 177, 23d edit. Miners employed to bring ore to the surface are paid according to the quantity raised; a miner removing a portion from another's heap to his own, is not guilty of stealing the goods of the owner of the mine. *R.* v. *Webb*, Moody's C. C. 431.

(*o*) 7 Hen. 6. f. 43.

(*p*) *R.* v. *Leigh*, East's P. C. 694. *Mucklow's Case*, 1 Ry. & M. 160.

(*q*) *Infra*, 609; East's P. C. 594. 837.

(*r*) But even in this case the taking must have been *bonâ fide*, and not under a mere pretence of finding, although the property has been deposited in an unusual place, as in a hay-mow (2 East's P. C. 664; 1 Hale, 506; 2 Hale, 507); or has been left in a hackney-coach by mistake (*Lamb's Case*, East's P. C. 664; *Wynne's Case*, ibid.; *Sears's Case*, 1 Leach, 215, n.); or be found on the highway, if the prisoner knew the owner (*R.* v. *Walters*, 3 Burn's, J. 180, 23d edit.); or be taken out of a bureau sent to be

Felonicè.

The notoriety and openness of the taking, where possession has not been gained by force or by stratagem (*s*), is a strong circumstance to rebut the inference of a felonious intention (*t*); and it is a good defence to show that the taking was *bonâ fide* under process of law, or under a supposed claim of right, however unfounded such claim may be. The law has not deemed it to be so necessary to provide against an open and notorious invasion of property, for which the party may have his remedy against the known trespasser by a civil action, as against a taking accompanied with secrecy, or effected by force and terror, or by artifice. It is a question of fact, whether the goods were taken *bonâ fide*, under a claim of right, or with a roguish and felonious intent (*u*). Where the taking is obtained by fraud or stratagem, it may amount to felony, although the owner consented to the act in ignorance of the prisoner's real intention; and proof that the prisoner obtained possession of the property by means of stratagem and artifice is strong evidence of the felonious intent. It is, however, to be observed, that no intention will make the taking felonious where the owner *intends* to part with the *property altogether* to the prisoner; in such case the party is liable to an indictment for obtaining the property by false pretences; and this seems to be the strong test of distinction between a larciny, and an obtaining of money or goods by false pretences (*v*). If by means of a false pretence the prosecutor be induced to part with the temporary possession only, reserving a right of ownership, the prisoner, provided he intend to appropriate the property to his own use, is guilty of felony; but if the owner be induced by the artifice to part with his whole interest, without any reservation, the defendant is guilty of a misdemeanor only (*w*).

Ownership. Possession.

3. The proof of the chattels stolen must of course correspond with the description in the indictment (*x*). In order to satisfy the allegation that

repaired. *Cartwright* v. *Green*, 8 Ves. 405; or be taken from a seat by the roadside. *Milburn's Case*, 1 Lewin's C. C. 251. Where the prisoner at first opened a letter, believing it intended for himself, and finding it to contain bills, appropriated them to his own use, held not to amount to larciny, the party not having any *animus furandi* at the time he received it. *Mucklow's Case*, 1 Ry. & M. 160.

(*s*) The mere doing it openly and by force does not excuse from felony. Kel. 82; 2 Ray. 276; 2 Vent. 94; Kel. 83. And in general, the taking with a felonious intention without lawful consent, by means of any trick or stratagem, amounts to felony. As where a tradesman is prevailed on to bring his goods to an appointed place, under pretence that the price shall be paid; and having been prevailed on to leave them there in the care of a third person, the prisoner fraudulently gets them from that person without paying the price. *R.* v. *Campbell*, Moody's C. C. 179; and see *R.* v. *Gilbert*, ib. 185; *R.* v. *Pratt*, ib. 250.

(*t*) It may be that the taking is no more than a trespass, and the circumstances in such case must guide the judgment; as where a man takes another's property openly before him or others, otherwise than by apparent robbery, or having possessed himself of them, avows the fact before he is questioned. 1 Hale, 507; East's P. C. 661. See *R.* v. *Phillips & Strong*, 2 East's P. C. 662.

(*u*) 1 Hale, 507; 1 Haw. c. 33, s. 8; *Farr's Case*, Kel. 43.

(*v*) And therefore where the servant of a pawnbroker, having general authority to act in his master's business, delivered up a pledge to the pawner on receiving a parcel from him, which he supposed to contain valuables which he had just before seen in the pawner's possession, it was held to be no larciny, for the party authorized intended to transfer the entire property. *R.* v. *Jackson*, Moody's C. C. 119. *Secus*, where a prisoner obtains from a servant a parcel, by falsely pretending to be the person to whom it is directed, for the servant has no authority to part with it but to the right person. *R.* v. *Longstreeth*, Moody's C. C. 137. And see *R.* v. *Pratt*, Moody's C. C. 250.

(*w*) *Supra*, 606, note (*m*); *infra*, 613.

(*x*) See tit. VARIANCE. If an animal, living or dead, have the same appellation, and it makes no difference in the charge whether it be living or dead, it may be described when dead by the appellation given it when living. *R.* v. *Puckering*, Moody's C. C. 242. Upon an indictment for receiving a lamb, knowing, &c., held that it was immaterial as to the prisoner's

Ownership. Possession.

the property was of the goods and chattels of the person specified, it must be proved, either that that person was the owner, or that he had the legal custody of the goods; for the offence of larciny includes a trespass, to which possession is essential (*y*); and therefore unless the person whose property is alleged to have been stolen be either actually or constructively in possession, the taking cannot amount to a larciny. But it is a general maxim, that the ownership of goods draws after it the possession; and, therefore, it is sufficient to prove that the goods are the property of the party whose goods and chattels they are alleged to be in the indictment, although they were at the time in the actual possession of some other person, as a servant or agent; and so it is sufficient to prove that the goods were in the legal custody of the person alleged to be the owner in the indictment, who has the actual legal custody of the goods, as the agent or bailee of the actual owner. For such possession and interest are sufficient against a wrong-doer (*z*). Where, however, the prisoner himself had possession of the goods delivered to him with the consent of the owner, a different consideration, as will presently be seen, arises; and the question will be, whether the prisoner had a *bare charge* of the goods, the possession of which still remained in the owner, or he had acquired a legal possession of them distinct from that of the owner (*a*).

On a charge of stealing bills of exchange, against one employed in the Post-office, it is not necessary to prove the execution or making of the bill (*b*).

Of the party described (*c*).—In order to satisfy the allegation that the property stolen was of the goods and chattels of *A. B.* as alleged in the indictment, it is sufficient to show that *A. B.* had the legal custody of the property, although the ownership resided in another (*d*); as where the goods are stolen from a servant in the absence of the master. For every larciny includes a

offence, whether the lamb was alive or dead at the time of receiving. *Puckering's Case*, 1 Moody's C. C. 242. The stealing parchment records of the Court of C. P. not relating to the realty, is the subject of larciny to the value of the parchment. *Walker's Case*, 1 Ry. & M. 155; *secus*, if they relate to the realty. See *R.* v. *Westbeer*, Leach, C. C. 12. Where the prisoner being sent to the post-office received a letter containing the halves of bank-notes, which he embezzled; held that they were "goods and chattels" of the master. *R.* v. *Mead*, 4 C. & P. 535. On an indictment under 7 & 8 Geo. 4, c. 29, s. 26, for stealing one "sheep," it appearing to have been under a year old or a lamb-teg, the variance was held to be fatal, the Act having the word "lamb." *R.* v. *Birkett*, 4 C. & P. 216. A set of new handkerchiefs, in a piece, may be described as so many handkerchiefs, though not separated from each other. *R.* v. *Nibbs*, Moody's C. C. 25. The goods of a ready-furnished lodging may be described as the lodger's. *R.* v. *Brunswicke*, Ib. 25.

(*y*) 1 Haw. c. 33; Kel. 24; Dalt. 3, c. 101; East's P. C. 554.

(*z*) See Criminal Pleadings. A box belonging to a benefit club, which by the rules was to be deposited, with one of the keys, with the landlord, was held to be properly laid as the property of the landlord, although he had no key at the time of its being stolen. *R.* v. *Wymer*, 4 C. & P. 391; and see *R.* v. *Willis*, Moody's C. C. 375.

(*a*) Vide *infra*, 610, 613. And see *Campbell's Case*, Leach, 942, 3d edit., where a prisoner decamped with a bank-note delivered to him by his landlady that he might change it, and held to be larciny. *R.* v. *Parker*, East's P. C. 671. *R.* v. *Nicholson & others*, East's P. C. 699. *Adams's Case*, Russel, 1060. *Walsh's Case*, 4 Taunt. 258. 284.

(*b*) *R.* v. *Ellis*, Russ. & R. C. C. L. 188.

(*c*) As to variance in the description of the property or owner, see Crim. Plead. 2 ed. 193. 201–2. Where the owner might easily have been ascertained, an indictment for stealing the goods of a person unknown is not maintainable. *R.* v. *Robinson*, cor. Richards, C. B., Durham, 1817. Where the indictment alleged that certain persons unknown committed a burglary, and that the prisoner received the goods, &c. and it appeared that an indictment had been found the same assizes, charging *A. B.* as the principal, and the prisoner as accessory to the same robbery, ten of the Judges were of opinion that the prisoner was rightly convicted. *R.* v. *Bush*, Russ. & Ry. C. C. L. 372.

(*d*) See the cases Crim. Pleadings, 2 ed. 201–2.

trespass, which is an injury to the possession; and therefore it seems that where property has been lost by the owner and found by the prisoner, the taking cannot be felonious, since no one was in possession (*e*) Ownership. Possession.

In Phipoe's case (*f*) it was held that the taking was not felonious, since the note had never been for a moment in the peaceable possession of the prosecutor. But it is a general rule of law, that the right of property draws after it the possession (*g*); therefore it is sufficient to prove the ownership according to the allegation in the indictment, although the alleged owner never had the actual possession; and in general the possession of an agent is the possession of the principal, with respect to third persons, even although the agent or bailee be not responsible to the principal for the loss of the goods (*h*). But as between the owner and a bailee, the possession of the latter is not necessarily the possession of the former, as will afterwards be seen. It is a consequence from the general principle, that a joint-tenant, or tenant in common, cannot be guilty of larciny in respect of the joint property, since he has a right to the possession (*i*). So where the wife delivers possession of the husband's goods, the person taking them upon such delivery is not guilty of larciny, since she has an interest in the goods (*k*); but it is otherwise where the goods are obtained by force or fraud from the wife (*l*). The property is not altered by a *tort*; and therefore if *B.* steal the goods of *A.*, and *C.* steal the same from *B.*, the property still remains in *A.*, and may be so described (*m*). So if *B.* receive goods from the sheriff under a *tortious* replevin (*n*).

Every larciny includes a trespass, and is an injury against the possession of the owner; and therefore in general a bailee who has possession of the goods under a contract cannot be guilty of felony in stealing them, so long as the contract continues undetermined. As where a tailor is entrusted with cloth, or a carrier with goods, to be carried, or a goldsmith with plate (*o*), or a weaver delivers materials to workmen out of the house to be woven (*p*). In such and all other cases where the party has a legal possession of the property distinct from that of the owner, he is not guilty of felony in appropriating the goods, unless indeed, as will afterwards be seen, the possession be obtained by fraud, and with a felonious intent to steal the goods, for then the party acquires no legal possession as against the owner, for the law will not permit him to take advantage of his own wrong; and in point of law no contract exists (*q*). Bailment, where existing.

(*e*) 1 Haw. c. 33; 3 Ins. 102; 1 Hale, P. C. 504; East's P. C. 25. 554; but see above, 606, note (*r*).

(*f*) Leach, C. C. L. 3d edit. 774. A banker's cheque is delivered to a servant in order to be delivered by him to *G. M.*; it is felony in the servant to appropriate the amount to his own use. *R.* v. *Heath*, 2 Moody's C. C. L. 33. And it may be described as a banker's cheque of the value specified, without stating the drawees to be bankers. *Ib.*

(*g*) See the *dictum* of Gould, J. East's P. C. 674.

(*h*) Crim. Pl. 2 ed. 203.

(*i*) 1 Hale's P. C. 513. East's P. C. 558.

(*k*) 1 Haw. c. 33, s. 19; *Harrison's Case*, Leach, 56; East's P. C. 559. *R.* v. *Clarke*, Moody's C. C. 375. *Qu.* For a stranger acting in conjunction with the wife (with whom he has committed adultery) may commit a felony in taking the husband's goods. *R.* v. *Tolfree*, Moody's C. C. 243. In *R.* v. *Willis*, Moody's C. C. 375, it was held that a wife could not be guilty of stealing the property of a friendly society deposited in her husband's custody.

(*l*) 1 Hale's P. C. 514; East's P. C. 559; St. West. 2, c. 34.

(*m*) 1 Haw. c. 33; 3 Ins. 102; 1 Hale's P. C. 504; 13 Ed. 4, 9, 10.

(*n*) 1 Hale's P. C. 507; 3 Ins. 108; Kel. 43; 1 Sid. 254; Raym. 276.

(*o*) East's P. C. 693.

(*p*) But see 1 Haw. c. 33, s. 56.

(*q*) The taking in such case is not war-

Proof to defeat a bailment.

Where a person has a legal possession of the goods distinct from that of the owner, he cannot be guilty of felony so long as the legal possession subsists; and therefore, where such distinct possession has been given, further evidence is essential to answer or rebut the inference of a legal possession by the prisoner. But it is to be observed, that to render this necessary, the possession must be *distinct* from that of the owner, for if the party have but a *bare charge* of the goods under the immediate control and superintendence of the owner, without any possession distinct from that of the owner, he may be guilty of larciny in taking the goods, notwithstanding his manual tenure of them; and therefore a servant is guilty of felony in stealing his master's goods, although he has the custody of them for a particular purpose (*r*). As where a butler steals his master's plate (*s*). Even though the servant has the goods for a specific purpose, as where money had been delivered to a servant to be delivered to a third person, and he spent part, and embezzled the rest (*t*).

Servant.

Where a servant received money from his master to buy licences with, which he embezzled, it was held that he was not guilty of felony (*u*) at common law. But this was denied in *Lavender*'s case (*v*).

There the money had been delivered by the master to the prisoner to be taken to one *Flawn*, as the consideration for bills to be given for the money in a few days (*x*), and the prisoner instead of delivering the money spent part, and embezzled the remainder, and it was held to be larciny.

So where a carter went away with his master's cart, it was held that he was guilty of felony (*y*).

Where a porter was sent by his master with goods to be delivered to a customer, and he broke open the parcel and sold them, it was held to be felony (*z*).

But although it be clear that in general a servant has nothing more than a bare charge of his master's goods, and that the possession of the servant is the possession of the master, it has been doubted whether, when a servant or clerk had received the possession of the goods by delivery to him for his

ranted by the contract; there was no assent to the taking for the fraudulent purpose intended. See tit. INTENTION. But if the owner intend to transfer his property, then, although the taker may have been guilty of fraud in obtaining goods which he never meant to pay for, yet the taking is with the assent of the owner, who means that the goods shall be the absolute property of another.

(*r*) E. P. C. 554. 1 Hale, 506. 1 Haw. c. 33. See the stat. 21 Hen. 8, c. 7, which makes it felony in servants, not being apprentices, to withdraw themselves, and go away with caskets, &c. delivered to them by their masters to keep, with intent to steal the same, &c.; or to embezzle the same, or convert the same to their own use with the like purpose, if the said caskets, &c. be of the value of 40*s*. To bring a case within this statute, it must appear that the servant was such, both at the time of the delivery and of the stealing. 1 Haw. 33, s. 12. 2 East's P. C. 562; and it must be proved that the goods were kept for the purpose of being returned. *Watson's Case*, East's P. C. 562.

(*s*) East's P. C. 564.

(*t*) *R.* v. *Lavender*, East's P. C. 566.

(*u*) *Watson's Case*, East's P. C. 562.

(*v*) East's P. C. 566.

(*x*) A distinction was taken between the case where the prisoner receives money to be delivered specifically to another, and where it is not to be so delivered; but Buller, J. denied the distinction, which certainly appears to be a very subtle one, and adhered to the case of *R.* v. *Paradice*, cited *R.* v. *Wilkins*, 2 Leach, 591, as good law. In that case, the prisoner having received several bills from his master, by whom he was employed as book-keeper, to be transmitted from Devizes by the post, to the prosecutor's banker in London, went to Salisbury and indorsed one of the bills, and got cash for it; and all the Judges (except Lord Camden, who was absent) held it to be larciny; on the ground that the possession still continued in the master. East's P. C. 565.

(*y*) *Robinson's Case*, East's P. C. 565.

(*z*) *R.* v. *Bass*, Leach, 285. See Kel. 35. *Vale* v. *Bayle*, Cowp. 294.

Bailment, where existing. Servant.

master, and the master never had any other possession than such possession by the servant or clerk, the latter was guilty of felony in stealing the goods (*a*). But the statute 39 Geo. 3, c. 85, which recited that doubts had been entertained on the subject, removed them (*b*).

In Sheares's case (*c*), where a servant received oats into his master's barge, and afterwards separated five sacks from the rest, and carried them away, it was held to be as much a felony as if he had taken the oats from his master's granary. So in Abrahat's case (*d*), the prosecutor having purchased corn which was on board a vessel in the Thames, sent the prisoner, who was his servant, and who had for many years been employed by him in superintending the unloading of vessels in the Thames, to receive it into the prosecutor's barge; whilst the corn-meters were unloading the corn from the Dutch vessel where it lay, into the prosecutor's barge, the prisoner came alongside in a boat, and requested that two empty sacks, which he handed on board the Dutch vessel, might be filled with oats, and desired that these might be added to the score, and not placed to a separate account, and took away the sacks so filled and sold them, and the Judges held that he was guilty of larceny. Where the owner has never had any possession of the money or goods, except by an agent, who is not a clerk or servant, the appropriation by the agent is not a felony. Thus where the prisoner received a draft from his employer with a felonious intention to embezzle part of the proceeds, but applied the draft itself according to the intention of his principal, by receiving the amount from the banker of the principal, but afterwards, instead of applying the amount in the purchase of American stock, according to the direction of his principal, appropriated part of the proceeds (*e*), he was not (it was held) guilty of stealing the draft, because he had applied the draft itself according to the intention of the principal; nor of stealing the produce of the draft, since the principal never had any possession of that, as distinct from the possession of the agent.

In general, where the party has a bare charge of the goods, or the use of them, subject to the immediate control and dominion of the master, the possession still remains in the latter; as, where a guest uses plate in the owner's house (*f*), a weaver delivers goods to his journeymen to be worked up in the house (*g*), or where a banker's clerk has access to the money-drawer for a special purpose (*h*). So goods, which remain in the presence of the owner, remain in his possession, although actually delivered to another (*i*), as to a servant, or to a porter to be carried. Where a banker's clerk took notes from the till, under colour of a cheque from a third person, which cheque he had obtained by having entered a fictitious balance in the books, in favour of that person, it was held that he was guilty of felony; the

(*a*) Lord Hale held, that if a servant went with a bond to receive money, which he embezzled, he was not guilty of felony at common law, because the bond was delivered to him by the master; nor under the statute, because the money was not delivered to him by the master. Hale, 668. See *Waite's Case*, East's P. C. 570; *R.* v. *Bazely*, East's P. C. 571; *R.* v. *Bull*, cited Leach, 980. But see *R.* v. *Sheares*, East's P. C. 568.

(*b*) Vide *infra*, 615.

(*c*) East's P. C. 568.

(*d*) East's P. C. 569. Leach, 960. See *R.* v. *Meeres*, Show. 50; Goulds. 186. Where a servant employed to sell goods for his master, received 160 guineas, and concealed some of them in his own chamber, and broke open the house at night to steal them, it was held to be no burglary, since he had possession of the money.

(*e*) *R.* v. *Walsh*, 4 Taunt. 258.

(*f*) East's P. C. 554.

(*g*) Ibid.

(*h*) *R.* v. *Murray*, East's P. C. 683. *Bazeley's Case*, East's P. C. 571.

(*i*) East's P. C. 682. 684. See *Chisser's Case*, East's P. C. 677. 683; *Atkinson's Case*, Leach, 330; 1 Hale, 585; *Campbell's Case*, Leach, 642.

fraudulent obtaining of the cheque being nothing more than mere machinery to effect his purpose (*k*).

Bailment. Precedent. Felonious intent.

Where the defendant has *primâ facie* the legal custody of the goods, as distinct from that of the owner, with his consent, the evidence may be rebutted, 1st, By proof that the prisoner originally obtained that possession with a felonious intention, by fraud, threats, or duress; for the law will not permit him to avail himself of his own fraud, and to set up as a defence a delivery by contract or consent, which was procured by stratagem and deceit, in order to perpetrate the offence.

2dly, By proof that the privity of contract had been determined by the wrongful act of the bailee; or, 3dly, That it had been determined according to the original intent of the parties.

1st. By proof of a precedent felonious intention, or that the possession was obtained by fraud or duress. As where the prisoner hired a horse from the owner with intent to steal it (*l*). So where the prisoner, intending to steal the mail-bags from a post-office, procured them to be let down to him by a string from the window of the post-office, under pretence that he was the mail-guard (*m*). So, although the general rule of law be, that the taking must be *invito domino*, according to the maxim, "*volenti non fit injuria*," yet if the owner consent from fear, under a reasonable apprehension of violence, the taking will be felonious (*n*); as where a woman gives money to preserve her chastity (*o*); for in such cases, where the party is not a free agent, but parts with property from fear and terror, there is no consent. But if the taking be by *procurement* of the owner, the maxim applies, and it is no larciny (*p*). But it is otherwise where the owner merely *facilitates* the execution of a felonious intent, as by placing himself in the way of robbers (*q*); or by allowing his servant to act the part of an accomplice (*r*).

Determination by tort.

2dly. That the privity of contract had been determined by the precedent wrongful act of the bailee. After the determination of the special contract, by any plain and unequivocal wrongful act of the bailee, inconsistent with that contract, the property, as against the bailee, revests in the owner, although the actual possession remain in the bailee (*s*). If a carrier break open a box delivered to him for the purpose of carriage, and steal part of the contents, he is guilty of felony, for the breaking open the box is clear and unequivocal evidence of his determination of the bailment; and the privity of contract being thus determined, it can no longer affect the question as to the commission of a felony in taking the goods (*t*); but if the carrier should, contrary to his duty, sell the whole package entrusted to him, without any previous breaking, or other act sufficient to determine the privity of contract, he would not be guilty of felony (*u*).

(*k*) *R.* v. *Hammon*, 4 Taunt. 304.

(*l*) *R.* v. *Munday*, East's P. C. 694. *Major Semple's Case*, Leach, C. C. L. 469. So where the owner of cattle hired the prisoner to drive them to a fair. *R.* v. *Stock*, Moody's C. C. 87; and see *Armstrong's Case*, 1 Lewin's C. C. 245.

(*m*) *R.* v. *Noah Pearce*, East's P. C. 693.

(*n*) East's P. C. 74. *Blackham's Case*, East's P. C. 555. 1 Hale, 533. East's P. C. 695.

(*o*) *Blackham's Case*, East's P. C. 711. 555.

(*p*) *R.* v. *Daniel & others*, Fost. Dis. 121. 4 Bl. Comm. 230. East's P. C. 695. *R.* v. *Eggington & others*, East's P. C. 666.

(*q*) *Norden's Case*, Fost. 129. East's P. C. 666.

(*r*) *R.* v. *Eggington & others*, East's P. C. 666.

(*s*) Per Gould, J. *Charlwood's Case*, East's P. C. 691. *Townsend's Case*, East's P. C. 627; 13 Ed. 4, 9.

(*t*) 1 Hale, 504; 1 Haw. c. 33, s. 5. 7; 3 Ins. 107; East's P. C. 695.

(*u*) Ibid. See the next note.

Determination by tort.

Where the prosecutor sent forty bags of wheat to the prisoner, a warehouseman and wharfinger, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by the direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags which had thus been emptied, and there was no severing of any part of the wheat in any one bag with intent to embezzle that part only which was so severed, it was held that the prisoner was guilty of larciny in taking the wheat out of the bag (*x*).

In many instances, however, where a party is regarded as having the custody only of goods and not a right to the possession, he may be guilty of larciny, notwithstanding the delivery to him. As in the case of a servant (*y*), carter (*z*), porter (*a*). So where a man, not being a general drover, but hired by the day to drive cattle to a market, sold part of them, it was held that he was guilty of larciny (*b*). In a later case, where the prisoner agreed for 4*s*. to take a heifer from *Y*. to *M*., and instead of doing so sold her and embezzled the proceeds, it was held that he was properly convicted (*c*).

(*x*) *R.* v. *Brazier*, cor. Holroyd, *J.* Nottingham Summer Assizes 1811, and afterwards by eleven of the Judges. The distinction, which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may at first sight appear somewhat paradoxical and unreasonable, that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be less objectionable, when it is considered how necessary it is to preserve the limits which separate the offence of larciny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, who did the like act, so would every other bailee or trustee, and the offence of larciny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larciny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larciny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larciny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. Hale, 504, 5; East's P. C. 697. Kelynge, C. J. explains it on the ground of a presumed previous felonious intention on the part of a carrier, when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package. For further illustrations of this doctrine, see the *Miller's Case*, East's P. C. 698. The *Porter's Case*, East's P. C. 697. *Wynne's Case*, East's P. C. 664. Cases of *Sears and Bass*, East's P. C. 664; Leach 285.

(*y*) *Supra*, 611.

(*z*) *Ibid.* (*a*) *Ibid.*

(*b*) *R.* v. *Macnamee*, Moody's C. C. 368.

(*c*) *R.* v. *Jackson*, 2 Moody's C. C. 32. This case, it will be observed, differed from that of Macnamee in two circumstances; the prisoner was not hired for the day but entered into a special agreement for the job, and as but one heifer was entrusted to him, which he sold, there was no separation of a part from the whole, as in Macnamee's case. In *Smith's Case*, Moody's C. C. 473, where the prisoner having received the prosecutor's horse to be agisted, sold it, he was held to have

Bailment.

3dly, or lastly, it may be shown that the bailment had been determined according to the intention of the parties; as, that a package delivered to a carrier had reached the place of destination, and was there delivered (*d*).

Variance.

Upon an indictment for felony, the prosecutor cannot usually proceed on two distinct felonies committed at different times, but must make his election on which he will proceed (*e*).

Two cannot be convicted upon an indictment charging a joint larciny, unless there be evidence to satisfy the jury that they were concerned in a joint taking (*f*).

Presumptive evidence.

As the caption and asportation can seldom be directly proved by an eye-witness, presumptive evidence must in general be resorted to. The most usual and cogent evidence of this nature consists in proof of the prisoner's *possession* of the stolen goods. The force of this presumption depends upon the consideration that the prisoner who *can* account for his possession of the goods, will, if that possession be an honest one, give a satisfactory account of it.

The effect of this evidence is to throw upon the prisoner the burthen of accounting for that possession, and in default to raise a presumption that he took the goods. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent, for the obvious reason, that the difficulty of accounting for the possession is increased by the length of time which has elapsed, during which the goods may have passed through many hands. The rule is, that *recent possession* raises a reasonable presumption against the prisoner (*g*). Where a letter

been properly convicted, the prosecutor having parted with the *possession*.

(*d*) 1 Hale, 504, 5; 21 H. 7. 14. But if a bailee receive goods for a special purpose, he is not guilty of felony in not returning, but disposing of the goods after the object of the bailment is answered. *R.* v. *Banks*, Russ & Ry. C. C. L. 441; overruling the authorities, 2 East's P. C. 690. 694, and 2 Russ. 1089, 1090.

(*e*) Where two horses were stolen from different persons at different times, but were taken at the same time by the prisoner into a different county, it was held that the prosecutor was bound to elect. *R.* v. *Smith*, 1 Ry. & M. 295. Where seventy sheep were put on Thornly Common on the 18th of June, and were not missed till November, and the prisoner was in possession of four of those sheep in October, and of nineteen other of them on the 23d of November, Bayley, J. allowed evidence of both to be given. *R.* v. *Deehirst*, Lanc. Sp. Ass. Ap. 1825. Where numerous articles had been stolen, the Court held, that it was no ground for compelling the prosecutor to elect upon a suggestion that they were probably stolen at various times, if they might have been stolen at once; but with respect to the receiver, it appearing that they had been received at several times, the prosecutor was bound to elect; held also, that evidence of the other acts of receiving was properly admitted to show the guilty knowledge. *Dunn's Case*, 1 Ry. & M. 140.

(*f*) *Hempstead and Hudson* were indicted jointly for stealing cutlery to the amount of 40*s.* in a dwelling-house. The two prisoners were in the employment of the prosecutor, a cutler, as porters; cutlery was found on the person of Hempstead to the amount of 6*l.*, and similar cutlery on the person of Hudson to the value of 6*s.* only; each confessed that the property in his possession belonged to his master; and the jury were of opinion, that although the prisoners were in the same room together (from which the property had been stolen), yet there was not sufficient evidence to prove that they had acted in conjunction. Both were found guilty; but the Judges were of opinion, that after Hudson had received a pardon, sentence might be passed upon Hempstead. O. B. Feb. Sessions, 1817. On a charge against two of jointly receiving, it is necessary to prove a joint receipt; and a receipt by one in the absence of the other, and subsequent delivery to the latter, is insufficient, successive receivers being separate receivers. *Messingham's Case*, 1 Ry. & M. 257.

(*g*) East's P. C. 657. It is also to be carefully observed, that the mere finding of stolen goods in the house of the prisoner, where there are other inmates of the house capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner. Possession of stolen property three months after it had been lost, was held not such a recent possession as to put a prisoner upon showing how he came by it. *R.* v. *C. Adams*, 3 C. & P. 600. In

containing two bank-notes, was put into the post-office on the 17th of April, proof that a person employed in the post-office had the notes in his possession on the 21st of April was held to be sufficient to warrant a conviction under the stat. 7 G. 3, c. 50, for secreting the letter (*h*). Unless the possession be recent, it is necessary to give strict proof of the identity of the goods, which is not so requisite where the possession is *very recent*; as where a man comes out of a barn with corn concealed upon his person (*i*); or where he is in possession of sugar which he cannot account for, just after he has left the dock, where a quantity of similar sugar is deposited (*k*). The having property of this nature in possession, without being able to account for it, is in some instances made a substantive offence, by local Acts made for the protection of property much exposed, and which it is difficult to identify. Presumptive evidence. Possession.

In other cases mere evidence of the possession of property by the prisoner, for which he cannot account, without evidence to *identify* it with that proved to have been stolen, is insufficient (*l*). And a prisoner ought not to be convicted of stealing the goods of a person unknown, upon such evidence, without proof that a felony has actually been committed (*m*). The fact of possession is capable of being confirmed or weakened by circumstances, particularly those of his concealment of the goods; the opportunity which the prisoner had to commit the crime; his vicinity to the place; his conduct when the charge was made; false or improbable representations to account for the possession; his readiness or unwillingness to meet the charge.

Under an indictment on the stat. 7 & 8 G. 4, c. 29, s. 47 (*n*), the prosecutor must prove (*o*), 1st, That the defendant was his *servant* or *clerk* (*p*); 2dly, That he *received* the goods or money specified; 3dly, On account of his master; 4thly, That he *embezzled* them. Embezzlement.

The goods or money specified.—This proof requires, it seems, the same particularity as upon an indictment for larceny. Upon a charge of em-

Cockin's Case, 2 Lewin's C. C. 235, in the case of a possession 20 days after the theft, the evidence was left to the jury. See the observations on such evidence by Sir G. Lewin, *Ib.*

(*h*) Ibid. (*i*) Ibid. (*k*) Ibid.

(*l*) East's P. C. 657; 2 Hale's P. C. 290.

(*m*) 2 Hale's P. C. 290; 4 Comm. 352.

(*n*) Which enacts, that if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same, &c.

(*o*) See Ld. Ellenborough's observations, *R.* v. *Johnson*, 3 M. & S. 548.

(*p*) See *R.* v. *Squire*, 2 Starkie's C. 349. The statute is not confined to clerks and servants in trade. A person employed as clerk by the overseers of Leeds was held to be within the statute. 2 Starkie's C. 349. The statute applies to female as well as to male servants. *R.* v. *Smith*, by the Judges, 3 Burn's J. by Chetw. 89. If a traveller be employed by different persons to receive money, he is the servant of each. *R.* v. *Leach*, 3 Starkie's C. 70. And if a clerk be employed by *A.* and *B.*, who are partners in trade, and he embezzles the money of *A.* he is within the statute. Ib. Note, that these cases were decided under the stat. 39 Geo. 3, c. 85. See the late stat. 7 & 8 Geo. 4, c. 20, s. 46. Where the prisoner was employed on the single occasion only, and requested to receive money, held that he was not to be considered as coming within the description of the 7 & 8 Geo. 4, c. 29, s. 49, as a clerk or servant, or person employed for the purpose of, or in the capacity of a clerk or servant. *Nettleton's Case*, 1 Ry. & M. 259. The clerk of a chapelry, employed to collect sacrament money, feloniously abstracted part, and the indictment charged him in different counts as servant to the minister, churchwardens, and poor of the township; held that he could not be considered the servant of any of the persons so alleged. *Burton's Case*, 1 Ry. & M. 237.

Proof of embezzlement.

bezzling so many pounds, it is not sufficient to prove an embezzling of the same number of bank-notes to the same amount (*q*). Upon a charge of embezzling the sum of 1 *l.* 11 *s.* it was held to be insufficient to prove that so much was paid, the party who paid it being unable to state in what way it was paid (*r*).

3dly, On account of his master (*s*).—It is not sufficient under this statute to prove a delivery to the servant by the master himself (*t*); but it is sufficient if he receive the money from a customer, although it was given by the master to the customer in order to try the servant's honesty (*u*).

4thly, *The embezzlement.*—It is not sufficient, in support of a charge of this nature, to prove a general deficiency to the amount stated, upon a balance of account, without fixing upon some particular sum of money which has been received by the prisoner, and evidence to show that he has embezzled it. Evidence of this nature generally consists in showing that the prisoner omitted to make the usual entry of the receipt of the money in the book or account in which it ought to have been entered (*x*); in his using artifice and practices to prevent a discovery of the deficiency, or his denial of the receipt of the particular sum (*y*).

By the late st. 7 & 8 G. 4, c. 29, s. 48, three distinct acts of embezzlement (*z*), committed against the same master, may be included in the same indictment, provided they have been committed within the space of six calendar months from the first to the last of such acts. The embezzlement may be alleged to be of *money*, without specifying any particular species of coin or valuable security, and such allegation shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned.

Where a prisoner, having received money in Surrey, denied the receipt of it the same day to his master in Middlesex, and there was no evidence

(*q*) *R.* v. *Lindsey*, 3 Burn, by Chetw. 189. *R.* v. *Furneaux*, Ibid. But an indictment was held to be good, which alleged a receiving of 9*l.* 18*s.* 9*d.* without showing how the same was made up. *R.* v. *Crighton*, Summer Ass. 1803, by all the Judges. 3 Burn, by Chetw. 190. But see the provisions of the late stat. 7 & 8 G. 4, c. 29, s. 48.

(*r*) *R.* v. *Furneaux*, O. B. Sept. 1818, cor. the Recorder, and afterwards by the Judges. Russ. & Ry. C. C. L. 335.

(*s*) Where the servant of the owner of a stallion was instructed not to receive less than a certain sum for each mare; held, that his receiving less sums and converting them to his own use, was not an embezzlement, not being received by him by virtue of his employment. *R.* v. *Snowley*, 4 C. & P. 300. *Qu.*

(*t*) *Peck's Case*, cor. Park, J. Staffordshire Summer Ass. 1817.

(*u*) *R.* v. *Whittingham*, 2 Leach, 912. *Headges's Case*, Leach, 1033. See *Bull's Case*, cited in *Bazeley's Case*, 2 Leach, 841. *R.* v. *Foot*, Bridg. Summer Ass. 1818, cor. Graham, B. and afterwards by the Judges.

(*x*) See *R.* v. *Squire*, 2 Starkie's C. 349. Where the party had charged himself with the receipt of the money in the books weekly, but had neglected to pay it over, it was held to be no felony. *R.* v. *Hodgson*, 3 C. & P. 423.

(*y*) *R.* v. *Hobson*, East's P. C. Add. xxiv. 2 Russ. 1238. *Taylor's Case*, 3 B. & P. 596. 2 Leach, 974.

(*z*) Where the indictment contained three counts for acts of embezzlement within six months, the Court held, upon motion by the prisoner, that he ought to be furnished with a particular of the charges, but that the proper course was to apply to the prosecutor, and that if he refused, the Court, upon affidavits, would grant an order, and put off the trial. *R.* v. *Hodgson*, 3 C. & P. 423.

to show an embezzlement in Surrey; the Judges held that the offence was committed in the county of Middlesex (*a*). Where the prisoner received money in the county of Salop, and denied the receipt in the county of Stafford, it was held to be evidence to show that the original receipt was with intent to embezzle, and that the prisoner was properly tried in the county of Salop (*b*). An indictment upon the st. 52 Geo. 3, c. 63, alleged that the defendant was directed to invest money absolutely and unconditionally, but it appeared that the direction was only to invest in case of any accident happening to the party; the variance was held to be fatal (*c*). Proof of embezzlement.

Where the indictment alleged against an accessory to a felony, that the principal felon was *unknown*, proof that the principal was known, and that he had given evidence before the grand jury, was held to defeat the indictment (*d*); and where the prisoner was indicted for a misdemeanor in receiving stolen goods, and it appeared that the principal had been convicted at the same assizes, the Court directed an acquittal (*e*). The buying goods at an undervalue affords some presumption that the buyer knew that they were stolen (*f*), and this is stronger or weaker in proportion to the inferiority of price. Accessories.

LEET.

A PRESENTMENT in a leet is not traversable, because all the suitors are presumed to be present and to concur. See Com. Dig. tit. *Leet*.

LIBEL AND SLANDER.

THE evidence is either, I. In a civil action; or, II. A criminal prosecution. In the case of a civil action are to be considered,

1*st*, *The proof of publication*, p. 617.
2*dly*, *Of the prefatory averments and innuendos*, p. 626.
3*dly*, *Of malice*, p. 629.
4*thly*, *Of damage*, p. 636.
5*thly*, *Evidence in defence*, p. 638.—*Mitigation*, *&c.* p. 641.—*Justification*, p. 643.

First, as to the fact of publication.—Where the action is for words spoken, evidence of the speaking before any third person will be sufficient, although the declaration allege them to have been spoken before *A. B.* and others (*g*). Proof of publication.

Where a witness having heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words (*h*); and if the words have not been written immediately, the witness may refer to his minutes to refresh his memory (*i*). It is not sufficient for the witness to

(*a*) *Taylor's Case*, 3 B. & P. 596. The prisoner in that case returned into the county of Middlesex soon after receiving the money, and probably had possession of the money in Middlesex, and *qu.* whether it is not necessary that the prisoner should have had possession of the money or goods in the county in which he is indicted, as in case of a common larceny.

(*b*) *R.* v. *Hobson*, East's P. C. Add. xxiv.

(*c*) *R.* v. *White*, 4 C. & P. 46.

(*d*) *R.* v. *Walker*, cor. Le Blanc, Gloucester Summer Ass. 1812. 3 Camp. 264. But see the cases of *Bush* and of *Robinson*, Russ. & Ry. C. C. 272; and the stat. 7 & 8 G. 4, c. 29, s. 54, *supra*, 7.

(*e*) Lancaster Lent Assizes, 1813, cor. Thompson, B., Crim. Pl. Prec. 123.

(*f*) 1 Hale, 619.

(*g*) B. N. P. 5.

(*h*) Ibid. *supra*, Vol. I, and Index, tit. WITNESS.

(*i*) Per Holt, C. J. *Sandwell* v. *Sandwell*, Holt, R. 295.

Proof of publication.

swear that the defendant uttered those words or words to the like effect, for the Court must know the very words, in order to judge of their effect (*k*).

If the words have been spoken, or libel has been published, in a foreign language, or in characters not understood by those who read or see them, there is no publication, since there is no communication prejudicial to the plaintiff; and if the words have been spoken, or the libel has been addressed to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the defendant's act (*l*); but such a publication of a libel would be sufficient to sustain an indictment, on the ground of its tendency to produce a breach of the peace.

Variance.

The general rule seems to be, that some of the words must be proved, as they are laid in the declaration (*m*). The rule as to the proof of words spoken is not so strict as in the case of libel, where the whole must be proved as laid, for it is considered to be one entire thing, and a variance as to any part destroys the identity of the whole (*n*). The same strictness (perhaps on the ground of convenience) does not apply in actions for words; for if some of those, being actionable, be proved, an omission to prove the remainder of the words laid in context with them, or a variance from the latter, will not be material, provided the words proved do not (*o*) differ in sense from those alleged, considering the whole context; and the rule is the same where the plaintiff declares of fewer words than were spoken (*p*). It is, however, a very

(*k*) Fost. 200. *Hussey* v. *Cooke*, Hob. 294; 1 Hale, 111. 115. 323; Kel. 14; 2 Haw. c. 46, *R.* v. *Barnston*, 2 C. & P. 414. *Harrison* v. *Bevington*, 8 C. & P. 713.

(*l*) 1 Wil. Saun. 132, n. 2; 2 Esp. C. 226. And even in the case of an indictment for a libel confined to reflections upon the professional character of the prosecutor, there being no allegation of an intention to provoke him to commit a breach of the peace is insufficient, unless there be a publication to a third person. *R.* v. *Wegener*, 2 Starkie's C. 245; vide *infra*, 629, note (*e*).

(*m*) 2 East, 494; 8 East, 150.

(*n*) *Infra*, 626, and *infra*, tit. VARIANCE.

(*o*) The plaintiff declared that the defendant said of him, "He is a maintainer of thieves, and a strong thief." The jury found the whole to have been said, except the word *strong*, and it was adjudged for the plaintiff (*Burgis's Case*, Dyer, 75). In *Sir J. Sydenham's Case*, Cro. Jac. 407, an action was brought for the words, "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the King too; and he is a maintainer of papistry and rebellious persons." The jury found that he spoke the words, "*I think in my conscience*, if Sir John Sydenham might," &c. finding all the remaining words verbatim. This case underwent much discussion. Three of the Justices of the King's Bench held that the plaintiff was entitled to judgment, since the additional words proved were not words of extenuation, or alteration of the sense of the former words, but rather enforced them: and upon a writ of error brought, the judgment was affirmed by the opinion of Tanfield, C. B., Warburton, Bromley and Hulton, against that of Hobart, C. J. of C. B., Winch and Denman; and see 12 Vin. Ab. 68, and *infra*, note (*s*). Where the words laid in the declaration were, "I will do my best to transport him, as he has been working for me for some time, and has been robbing me all the while;" the proof being "he has worked for me some time, and has been continually robbing me;" held to be no variance; held, also, that the words being spoken to an officer who had a warrant to search the plaintiff's house for goods suspected to have been stolen from the defendant, was not a privileged communication. *Doncaster* v. *Hewson*, 2 M. & R. 176. In an action for words spoken of the plaintiff, a fruit-broker, representing him, with a view to injure the sale of plaintiff's fruit, to have falsely represented that he (the plaintiff) then had three or four vessels in the river coming up with fruit; the evidence was that the defendant alleged the plaintiff to have given out that there were three or four vessels, &c.; held to be a fatal variance, it being very different whether the plaintiff were represented as having spoken of his own knowledge, or merely on report. *Wood* v. *Adams*, 6 Bing. 481, and 4 C. & P. 268. If the words alleged were not proved to be actionable *per se*, whilst the others were not so, the plaintiff is still entitled to full costs, although the damages be under 40 *s*. *Kelly* v. *Partington*, 5 B. & Ad. 649.

(*p*) See the preceding note (*d*). Where the words were laid to be "'Ware hawk, *you must take care of yourself there*,

general rule that where the words constitute one entire charge, the whole must be proved (*q*). And provided the sense be kept entire, it seems that even partial grammatical variances in the construction of sentences will not be material. But proof of words spoken interrogatively will not support an allegation of words spoken affirmatively (*r*). Evidence of the words "You are a broken-down justice," does not support an indictment for speaking of a magistrate the words, "He is a broken-down justice (*s*)." Words alleged to have been spoken affirmatively are not proved by evidence of words spoken interrogatively (*t*). So words alleged as having been spoken in English, are not proved by evidence of the speaking of words of the same meaning in another language (*u*).

Proof of the words. Variance.

It is sufficient, even where special damage is the gist of the action, to prove some of the words as alleged, and that the special damage resulted from them (*x*); but if all the words as laid constitute but one entire charge, the whole must be proved. The declaration stated, that the defendant said of the plaintiff, "He is selling coals at one shilling a bushel, to pocket the money, and become a bankrupt to cheat his creditors." Upon the trial the words "and become a bankrupt," were not proved, and the plaintiff was nonsuited (*y*).

In case of a libel, before any evidence can be given of its contents, *primâ facie* evidence must be given of a publication by the defendant. Evidence

Publication of the libel.

mind what you are about;" and the words in italics were not proved, it was held to be no variance, the sense not being altered. *Orpwood* v. *Barkes*, 4 Bing. 174. And see *Doncaster* v. *Hewson*, 2 M. & R. 176.

(*q*) *Flower* v. *Pedley*, 2 Esp. C. 491. Cor. Eyre, C. J.; and see above, p. 618, note (*o*); and below, as to variance in case of libel, p. 626; and Vol. I. tit. VARIANCE.

(*r*) 2 East, 434; 8 T. R. 150; 4 T. R. App. 217.

(*s*) *R.* v. *Berry*, 4 T. R. 217. But see *Blisset* v. *Johnson*, Cro. Eliz. 503. In the former of these cases, Lord Kenyon held at Nisi Prius, that it was sufficient to prove the *substance* of the words stated, and the defendant was found guilty; but the point was reserved; and on a motion being made to enter an acquittal, Buller, J., said that there was a case in Strange in support of his Lordship's opinion, but that it had been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant. In the case of *Lady Ratcliffe* v. *Shubly* (Cro. Eliz. 224), the words laid in the declaration were, "She is as very a thief as any which robbeth by the highway side." The words proved were, "She is a *worse thief*," &c. Wray, C. J., was of opinion, that as very a thief, and a worse thief, were all one; but Gawdy and Fenner, justices, ruled, that the words did not agree with the declaration. Where these words were alleged to have been spoken by the defendant, "Harrison is a scoundrel; if I would have found him an oven for nothing, and given him after the rate of 20 *l.* per cent. upon the amount of the charges for work and materials, he would have passed my account." The first witness proved the words, "Harrison is a scoundrel; and if I had *allowed* 20 *l.* per cent. he would have passed my account." The second witness proved the words, "Harrison is a scoundrel; and if I had *deducted* 20 *l.* per cent. he would have passed my account." Lord Ellenborough held that words to be actionable should be unequivocally so, and be proved as laid; and that the proof did not support the declaration. (*Harrison* v. *Stratton*, 4 Esp. C. 218). It was held that the words, as laid in the declaration, "*this is* my (the defendant's) umbrella, and he (the plaintiff) stole it from my back door," were not supported by evidence of the words, "*it is* my umbrella," &c. for the words alleged import a conversation concerning a thing present; those proved import a conversation concerning a thing absent. *Walters* v. *Mace*, 2 B. & A. 756. So if *A.* say to *B.* and *C.*, you have committed a felony, although they have separate actions, each must allege the words to have been spoken of both.

(*t*) *Barnes* v. *Holloway*, 8 T. R. 150. So the words "*This* is my umbrella, he stole it from the back-door," are not proved by evidence of the words "*It* is my umbrella, &c." *Walters* v. *Mace*, 2 B. & A. 756. See further, Vol. I. tit. VARIANCE. *M'Pherson* v. *Daniells*, 10 B. & C. 274. *Bell* v. *Byrne*, 13 East. 554.

(*u*) *Zenobio* v. *Axtell*, 6 T. R. 162.

(*x*) Holt's R. 130

(*y*) *Flower* v. *Pedley*, 2 Esp. C. 491.

Proof of the words. Variance. Publication of the libel.

of a publication is either of a publication *generally*, or of a publication in some *particular* county or place, and it is either *direct* or *indirect*.

The publication may be *directly* proved, by evidence that the defendant with his own hand (*z*) distributed copies of the libel, or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession, carrying a representation of the plaintiff in effigy, for the purpose of exposing him to contempt and ridicule, or maliciously read or sung the contents of the libel in the presence of others; all of these facts are direct proofs of the averment that the defendant published the alleged libel (*a*).

But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel, and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel *published* is in the *hand-writing* of the defendant; when the plaintiff has proved this, he has, if the county be not material, made out such a *primâ facie* case as entitles him to have the contents read in evidence (*b*).

It was observed by a great authority (*c*), that "when a libel is produced, written in a man's own hand, he is taken in the *mainer*, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him."

And even the *possession* of a libel which has been *published* is, it is said, evidence to prove a publication by the possessor (*d*).

The writing (*e*) or even printing (*f*) a libel, does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred; whether there has been any publication is usually a question of fact, falling within the province of the jury to decide (*g*); and though proof that the libel is in the hand-writing of the party goes far in fixing him with the publication, he is still at liberty to rebut, if he can, the strong presumption thus raised against him, by reconciling the fact with his own innocence.

The sending a letter to a third person is a sufficient publication (*h*).

Where the libel was contained in a letter sent by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were usually opened by his clerks, was held to be sufficient evidence to go to a jury, of the defendant's intention that the letter should be read by a third person, so as to amount to a publication (*i*).

(*z*) *R.* v. *Almon*, Burr. 2689. *Seven Bishops' Case*, 4 St. Tr. 338.

(*a*) 5 Rep. 125. 9 Rep. 59, b.

(*b*) Burr. 2689.

(*c*) Per Holt, C. J., *R.* v. *Beere*, Lord Raym. 417; 1 Vent. 31; 2 Salk. 40. *Mullet* v. *Hulton*, 4 Esp. 248. 9 Rep. 59, b.

(*d*) It has been said, that until publication, the possession of a libel is no more than the possession of a man's thoughts. See *Entick* v. *Carrington*, 11 St. Tr. 321. But where the libel has been published, then the possession is evidence that the defendant was the publisher. *R.* v. *Beere*, 1 Vent. 31. The possession of a libel in the defendant's house or shop is evidence of a printing and publishing there, 12 Vin. Ab. 229; 4 Read, St. Law, 155; Dig. L. L. 22. If a libel be stolen, that is no publication (*Barrow* v. *Lewellyn*, Hob. 62); but if a single copy reach a single person in consequence of an *intent* to publish, it is sufficient. Ibid.

(*e*) *Lamb's Case*, 9 Rep. 59; 15 Vin. Ab. 91; Mod. 813.

(*f*) *Baldwin* v. *Elphinstone*, Bl. R. 1037, where the printing of a libel in a newspaper was intended by the Court to be a publication.

(*g*) *Baldwin* v. *Elphinstone*, Bl. R. 1037; *R.* v. *Burdett*, 4 B. & A. 95.

(*h*) Rast. Ent. tit. *Actions sur le Case*, 3, a.; Lord Raym. 341. 417. 486.

(*i*) *Delacroix* v. *Thevenot*, 2 Starkie's C. 63.

Proof of publication.

A consent by the master to the act of the servant in printing a libel, is *primâ facie* evidence of a publication by the master (*k*).

An allegation that the defendant published the libel is satisfied by proof that it was published by his agent (*l*), if an authority from the principal to the agent can be proved. And although an authority to commit an unlawful act will not in general be presumed, yet it seems to be otherwise in the case of booksellers and others, where the book or libel is purchased from an agent in the usual course of trade (*m*).

The publication of a newspaper is sufficiently proved by a witness who states it to have been published in the usual way, without producing a copy which has actually been published (*n*).

Where the libel (a song) from which the publication took place, was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost, it was held to be sufficient (*o*).

By an agent.

The sale by an agent in a shop in the usual course of business is *primâ facie* evidence of a publication with the knowledge and privity of the owner; and although it be not conclusive evidence, yet it throws upon him the necessity of rebutting the presumption by evidence to the contrary (*p*), even although the principal lives at a distance from his shop (*q*). But the defendant may rebut the presumption, by evidence that the libel was sold contrary to his orders, or clandestinely; that by reason of sickness he was ignorant of the fact; or that he was absent under circumstances which do not import fraud (*r*). The imprisonment of the defendant at the time of publication is evidence in exculpation, but not conclusive; it may be rebutted by proof of the access of agents (*s*).

Where in an action for a libel it appeared that the libel was written in the hand of the daughter of the defendant (a minor), who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence to go to the jury of a publication by the defendant, since this was not an act within the scope of the defendant's authority (*t*).

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant, and the consequent publication (*u*). And if a letter be sent by the post, it is

(*k*) *R.* v. *Harris*, 2 St. Tr. 1039. See Lord Camden's observations in *Entick* v. *Carrington*, 11 St. Tr. 322.

(*l*) *Supra*, tit. AGENT; and Hale, P. C. 613.

(*m*) Bac. Ab. tit. *Libel*, 458. *R.* v. *Gutch & others*, 1 M. & M. 433. The sale of each copy is a distinct publication. *R.* v. *Carlisle*, 1 Chitty, 451.

(*n*) *R.* v. *Pearce*, Peake's C. 75; and the copy need not bear a stamp; Ibid.

(*o*) *Johnson* v. *Hudson*, 7 Ad. & Ell. 233, n.

(*p*) Bac. Ab. tit. *Libel*, 458; and *R.* v. *Almon*, 5 Burr. 2689. *R.* v. *Dodd*, 1724. 2 Sess. C. 33. Dig. L. L. 27. And Wood's Ins. 445, 2 Sess. C. 33. 12 Vin. Ab. 229. *Plunkett* v. *Cobbett*, 5 Esp. C. 136. Haw. P. C. c. 73, s. 10, Barnard, K. B. 308.

(*q*) *R.* v. *Dodd*, 2 Sess. C. 33. Dig. L. L. 27; for the law presumes that the master is acquainted with what his servant does in the course of his business. And see *R.* v. *Nutt*, Barnard, K. B. 308. Fitzg. 47. Dig. L. L. 27, where it was so held, although the defendant lived a mile from her shop, and had been bed-ridden for a long time. In Com. Dig. tit. *Libel*, B. 1, it is said that the sale of a libel in the defendant's shop, by his servant or agent there, for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale.

(*r*) See 1 Haw. c. 73. *R.* v. *Woodfall*, Ibid. sec. 10.

(*s*) *R.* v. *Woodfall*, 1 Haw. c. 73. s. 10.

(*t*) *Harding* v. *Greening*, 1 Moore, 477.

(*u*) *R.* v. *Johnson*, 7 East, 65. *R.* v.

Proof of publication. By an agent.

a publication by the defendant in any county to which the letter is in consequence sent (*v*).

A statement in a newspaper in consequence of a communication of the contents by the defendant to a reporter, for the purpose of publication, is a publication by the defendant, notwithstanding some immaterial variations; but the newspaper cannot be read without proof of the written statement delivered by the reporter (the witness) to the editor (*x*).

Where the defendant has admitted that he is the author of a particular book, errors excepted, it is incumbent upon him to prove that the errors excepted are material (*y*).

In the case of libel, as well as in all others, whether civil or criminal, presumptive evidence must be resorted to in failure of direct and positive testimony; and the same reasonable inferences and presumptions are to be made so by the juries as in all other instances (*z*).

Publication in a particular county.

In criminal cases it is always, and in civil cases it is in some instances, necessary to prove a publication within the particular county. It seems that wherever the publication of a libel has once been authorized by the defendant, he is guilty of a publication in every county where the libel shall afterwards be in consequence published (*a*). Where the writer of a libel sent it by post, directed to *A. B.* in the county *B.*, and it was in consequence sent into the county *B.*, and from thence sent by the post to *A. B.* in the county *M.*, where *A. B.* received it, and read it, it was held to be a publication in the county *M.* (*b*).

If the libel be dated of a particular place, the date is evidence that it was written there (*c*). It has been said, that the post-mark upon a letter is not *primâ facie* evidence to prove that a letter has been put into the post-office at the place denoted by the post-mark (*d*); it seems, however, from a later authority, that the post-mark is a fact admissible in evidence, when corroborated by other circumstances (*e*).

Dodd, 2 Sess. C. 33. Bac. Ab. tit. *Libel*, 497. Wood's Ins. 445.

(*r*) *R.* v. *Watson*, 1 Camp. 215. The defendant was indicted in Middlesex, the letter had been sent by the post into Berkshire, and had been sent from thence to the prosecutor in Middlesex.

(*x*) *Adams* v. *Kelly*, R. & M. 157.

(*y*) *R.* v. *Hall*, Str. 416. *Macleod* v. *Wakeley*, 3 C. P. 311.

(*z*) See *R.* v. *Johnson*, 7 East, 65; *infra*, note (*a*).

(*a*) B. N. P. 6, *R.* v. *Johnson*, 7 East, 65. If *A.* send a libel to London to be printed and published, it is his act in London, if the publication be there. Vide *infra*, *R.* v. *Watson*. In *R.* v. *Johnson*, *C.*, in the county of Middlesex, received a letter in the handwriting of the defendant, offering to supply political matter for publication by *C.* in a public journal, and two letters were afterwards received by *C.*, also in the defendant's handwriting. It was held that these letters might be read in evidence; and that as they indicated that the writer had sent them for publication there, and they had in fact been published, this was evidence of a publication, by the procurement of the defendant, in Middlesex.

(*b*) *R.* v. *Watson*, 1 Camp. 215. *R.* v. *Girdwood*, East's P. C. 1116. 1120. The sending a letter by post from the county *A.* to the county *B.*, is a publication in *A.* *R.* v. *Williams*, 2 Camp. 646, per Ld. Ellenborough, C. J., and see the opinion of Abbott, C. J. and Best, J. in *R.* v. *Burdett*, 4 B. & A. 717; and see tit. VENUE.

(*c*) *R.* v. *Burdett*, 4 B. & A. 95.

(*d*) *R.* v. *Watson*, 1 Camp. 215. But the defendant was found guilty of another publication.

(*e*) *R.* v. *Johnson*, 7 East, 65; note, that in this case the post-mark seems to have been perfectly immaterial; but upon principle there seems to be little doubt that a post-mark, upon a letter in the handwriting of a defendant, and received through the medium of the post, is evidence, as a circumstance arising in the usual course and routine of business. The post-mark is evidence to show that the letter was in the office whose mark it bears, at the date of the mark. *R.* v. *Plumer*, Russ. & Ry. C. C. L. 164. In the case of *Fletcher & others, assignees of Parry* v. *Braddyll*, cor. Holroyd, J. Lanc. Summ. Ass. 1822, a

Publication in a particular county.

A general confession that the defendant was the *writer* of a libel does not amount to an admission that he *published* it, still less is it a confession that he published it in any particular county (*f*).

A late case upon this subject excited much interest, and exercised great talent and profound learning. The points were shortly as follow: the information charged the defendant with composing, writing, and publishing a libel in Leicestershire; *A.* stated that he received the libel, which was in the handwriting of the defendant, from *B.* on the 24th of August (*g*); it was contained in an envelope, which had been destroyed, but which, to the best of the witness's recollection, was addressed to *B.* who was the professional friend of the defendant; there was no trace of any seal, either on the envelope or paper. The paper was dated Kirby Park, Aug. the 22d, Kirby Park (the defendant's seat) being situate in Leicestershire, 100 miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leicester, near Kirby Park, on the 22d and on the 23d of August, and there was no evidence of his having left the county of Leicester till after the publication (*h*) of the paper, which took place on the 25th; the only words either on the paper or envelope, besides the libel, were "forward this to *A.*" (the witness.) The paper was addressed to the electors of Westminster; and *A.* had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. *A.* having been required to give up the author, the defendant wrote a letter, admitting that he was the author. No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a *publication* in *Leicestershire*. The learned Judge left it to the jury to say, whether there had been a publication in Leicestershire, by an open delivery of the libel. The question, and the principles relating to it, were discussed on the motion for a new trial, with all the aid which talent, learning, experience and unwearied diligence could supply. The ultimate, although it seems not the unanimous, decision of the Court was, that the evidence was sufficient to warrant the conviction (*i*).

Some proofs are to be noticed which apply particularly to the proprietors

letter of one of the bankrupts was offered in evidence to prove an act of bankruptcy; it was objected that proof ought to be given of the existence of the letter previous to the bankruptcy, and Holroyd, J. admitted the post-mark on the letter as *primâ facie* evidence to prove the existence of the letter at that time. The postmistress of Lancaster was called to prove that the letter was stamped with the Wakefield post-office stamp.

(*f*) *The Seven Bishops' Case*, St. Tr. 4 Jac. 2, where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And see the observations upon this case by Ld. Ellenborough, C. J. and Lawrence, J. in *R.* v. *Johnson*, 7 East, 65; and *R.* v. *Burdett*, 4 B. & A. See also *Macleod* v. *Wakeley*, 3 C. & P. 311.

(*g*) *A.* did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

(*h*) *i. e.* in the public newspapers.

(*i*) *R.* v. *Sir Francis Burdett*, bart., 3 B. & A. 717; 4 B. & A. 95. The Judges delivered their opinions *seriatim*.—Best, J. was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post from that county amounted to a publication. (*R.* v. *Watson*, 1 Camp. 215. *R.* v. *Williams*, 2 Camp. 505, Codex, Lib. 9, tit. 36; and see *Girdwood's case*, East's P. C. 1116. 1120.)—Holroyd, J. was of opinion, that the composing and writing a libel in the county of *L.* and afterwards publishing it, although the publication was not within the county of *L.*, was an offence sufficiently charged as a substantive offence in the information, and which gave jurisdiction to a jury of the county of *L.* (see *R.* v. *Beere*, 2 Salk. 417. Carth. 409. Holt's R. 422. *R.* v. *Knell*, Barnard, K. B.

Proof of publication. In a newspaper.

and publishers of newspapers. Upon an indictment for a libel, published in a newspaper called The World, proof that the paper was sold at the defendant's office, and that he *as proprietor* had given a bond to the Stamp-office, as required by the stat. 29 Geo. 3, c. 10, s. 10, for securing the duties on advertisements, and that he had from time to time applied to the Stamp-office respecting the duties, was held to be strong evidence to prove a publication by him (*k*).

Where the affidavit made by the printer and proprietor of a newspaper (according to the statute 38 Geo. 3, c. 78 (*l*), stated the place where it was

305. *R.* v. *Carter*, Dig. L. L. 124); and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor; and that a jury of the county of *L.* might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in the county of *L.* And that in the case of an aggregate charge, part of which, being in itself a substantive misdemeanor, is committed within a particular county, the jury may inquire into the remainder, although done elsewhere; that there was reasonable evidence of a publication in *L.*; and that a *delivery* of a libel within the county, although it be sealed, is a publication in law.—Bayley, J. was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in *L.*, considering that positive proof might have been given by calling *B.* as a witness. He gave no opinion on the question, whether a close delivery amounted to a publication. He held, that the whole *corpus delicti* must be proved within one county; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question, whether the composing a writing, with intent to publish, constituted an offence.—Abbott, C. J., intimated his opinion, that mere delivery constituted a publication. He held that the facts warranted the conclusion, that the paper had been delivered by the defendant in *L.*, to *B.*, in the state in which it had been delivered by the latter to *A*. That even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of *L.*, where one of those acts had been done.

(*k*) *R.* v. *Topham*, 4 T. R. 126.

(*l*) By sect. 1, no person shall print or publish any newspaper, until certain affidavits, &c. shall have been delivered to the commissioners of stamps, &c.—By sect. 2, these must contain a true description of the printer (*), publisher and proprietors, or of two of them, and of their places of abode; of their shares in the paper, and the house in which it is intended to be printed, and of its title.—By sect. 9, all such affidavits and affirmations, or copies thereof, certified to be true copies according to the Act, shall, in all proceedings, civil and criminal (†), touching any newspaper or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations as are hereby required to be therein set forth, against every person who shall have signed and sworn or affirmed such affidavits or affirmations; and shall also be received and admitted in like manner, as sufficient evidence of the truth of all such matters, against all and every person who shall not have signed or sworn or affirmed the same, but who shall be therein mentioned to be a proprietor, printer or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved. The section then contains an exception in favour of such as have, before the publication of the paper in question, delivered in to the commissioners an affidavit, stating that they have ceased to be the printers, &c. of such paper.—By the 10th section, in some part of every newspaper, &c. shall be printed the names, additions, and places of abode (‡) of the printers, publishers, &c., and the place where the same is printed.—By sect. 11, it shall not

(*) One who lets out types and men to print a newspaper, is not a printer within the stat. 38 Geo. 3, c. 78; the party who hires the men, and superintends the printing, is the party responsible to the Stamp-office. *Bagster* v. *Robinson*, 9 Bing. 77.

(†) The provisions of the statute are applicable in the case of a motion for a criminal information. *R.* v. *Dennison*, 4 B. & Ad. 698; and *R.* v. *Franceys*, 2 Ad. & Ell. 49.

(‡) The affidavit was, "situate Union-street, Castle-street;" the newspaper was, Union-buildings, John-street; the variance, on motion for criminal information, was held to be fatal. Note.—The Court said they would notice the newspaper filed with the affidavits, although not expressly identified by or annexed to any affidavit. *R.* v. *Dennison*, 4 B. & Ad. 698; *R.* v. *Franceys*, 2 Ad. & Ell. 49.

printed in London, and the newspaper given in evidence stated at the foot of it that it was printed at No. 3, Warwick-lane, London, and it was also proved that the defendant's printing-house was there; it was held to be sufficient evidence of a publication in London (*m*). Proof of publication.

The observations which have been made as to variances between the alle-

be necessary, after any such affidavit, &c. or a certified copy thereof, shall have been produced in evidence as aforesaid, against the persons who signed and made such affidavit, or are therein named, according to this Act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing, mentioned in such affidavit or affirmation, for the plaintiff, informant or prosecutor, or person seeking to recover any of the penalties given by this Act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves, or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.—By sect. 13, it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.—By sect. 14, in order to prevent the inconvenience which might result from requiring the personal attendance of the commissioners, it is enacted that a certificated copy of any affidavit or affirmation, proved to be signed by the officer who has the custody of the original, shall be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and that such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this Act; and shall have the same effect for the purposes of evidence as the originals would have had in case they had been produced and proved to have been duly so certified, sworn and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.—By the 17th section it is enacted, that every printer or publisher of any newspaper or other such paper, shall, within six days, deliver to the commissioners, or their officer, one of the papers (*) so published, signed by the printer or publisher in his hand-writing, with his name and place of abode; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of 100 *l.*; and that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such commissioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security, at his own expense, for returning the same; and that in case such commissioners or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do. The above statute has been repealed, and provisions of a similar nature have been substituted by the 6 & 7 W. 4, c. 76, s. 8. See APPENDIX.

(*m*) *R.* v. *Hart & White*, 10 East, 94.

(*) Such a delivery amounts to a publication in respect of which the party may be indicted, if the matter be libellous. *R.* v. *Amphlitt*, 4 B. & C. 35. But the rule does not extend to one who is not the printer or publisher. *Adams* v. *Kelly*, 1 Ry. & M. 157. Where the identical paper was produced by the distributor of stamps, marked with various charges corresponding with the sum paid by the defendant to the distributor; held that it was evidence to go to the jury of a publication by the defendant; held also, that it was libellous to print and publish a ludicrous story of the plaintiff, exposing him to ridicule, notwithstanding it appeared that the plaintiff himself had told it of himself; and that evidence of the plaintiff having been exposed to public laughter at a vestry was evidence as identifying the subject of the libel, and proving the consequences of the publication. *Cook* v. *Ward*, 6 Bing. 409. Where the plaintiff produced a certified copy of the affidavit lodged at the Stamp-office, and a newspaper containing the libel, corresponding with the paper described in the affidavit, it was held to be sufficient evidence of publication. *Mayne* v. *Fletcher*, 9 B. & C. 382. And see *R.* v. *Leigh Hunt*, Ib. *a notis*, 385.

Proof of publication.

gation and proof of words, apply still more forcibly to the case of a libel, which must be set out in the pleadings *secundum tenorem*, or *in hæc verbâ*, or by equivalent words (*m*).

Variance.

It is no variance, although the libel read in evidence contain matter in addition to that which is set out on the record, provided the additional part does not by its context alter the sense of that which is set out (*n*). But if the additional matter causes the libel proved to vary in sense from that alleged, or if by a selection of passages, and setting them out as one continuous libel, the sense be altered, the variance will be fatal (*o*).

With respect to the alteration of one or more letters of a word, the rule seems to be now settled, that if the sense be altered by the changing of one word into another the variance will be fatal, but not otherwise (*p*).

Proof of averments, &c.

2dly. Where the plaintiff or prosecutor has fairly launched his case, by proof of the words or libel, he is next, in the usual order of proof, to establish in evidence the prefatory averments (*q*) and innuendos which are alleged in

(*m*) See *Dr. Sacheverell's Case*, 8 St. Tr. 557; 2 Salk. 417. *R.* v. *Beare*, 1 Ld. Raym. 414; Holt's R. 348. 350; Starkie's Crim. Pl. 2d edit. 124; Starkie's Law of Libel, 314, 2d edit.; and see the late st. 9 G. 4, c. 15; *infra*, tit. VARIANCE.

(*n*) See *Sir J. Sydenham's Case*, *supra*, 618; and *Tabart* v. *Tipper*, 1 Camp. 350. One count of a declaration for a libel stated the words as follow: "My sarcastic friend, by leaving out the repetition or chorus of Mr. T.'s poem, greatly injured the *tout ensemble*," &c. The words proved in evidence were, "My sarcastic friend MΩPOΣ by leaving out," &c. and Lord Ellenborough held that the variance was material. See also tit. VARIANCE; and Appendix; and *Cartwright* v. *Wright*, 5 B. & A. 615. In an action for a libel contained in a letter addressed "to the treasurer of the N. E. Company," and slandering the plaintiff in his employment as surveyor of the company, held, that it was not necessary to allege with extreme precision the description of the company, nor to prove the plaintiff's employment by deed, the libel being alleged of the plaintiff in that employment; the letter going on, after stating the libellous matter, to say, that the writer had never disclosed the matter, nor ever would, except to the person he addressed and his friend, which was not set out in the declaration; it was held, that although the defendant might avail himself of the whole of the letter to repel malice, yet the omission of such part in no way qualifying the meaning of the libellous part set out, was not a ground of variance. *Rutherford* v. *Evans*, 6 Bing 451.

(*o*) 1 Camp. C. 350. Where a declaration alleged a publication by the defendant, omitting a reference, from which on reading the libel it appeared to be a quotation, the variance was held to be fatal. *Cartwright* v. *Wright*, 5 B. & A. 615. So where the libel as alleged imputed to an engineer "mismanagement or ignorance," and the words proved were, "ignorance or inattention." *Brooks* v. *Blanshard*, 1 C. & M. 779; 3 Tyr. 844. As to variances in allegations of intention, see tit. VARIANCE, and the observations of Buller, J. in *Peppin* v. *Solomon*, 5 T. R. 497.

(*p*) According to the distinction taken in *The Queen* v. *Drake*, Salk. 660; 3 Salk. 224; as where the word *not* was inserted for *nor*. If the sense be not altered, the variance is immaterial, even upon an indictment for perjury. As where the assignment of perjury alleged that the defendant had sworn in the affidavit on which the perjury was assigned, that he *undertood* and believed, whereas the words in the affidavit were "*understood* and believed;" and upon motion for a new trial, Lord Mansfield, after observing upon the great length of nicety to which the cases had been carried, particularly the case in *Hutton*, where *Indicari* had been written for *Indictari*, said that the case had been shaken by the doctrine laid down in Hawkins. 2 Haw. c. 46, s. 190. And that the true distinction had been taken in *The Queen* v. *Drake*. *R.* v. *Beech*, Leach, C. C. L. 158. See *R.* v. *May*, Leach, 227. Starkie's Crim. Pl. tit. VARIANCE. Starkie's L. Libel, 2 edit. vol. 1, p. 377. *Infra*, tit. PERJURY — VARIANCE. *R.* v. *Mary-Ann Taylor*, 1 Camp. 404.

(*q*) The Insolvent Act requiring that the petition shall be *subscribed* by the prisoner, and filed, and a certified copy admitted as legal evidence, held that it must be presumed to have been regularly done; and that such copy therefore was sufficient proof of an allegation in a declaration for a libel, that a petition *subscribed* by the plaintiff, as such prisoner, had been duly filed, &c. *Gould* v. *Hulme*, 3 C. & P. 625. Where the words convey a substantive imputation of a crime, introductory averments are unnecessary. See *Starkie on Slander and Libel*. V. 1. p. 383. *Curtis* v. *Curtis*, 10 Bing. 477. *Slowman* v. *Dutton*, 10 Bing. 402. A declaration for a libel, headed "an honest lawyer," alleged that the plain-

the declaration or indictment, and which are essential to his case. If the publication affects the plaintiff in a particular character, it must be proved that the character belonged to him, or that he filled the office or situation at the time of the publication complained of. It has already been seen that a man's special character is usually established by evidence of his having acted in that capacity, for then a *presumption in fact* arises that he *legally* acted in that capacity (*r*). And where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, trade or business, is of course the only evidence which the fact admits of. Proof of prefatory averments and innuendos.

The evidence of character, in actions brought by physicians (*s*), attornies (*t*), &c. has already been adverted to (*u*). Notwithstanding the doubts which have prevailed upon the subject, the better opinion seems to be, that evidence of the plaintiff's *having acted* in the particular character in which the words affect him, is *primâ facie* evidence of his title to it (*v*). Where, however, there is any reason to apprehend that evidence will be offered on the other side to disprove the fact, the plaintiff ought to be prepared with the best evidence to establish it. If the declaration allege a diploma or appointment, it must be proved, although the special allegation was unnecessary (*x*).

In general, if the slander or libel assume that the plaintiff possesses the character, or fills the situation or office in which he is defamed, it operates by way of admission (*y*), and is *primâ facie* evidence of the fact. According

tiff had been reprimanded by one of the masters of the Court for sharp practice, with introductory averments that the plaintiff had carried on the business of an attorney, and been engaged as such in a certain cause, and that sharp practice in such profession was considered to be disreputable to the attorney practising the same; held, that such matter was libellous, and that the averment that the libel was ironical, coupled with the innuendo that the term "honest lawyer" was used in a libellous sense, was sufficient. *Boydell* v. *Jones*, 4 M. & W. 446; and 7 Dowl. 210.

(*r*) *Supra*, 307, and the cases there cited.

(*s*) Words imputing adultery to a physician are not actionable, unless shown to be connected with professional character. *Agar* v. *Craven*, 2 Ad. & Ell. 2. And see *Lumby* v. *Allday*, 1 C. & J. 301; 1 Tyr. 217.

(*t*) See tit. ATTORNIES. CHARACTER.

(*u*) *Supra*, tit. CHARACTER.

(*v*) But see *Collins* v. *Carnegie*, 1 Ad. & Ell. 695.

(*x*) *Supra*, 218. And see in general as to proof of special character, *Moises* v. *Thornton*, 8 T. R. 303; *Collins* v. *Carnegie*, 1 Ad. & Ell. 695; *Jones* v. *Stevens*, 11 Price, 251; *Sparling* v. *Heddon*, 9 Bing 11; *R.* v. *Crossley* 2 Esp. C. 526; *Whittington* v. *Gladwin*, 2 C. & P. 146.

(*y*) *Berryman* v. *Wise*, 4 T. R. 366. And see *Smith* v. *Taylor*, 1 N. R. 196. So where the libel itself showed that certain acts of outrage had been committed, it is evidence to support an averment of the fact in the introductory part of the record. See the observations of Bayley, J. 4 M. & S. 548. Where in an action for a libel against the plaintiff, a medical practitioner, of and concerning him in his said practice, no evidence was offered of the plaintiff being of any regular degree, the libel stating him to be a quack, and that certain persons had the misfortune to come within his doctrinal prescriptions; held, that if the jury considered that the libel spoke of him as a medical practitioner, the libel was not withdrawn from their consideration, although they might not give the same damages as to a person proved to be a regular practitioner; held also, that subsequent publications, although the subject of action, were admissible in evidence to show the motives of the defendant. *Long* v. *Chubb*, 5 C. & P. 55. The declaration alleged that the plaintiff was an auctioneer and appraiser, and had been employed by the defendant as an appraiser, to value certain goods; and that intending to injure him in his business of an auctioneer, the defendant spoke of him and of his conduct as to such valuation, "He is a damned rascal, he has cheated me out of 100*l.* on the valuation;" the words themselves were held sufficiently to show that the slander was of and concerning the plaintiff in the way of his trade, and sufficient after verdict. *Bryant* v. *Loxton*, 11 Moore, 344. See further, *Figgins* v. *Cogswell*, 3 M. & S. 369; *Hall* v. *Smith*, 1 M. & S. 287; *Rutherford* v.

Proof of prefatory averments and innuendos.

to the general rule, all averments which are material, that is, which are connected with the charge, must be proved, but those which are immaterial need not be proved (*z*). An information alleged that the King had issued a particular proclamation, and also averred, that on occasion of that proclamation divers addresses had been presented to his Majesty by divers of his subjects; the information charged the defendant with a publication with intent to bring the said proclamation into contempt, but did not refer to the addresses: it was held to be essential to prove the fact that such a proclamation was issued (*a*), but it seems that it was unnecessary to prove that any addresses had been presented (*b*).

So in general where the declaration or indictment avers the existence of particular facts, and that the publication was of and concerning those facts, their existence, if material to the actionable or criminal quality of the publication, must be proved. In an action for a libel on a constable, alleged in both counts of the declaration to have been published concerning his conduct in the apprehension of persons stealing a dead body, it was averred in the first count what that conduct had been, and it was alleged that he had carried the dead body to Surgeons Hall; the Court held that it was necessary, under both counts, to prove this introductory allegation (*c*).

Colloquium and innuendos.

The colloquium, and other averments, which connect the words or libel with the plaintiff or subject-matter before stated, must next be proved. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who state their opinion and judgment as to the *intention* of the defendant to apply his words or libel to the parties or circumstances as alleged. It seems to be sufficient if the witness in the first instance state his general belief and opinion as to the defendant's meaning, without disclosing his reasons, leaving it to the defendant, if he think proper, to inquire as to the grounds and reasons which support that conclusion. The truth of an innuendo is a question of fact for the jury (*d*);

Evans, 6 Bing. 451; *Yrisani* v. *Clement*, 3 Bing. 432.

(*z*) *Infra*, tit. VARIANCE. *R.* v. *Holt*, 5 T. R. 436. Action on the case for exhibiting an inscription tending to defame the plaintiff as the keeper of a brothel, a prefatory allegation that he carried on business as a retailer of wines need not be proved, there being no colloquium of the trade. *Jefferies* v. *Duncombe*, 11 East, 226. In general, where the words or libel are laid to be published of and concerning several different facts, a variance from one or more, if it does not alter the nature of the criminal or actionable quality of the words or libel, is not material. *Lewis* v. *Walter*, 3 B. & C. 138, n. *May* v. *Brown*, 3 B. & C. 113. *Infra*, tit. VARIANCE. Where the plaintiff had a clear right to sell the whole of a certain interest, which he derived from the defendant, but his right to sell part only was doubtful; and he alleged that he put up his said interest to sell, and that the defendant published, &c. of and concerning his said interest; it was held that the allegation was not supported by proof that he put up an underlease of part of the term only; for a grant of an underlease is not a sale of anything; and therefore the proof did not sustain the averment *pro tanto*. *Millman* v. *Pratt*, 2 B. & C. 486.

(*a*) *R.* v. *Holt*, 5 T. R. 436.

(*b*) Per Buller, J. Ibid. 446. As if the slander or libel state the plaintiff to be an attorney or physician.

(*c*) *Teesdale* v. *Clement*, 1 Chitty, R. 603. The Court intimated that the plaintiff needed not to have burthened himself with the proof. Abbott, C. J. 3 B. & C. 124, stated that the ground of decision in that case was, that the fact was material. The plaintiff had in truth made it material by the form of his declaration. Where the introductory averments are immaterial they need not be proved. See *Cox* v. *Thomason*, 2 C. & J. 361. See Vol. I. tit. VARIANCE; *Heriot* v. *Stuart*, 1 Esp. C. 437; *Sellers* v. *Till*, 4 B. & C. 656; *Shepherd* v. *Bliss*, 2 Starkie's C. 510. An innuendo which enlarges the meaning of the terms used is bad on demurrer. *Gompertz* v. *Levi*, 1 P. & D. 214.

(*d*) Per Lord Ellenborough, C. J., in *Roberts* v. *Cambden*, 9 East, 96. Sir W. Blackstone, 2 W. Bl. 962; and Gould, J., in *Oldham* v. *Peake*, 2 W. Bl. 959. Cowp. 278. *Penfold* v. *Westcott*, 2 N. R. 335.

and in general, if the meaning of the terms be ambiguous, it is for the jury to say in what sense they were used. Thus if the defendant call the plaintiff a thief, and it be doubtful, under the circumstances, whether the term was meant to be applied in its felonious sense, it is for the jury to decide (*e*). Colloquium and innuendos.

Wherever a specific meaning is given to the terms of a libel or oral slander by connecting it with previous matter, the whole must be proved as being essential to the nature and identity of the charge (*f*). Where the innuendo does not refer to any preceding averment, but unnecessarily introduces new matter, it may be rejected (*g*).

In an action for oral slander or libel, the proof of malice either results from the slander itself, or is matter of extrinsic evidence. Where the slander or libel stands unexplained by any collateral evidence which indicates the intention of the party, and no light is derived from the occasion and circumstances attending the publication, by which the mind of the author can be read, the Court and jury necessarily derive their inference from the words themselves, reading and understanding them, according to Evidence of malice.

(*e*) *Penfold* v. *Westcott*, 2 N. R. 335. It has been said that the understanding of the hearers is the rule to go by. Sel. N. P. 1252. *M. S. Case*, 1 Viner, 507; where it is laid down that the question is only what was understood by the hearers. In *Fleetwood* v. *Curley*, Hob. 268, Lord Hobart says, the slander and damage consist in the apprehension of the hearers. In Gilbert's Cas. Law and Equity, the rule laid down is, that the words shall be taken in the sense in which the hearers understand them. No doubt the understanding of the hearers is a good test for ascertaining the meaning, where the hearers understand them in an actionable sense, but it is not conclusive the other way; for where the words are actionable in respect of extrinsic facts, as for instance, where they are spoken of the plaintiff in his character of an attorney, it is not essential to show that the hearers knew the fact at the time of speaking, for they may know it afterwards, and communicate the words to those who know it. P. C. *Fleetwood* v. *Curley*, Hob. 267. Where the libel consisted of an insertion in a circular letter, sent by the secretary of a society for the protection of trade, stating "that a bill drawn on and accepted by the plaintiff was made payable at a banker's where he had no account;" held, that as it stated a specific fact which required no explanation, a witness could not be asked what he understood by finding a person's name in such a paper; but the Judge permitted the question, whether such statement had any other meaning beyond that which was expressed on the face of it. *Humphreys* v. *Miller*, 4 C. & P. 7. A letter threatening to accuse the party of an infamous crime, but not naming it, was held to be within the 4 Geo. 4, c. 54, and that declarations of the prisoner as to what he meant are admissible. *Tucker's Case*, 1 Ry. & M. 134. Where the libel purported to be the report of a proceeding in the Insolvent Court, and imputed to the insolvent's landlord (the plaintiff) that he colluded with the insolvent in putting in a fictitious distress; held, that the Judge ought not to have left it as a question to the jury, whether the defendant *intended* to injure the plaintiff, but that if he thought the tendency of the publication injurious to the plaintiff, to have told them it was actionable, and that the plaintiff was entitled to a verdict. The law presumes a party to have intended to produce the injury which his act is calculated to effect. *Haire* v. *Wilson*, 9 B. & C. 643. And see *Ward* v. *Smith*, 6 Bing. 749. Where the direction of the Judge to the jury was substantially, whether the tendency of the libel was injurious to the plaintiff, and that they were to collect the intention of the defendant from the libel itself, the Court refused a new trial. *Fisher* v. *Clement*, 10 B. & C. 472. The question where the language of an alleged libel is ambiguous, is not as to the intention of the publisher, but the tendency of the matter published to injure the plaintiff. Ib. Lord Ellenborough, in the case of *Dubost* v. *Beresford*, 2 Camp. 512, held that the declarations of spectators admitted to see a libellous picture were evidence to show the intention to represent the parties libelled. The word rob is actionable unless it appear to have been used in a sense not actionable. *Tomlinson* v. *Brittlebank*, 4 B. & Ad. 630.

(*f*) *Supra*, Vol. I. tit. Variance, and see *May* v. *Brown*, 3 B. & C. 128. *Sellers* v. *Till*, 4 B. & C. 656. *Harvey* v. *French*, 1 C. & M. 11. *Williams* v. *Stott*, 1 C. & M. 687.

(*g*) See *Roberts* v. *Camden*, 9 East, 93. *Day* v. *Robinson*, 1 A. & E. 558. *Harvey* v. *French*, 1 C. & M. 11. *Williams* v. *Gardner*, 1 M. & W. 245.

Evidence of malice.

their plain import and meaning, in their usual and ordinary sense. If the natural tendency and import of the expressions used be to vilify, defame and injure, then, according to every principle of reason and justice, the plaintiff must be taken to have acted maliciously, that is, with a view to effect those consequences to which the means which he has used naturally and obviously tend (*h*).

Where, therefore, there is no doubt as to the illegal quality of the words or writing published, and no circumstances appear which in point of law entitle the speaker or writer to any privilege in making the communication, his malice is a mere inference of law from the act of publication, and no extrinsic proof of malice is necessary (*i*).

But where it appears that the words were spoken or libel published on an occasion and under circumstances which the law regards as privileged, that is, as it seems, where they were spoken or published in the *bonâ fide* discharge of some legal or moral duty to society, or even in the fair and honest prosecution of the rights of the party himself, or the protection of his interests, the plaintiff will fail, unless he can establish the malicious intention by means of the words or libel, or by sufficient extrinsic evidence, and show that the defendant used the occasion as a mere colour and pretext for venting his malice (*k*). In some instances, indeed, which will be afterwards noticed, where the publication occurs in the performance of a legal duty, which the defendant is *bound* to perform, the occasion of publication is not merely *evidence* to rebut the inference of

(*h*) *Supra*, tit. INTENTION. Ld. Kenyon's observations in *R.* v. *Lord Abingdon*, Esp. C. 228. In *R.* v. *Creevey*, 1 M. & S. 273, which was an indictment against a member of parliament, for publishing in a newspaper a speech which he had delivered in the House of Commons, it was objected that the malice ought to be proved by extrinsic evidence; but Le Blanc, J. informed the jury, that where a publication is defamatory, the law infers malice, unless anything can be drawn from the circumstances attending the publication to rebut that inference; and added, that in point of law, the circumstance of its being a publication of a speech delivered by a member of the House of Commons did not rebut it. Vide *supra*, tit. INTENTION; and *infra*, tit. MALICE. See also, *R.* v. *Harvey*, 2 B. & C. 257. *Macpherson* v. *Daniels*, 10 B. & C. 272. In 6 East, Lord Ellenborough observed, that in *Bromage* v. *Prosser*, 4 B. & C. 247, it was held that where the occasion of speaking the words affords a *primâ facie* justification, there malice in fact must be proved; but that where the act is in itself injurious, and is not privileged by any legal occasion, malice is a mere inference of law from the act itself. The Court are the judges of libel or no libel. *Levi* v. *Milne*, 4 Bingh. 195. See Starkie on Libel, 2d edit. Preliminary Discourse, vol. 1, c. 8—13; vol. 2, c. 12, and the 6th Report of the Criminal Law Commissioners. In case for libel on a shipowner, alleging that his vessel was not seaworthy, and was hired by Jews, and intended to take in convicts; it was held to be a libel in his business, and entitling him to recover damages, without proof of malice, or allegation of special damage. *Ingram* v. *Lawson*, 6 Bing. N. C. 212.

(*i*) Where the plaintiff brought an action against the defendant, for saying that he had heard that the plaintiff was hanged for stealing a horse, and upon the evidence it appeared that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited, because the words were not spoken maliciously. Lev. 82; cited by Twysden, J., as a case which he had heard tried before Hobart, J., and all the Court agreed that the plaintiff had been properly nonsuited. See 1 Vin. Ab. 540. It may, however, well be doubted whether at the present day the mere absence of a malicious and injurious intention, without any justifying occasion recognised by the law, would furnish a legal defence for the use of words in themselves defamatory and illegal. If a man were falsely to say, though in sorrow, that a trader had become bankrupt, and a loss were occasioned by the assertion, it ought, in point of natural justice, to be compensated by the party who, through ignorance or carelessness, and without any legal cause, occasioned the loss; and the case stands on the same footing, though no actual loss can be proved, but where the law presumes one, and constitutes the communication a substantive injury.

(*k*) The jury may infer express malice, from the terms of the libel itself. *Wright* v. *Woodgate*, 2 C. M. & M. 573.

malice, but is an absolute bar to the action; as, where the party was acting in the capacity of a Judge, or witness, or party in the cause (*l*). And in such cases the malice of the party is immaterial. In other cases, where the publication arises in the course of discharging any duty, the performance of which is required by the ordinary exigencies of society, although the party was under no absolute legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *primâ facie* justification. Evidence of malice.

Thus where a party having *probable cause* lays claim to land, and a loss results to the real owner, it is a question for the jury whether the defendant acted *bonâ fide*; and the want of probable cause for making the claim, unless it be such as induces the jury, under the circumstances, to infer that the defendant acted out of malice (*m*), will not entitle the plaintiff to recover. Where a master gives the character of a servant, malice will not be presumed, but must be expressly proved (*n*); and that whether the master be or be not asked for a character (*o*). In such cases, proof that the master sought occasions of speaking ill of the servant, without any application to him for a character, and that the representation was made in heat and passion, after a quarrel between them, and above all, that the master *wilfully* misrepresented the servant's character contrary to his better knowledge, are important manifestations of malice in support of the action (*p*). Again, where a communication, imputing misconduct to the plaintiff, is made confidentially by a person *interested*, or to a person *interested*, no action is maintainable, provided it was made *bonâ fide* with a view to the interests of those concerned (*q*); and

(*l*) *Infra*, 638. So where the defendant pleads that the allegations are true. See Starkie's Law of Libel, 229, 2d edit.; or where the defendant pleads that he has merely repeated the words of another, and that he has given up the author. Ibid. 329.

(*m*) *Pitt* v. *Donovan*, 1 M. & S. 639. *Smith* v. *Spooner*, cor. Lord Ellenborough, 1811. Starkie on Libel, 287, 2d edit. Where the owner of a house had prevented the plaintiff, his lessee for years, from disposing of the remainder of his term, by falsely asserting that he had no title, it was left to the jury to say whether there was malice or not. See *Gerard* v. *Dickenson*, 4 Rep. 18; and the cases cited, Starkie on Libel, Vol. I. p. 287, 2d edit. *Smith* v. *Spooner*, 3 Taunt. 246.

(*n*) *Hargreave* v. *Le Breton*, 4 Burr. 2425. *Weatherstone* v. *Hawkins*, 1 T. R. 110. Burr. 2425. *Edmonson* v. *Stephenson*, B. N. P. 8. If, as laid down in *Weatherstone* v. *Hawkins*, 1 T. R., it be incumbent on the plaintiff to prove the *falsity* as *well* as malice of the charge, it seems that, provided malice be shown, general evidence of good conduct would be sufficient *primâ facie* evidence to establish the falsity where the charge is specific, for in such a case, where the imputation is in fact unfounded, it is impossible that the plaintiff should be prepared with particular evidence. And see *Pattison* v. *Jones*, 8 B. & C. 578. *Child* v. *Affleck*, 9 B. & C. 403. To prove such express malice evidence that the character was false is admissible. *Rogers* v. *Clifton*, 3 B. & P. 587. *Pattison* v. *Jones*, 8 B. & C. 578. *King* v. *Waring*, 5 Esp. C. 13.

(*o*) *Rogers* v. *Sir Gervase Clifton*, 3 B. & P. 587. But the fact that the master volunteered the giving of the character, is a circumstance to be taken into consideration in estimating the defendant's motives. See the observations of the Court in *Pattison* v. *Jones*, 8 B. & C. 578; *Child* v. *Affleck*, 9 B. & C. 403.

(*p*) Ibid. And see *Lowry* v. *Aikenhead*, cited 3 B. & P. 587. If the plaintiff, knowing what character the master will give, procure it to be given for the purpose of founding an action upon it, he will not, it is said, be entitled to recover.

(*q*) *M'Dougall* v. *Claridge*, 1 Camp. 267. Where the defendant wrote a letter to his bankers, charging the plaintiff, a solicitor, with misconduct in the management of their concerns, it appeared that the letter was written confidentially, and that the defendant was himself interested in those affairs, and Lord Ellenborough nonsuited the plaintiff, and referred to the case of *Cleaver* v. *Sarraude*, where it appeared that the letter had been written confidentially by the defendant to the Bishop of Durham, to inform him of malpractices on the part of the plaintiff as the Bishop's steward, and the learned Judge nonsuited the plaintiff. So where the

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although in such case the expressions used are stronger than the exigency of the case warranted, it is a question for the jury whether they were used with an intention to defame, or with good faith to communicate facts, in the knowledge of which the party had an interest (*r*). Where an advertisement was published in a newspaper, the tendency of which was to throw upon the plaintiff a suspicion that he had been guilty of bigamy; yet, as it appeared that this had been done at the instance of the plaintiff's wife, it was left to the jury, under the circumstances, to say whether it had been done *bonâ fide* on behalf of the wife, in order to ascertain a fact in which she was materially interested (*s*). So where the alleged slander was contained in a communication made by the defendant, a sergeant in a volunteer corps, of which the plaintiff was also a member, to the committee by which the affairs of the corps were conducted, that the plaintiff was an improper person to remain a member of the corps (*t*). So where the words are delivered by way of admonition or advice (*u*), or spoken in confidence and friendship (*x*).

plaintiff, a dissenting minister, went with a friend to the defendant, who in answer to questions put to him, stated that his wife had been cautioned against the plaintiff as a drunkard, &c. *Warr* v. *Solly*, 6 C. & P. 497. Where, in an action of slander against the defendant, a surveyor employed by a committee to investigate the truth of reports against the plaintiff, as having executed improperly contract work for them, which the defendant alleged, on such inquiry, to be the case; held, that such a report was not a privileged communication, it being found by the jury that the reports originated with the defendant, and were false. *Smith* v. *Matthews*, 2 M. & M. 151. And see Starkie on Libel, Vol. I. c. xiii. 2d ed.

(*r*) *Dunmore* v. *Bigg*, 1 Camp. 269, where the defendant having supplied beer to the plaintiff, for which Leigh was surety, went to Leigh and complained of the plaintiff's conduct in terms of great opprobrium, there being a sum then due for beer, and Lord Ellenborough, considering that the defendant had been betrayed by his passion into unwarrantable expressions, left the question of malice to the jury. A letter addressed to the Judge, being an irregular and improper proceeding, cannot be considered as falling within the rule as to privileged communications. *Gould* v. *Hulme*, 3 C. & P. 625. Where the libel, professing to be a report of proceedings in a court of justice, did not profess to state facts as deposed to by witnesses, but only as stated by the counsel for the prosecution; held that it could not be justified as a privileged publication; and that the Judge properly rejected evidence of publications by others to the same effect. *Saunders* v. *Mills*, 6 Bing. 213.

(*s*) *Delany* v. *Jones*, 4 Esp. C. 191. Where the alleged libel was contained in a handbill offering a reward for the recovery of bills, and stated that the plaintiff was believed to have embezzled them; held, that if it was done with the view solely to protect persons liable on the bills, or for the conviction of the offender, it was a good defence; and that in order to show the *bonâ fides* of the defendant, evidence of his having preferred a charge of the same nature against the plaintiff was admissible. *Finden* v. *Westlake*, 1 M. & M. 461. See *Lay* v. *Lawson*, 4 Ad. & Ell. 795, and the remarks there made on *Delany* v. *Jones*. So in the case of an advertisement for the discovery of the plaintiff, an absconding debtor, at the instance of a party who had sued out a *capias* in order to enable the sheriff to take him. *Lay* v. *Lawson*, 4 Ad. & Ell. 795; and see *Finden* v. *Westlake*, M. & M. 462. If, however, the publication be more extensive than is necessary for the purpose of procuring the desired information, it will be actionable. *Brown* v. *Crome*, 2 Starkie's C. 297, subject, however, to the observations, *supra*.

(*t*) *Barbaud* v. *Hookham*, 5 Esp. C. 109.

(*u*) *M'Dougall* v. *Claridge*, 1 Camp. 267; *Dunmore* v. *Bigg*, 1 Camp. 269; *Herver* v. *Dawson*, B. N. P. 8; *Twogood* v. *Spyring*, 1 C. M. & R. 181; 4 Tyr. 582, C. C.; and see *Brooks* v. *Blanchard*, 1 C. & M. 779. See the remarkable case, Cro. J. 90, cited by Lord Coke, where a clergyman, in his sermon, recited as a

(*x*) *Herver* v. *Dawson*, B. N. P. 8. An action was brought against a man for warning his friend respecting the circumstances of the plaintiff; and Pratt, C. J., directed the jury, that if they were of opinion that the words were not spoken out of malice, but in confidence and friendship, and by way of warning, they should find the defendant not guilty; which they did.

Upon similar principles, fair criticisms upon the merits of literary works are not actionable. Proof of malice.

If a commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, or follow the plaintiff into private and domestic life, for purposes personally slanderous, and unconnected with the work whose merits he professes to discuss, he exercises, it has been said by authority, a fair and legitimate right (*y*); but it is a question for the jury, whether the defendant has not made false assertions in point of fact, for injurious purposes, or exceeded the bounds of fair and legitimate criticism for the purpose of personal slander (*z*). Where the ground of complaint was, that the defendant had charged the plaintiff with the publication of books of an improper and immoral tendency, Lord Ellenborough informed the jury that it was certainly libellous gravely to impute to a bookseller a publication to which he was a stranger, as the evident tendency of the imputation was to hurt him in his business (*a*). Where an action was brought for publishing in a newspaper a paragraph, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and that the performance was despicable, Lord Kenyon said, "the editor of a public newspaper may fairly and candidly comment on any place, or species, of public entertainment, but it must be done fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel, and actionable" (*b*).

story out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted on him, and died by the hand of God; whereas in truth he never was so plagued, and was himself present at that sermon; and he brought his action on the case; and Wray, J., delivered the law to the jury, that it being delivered but as a story, and not with any malice, or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty. This case seems, however, to have been decided on a principle, the generality of which is now questionable, viz. that there was no malice in fact. It seems to be now settled that malice in law will support the action in the absence of circumstances which constitute a privileged occasion, or in a case of unnecessary publicity. In the case cited, it may be questionable whether the publicity of the communication did not exclude a defence on the score of privilege. A letter to a father advising him to have better regard to his children, though it use scandalous words, yet, if written *bonâ fide*, is not libellous, 2 Brownl. 150; *secus* if published in a newspaper, although the pretence should be reformation. *R.* v. *Knight*, Bac. Ab. Libel, A. 2.

(*y*) By Ld. Ellenborough, C. J., in *Carr* v. *Hood*, 1 Camp. 355; *Tabart* v. *Tipper*, Camp. 350. And see *Soane* v. *Knight*, 2 M. & M. 74. *Thompson* v. *Churchill*, 2 M. & M. 187. *Macleod* v. *Wakley*, 3 C. & P. 311. *Fraser* v. *Berkeley*, 7 C. & P. 621. Whatever is fair, and can be reasonably said of the works of authors, or of themselves as connected with their works, is not actionable, unless it appear that under the pretext of criticising the works, the party takes the opportunity of attacking the character of the author. Whatever is published by the defendant at any time before the trial may be admitted in order to show his motives; but an admission of his being the publisher of the periodical work cannot be extended beyond the date of such admission. *M'Leod* v. *Wakley*, 3 C. & P. 311. The defendant published of a painting publicly exhibited, that it was a mere daub, with other strong terms of censure; held that it was a question for the jury, whether this was a fair and temperate criticism, or only the vehicle of personal malignity towards the plaintiff. *Thompson* v. *Shackell*, 1 M. & M. 187.

(*z*) Ibid.

(*a*) *Tabart* v. *Tipper*, 1 Camp. 350. In that case the counsel for the defendant were permitted to inquire, upon cross-examination, whether the defendant had not published particular books; but *qu.*

(*b*) *Dibdin* v. *Bostock*, 1 Esp. C. 29. So it is not libellous to comment fairly upon a petition relating to matter of general interest, which has been presented to Parliament and published. *Dunne* v. *Anderson*, 3 Bing. 88; R. & M. 287.

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It seems to be a general rule, embracing all the cases above referred to, where the occasion affords presumptive *primâ facie* evidence to rebut the inference of malice, that if it can be shown that the object of the party was malignant, and that the occasion was laid hold of as a mere colour and excuse for gratifying his private malice with impunity, the action is maintainable.

It is no answer to the action to show that the words were spoken carelessly, wantonly, or in jest; it has been well observed, that the mischief to the reputation of the party grieved is no wise lessened by the merriment of him who makes so light of it (*c*). A wanton disregard of the feelings and interests of others is perfectly consistent with malice, in every sense of the word; and a man does not the less intend to injure another, and therefore his act is not the less malicious, because his primary object is to derive some private gratification or emolument to himself (*d*). It is, however, also to be observed, that a mere excess beyond what was strictly and absolutely necessary, such as the making a statement privileged *per se* in the presence of a third person, does not of itself deprive the communication of its privileged character, and that in such a case it is still a question for the jury whether such communication was made *bonâ fide* or of malice (*e*).

It is also to be observed generally, that although the occasion may protect the party in a publication to a certain extent, such as the circumstances and urgency of the case will fairly warrant, yet that any extraordinary and unnecessary publication, although not considered as resulting from a purely malignant intention, is still to be regarded as proceeding from a careless inattention to the interests and welfare of others, which is culpable in the eye of the law (*f*).

In an action by a servant.

In an action by a servant against a former master for giving a false character, the plaintiff, in order to establish the *malicious intention*, may prove the falsity of the representation made by the defendant (*g*). It has been said, that where the defendant has made a charge against the plaintiff of dishonesty and misconduct, the latter may adduce general evidence of good conduct, even antecedently to the service, general character being in some respects in issue (*h*).

(*c*) Haw. P. C. c. 73.

(*d*) See the observations, tit. INTENTION. If a person were to write a libel, which was published through carelessness or accident, and damage were to result to the party reflected on, it seems that an action might be supported.

(*e*) *Twogood* v. *Spyring*, 1 C. M. & R. 181; 4 Tyr. 582. *Brooks* v. *Blanchard*, 1 C. & M. 779; 3 Tyr. 844.

(*f*) Vid. *infra*, 639; and see *Brown* v. *Croome*, 2 Starkie's C. 297, where Lord Ellenborough held that an advertisement, addressed by an interested party to the creditors of a bankrupt, but reflecting strongly on the character of the bankrupt, would not be justifiable, if the legal object could have been effected by means less injurious. Where a party spread false reports prejudicial to a tradesman, and being called by the employers of the latter to examine the matters complained of, repeated the false statement, it was held that the communication was not privileged. *Smith* v. *Matthews*, 1 Mo. & R. 151. And although in a letter of confidence to an agent, on business in respect of property in which the plaintiff and defendant are jointly interested, a communication as to the plaintiff's conduct in respect of that property is privileged, it is otherwise as to mere foreign matters in respect of his conduct to his mother and aunt. *Warren* v. *Warren*, 1 C. M. & R. 250.

(*g*) *Rogers* v. *Clifton*, 3 B. & P. 587. The master there described the servant as a bad-tempered, lazy, impertinent fellow, and the plaintiff proved (without objection) that whilst he was in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. See also *Pattison* v. *Jones*, 8 B. & C. 578.

(*h*) *King* v. *Waring & Ux.* 5 Esp. C. 13; but see above, 307. It has been held, that a servant in an action of this nature must prove the character to

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For the purpose of proving malice in a case where the intention is ambiguous, and proof of malice in fact is essential, it seems that any acts or words used by the defendant, tending (*i*) to prove a malicious and malignant intention towards the plaintiff, are admissible in evidence; although the words so given in evidence be in themselves actionable, and be not specified in the declaration (*k*), and although they were spoken subsequently to the words declared upon (*l*). So where a libel was published in a weekly political paper, evidence was admitted of the previous sale of other papers, with the same title, at the same office, in order to show that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal (*m*). In an action for a malicious prosecution of an indictment for perjury, evidence was admitted of an advertisement published by the defendant pending the libel, although an information had been granted for publishing that advertisement (*n*).

* In an action for words imputing perjury, the plaintiff was allowed to prove, that subsequently to the speaking of the words, the defendant preferred an indictment against him (*o*). Where, however, other words not specified in the declaration, are given in evidence to prove malice, the defendant is at liberty to prove the truth of the words, for he had no opportunity of justifying. But it has been held, that other libels published by the defendant of the plaintiff, are not admissible in evidence to prove malice, unless they

have been given *maliciously* as well as *falsely* (*Weatherstone* v. *Hawkins*, 1 T. R. 110); the reason seems to be, that the knowledge of the servant's misconduct may often be confined to the master himself, and being unable to prove it by his own testimony, if the general presumption arising from his not justifying were to operate against him, and it were to be inferred that his representation was false, he would be left without defence. In order to prevent this inconvenience, the law does not permit the presumption so to operate, but requires proof of malice *aliunde*. No stronger proof of malice can be given than by evidence that the master *knew* that the character which he gave was false. Any evidence therefore which tends to such proof seems to be admissible and material evidence, but proof of a general character at an antecedent period is very remote from this object. In the case of *Stuart* v. *Lovell*, 2 Starkie's C. 93, Lord Ellenborough, C. J. refused to permit the plaintiff in an action for a libel, under the plea of the general issue, to go into evidence to disprove the charges contained in the libel. In a case before Abbott, L. C. J. (cited 4 B. & A. 132), the prosecutor was admitted to give evidence of the falsity of the charge, under the particular circumstances of the case, the supposed libel containing little more than a narrative of certain facts supposed to have taken place in one of the West India islands. In such a case it is competent to the defendant, under the general issue, to prove the truth of the facts.

(*i*) In *Kelly* v. *Partington*, 4 B. & A. 700, very slight proof of express malice held to be sufficient to go to a jury. The master had been remonstrated with after having charged the plaintiff, formerly his maid-servant, with theft, and stated to him that she might (in consequence of the charge), have gone upon the town, to which he answered, "What is that to us?"

(*k*) *Lee* v. *Huson*, Peake's C. 166. *R.* v. *Pearce*, Ibid. 75. *Mead* v. *Daubigny*, Ibid. 125. *Warne* v. *Chadwell*, 2 Starkie's C. 457. *Stuart* v. *Lovell*, 2 Starkie's C. 93; Starkie's L. L. vol. 2, p. 58. But where other words than those laid in the declaration are given in evidence, their truth may be proved by the defendant; for then truth could not be pleaded. *Warne* v. *Chadwell*, 2 Starkie's C. 93.

(*l*) *Russel* v. *Macquister*, 1 Camp. C. 49. And see *Macleod* v. *Wakley*, 3 C. & P. 312. *Tate* v. *Humphrey*, 2 Camp. 73. *Lee* v. *Huson*, Peake's C. 166. *Chubb* v. *Westley*, 6 C. & P. 436. And previous slander, in respect of which damages have been recovered, may be given in evidence. *Defnis* v. *Davies*, 7 C. & P. 162. The insertion of the same libel in substance, in other newspapers, is evidence of malice, although there are counts in the declaration to meet such other publications; and a demurrer to some of the pleas does not prevent the defendant from proving the truth of the libel. *Delegal* v. *Highley*, 8 C. & P. 444.

(*m*) *Plunkett* v. *Cobbett*, 5 Esp. C. 136.

(*n*) *Chambers* v. *Robinson*, Str. 691.

(*o*) *Tate* v. *Humphreys*, 2 Camp. 73, n. cor. Graham, B.; and afterwards by the Court.

Proof of malice.

refer to the libel set out in the declaration (*p*); and in such cases the jury are not to consider the effect of such evidence in their measure of damages, but merely as a circumstance to prove malice (*q*). And as such evidence is merely to be used as evidence of the *quo animo*, it seems that where there is no doubt as to the intention, it ought not to be resorted to (*r*).

Damages.

4thly. The general rule is, that no evidence of special damage is admissible unless it be averred in the declaration; whether special damage be the gist of the action, or be used as matter of aggravation, the words being in themselves actionable (*s*). But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation (*t*).

Where the damage consists in loss of marriage, the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss (*u*). So if he allege loss of marriage with *M. N.* he cannot give in evidence loss of marriage with any other person (*x*).

In an action for slander, by which the plaintiff has lost his customers, he cannot give in evidence the loss of any whose names are not specified in the declaration (*y*). But where it is alleged as special damage that the plaintiff was prevented from selling his estate, and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders are not specified, for the loss is the preventing of the sale (*z*), and proof that persons would have purchased is evidence of such prevention.

The persons who are alleged in the declaration to have discontinued their dealings with the plaintiff ought to be called to prove the fact (*a*); and their mere declarations of the fact are not receivable in evidence (*b*).

Where the plaintiff alleged that he had been employed from time to time to preach to a congregation of Dissenters, and that by reason of the words, the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the Court, after a verdict for the plaintiff, on motion in arrest of judgment, held that the allegation of damage was sufficient, for he could not have stated the names of all his congregation (*c*).

(*p*) By Sir J. Mansfield, C. J. in *Finnerty* v. *Tipper*, 2 Camp. 72; who observes, "you might as well give evidence of one highway robbery on the trial of another."

(*q*) Ibid.

(*r*) See *Stuart* v. *Lovell*, 2 Starkie's C. 93. In strictness, however, such evidence, if tendered, ought to be admitted in all cases where the intention is in the least equivocal, and proof of malice is essential, for it is impossible either for the party or the Court to pronounce *à priori*, whether, independently of the proposed evidence, the jury will be satisfied on the point of malice. It has been said, that *subsequent* words of the same import with the slander are not admissible where the words declared on are unambiguous. *Pearce* v. *Ormsby*, Mo. & R. 455. *Symmons* v. *Blake*, Mo. & R. 477.

(*s*) R. N. P. 7; 1 Will. Saund. 243, n. 5. It was formerly held, that where special damage was the gist of the action, such special damage might be given in evidence, although the particular instances were not specified; otherwise, where the words were actionable. Str. 666. Where the words are actionable *per se*, evidence of special damage is unnecessary. *Tripp* v. *Thomas*, 3 B. & C. 427.

(*t*) Per Cur. in *Wetherell* v. *Clerkson*, 12 Mod. 597; 2 Lutw. 1295. See *Clarke* v. *Periam*, 2 Atk. 33.

(*u*) 1 Sid. 396; 1 Vent. 4. *Hunt* v. *Jones*, Cro. J. 499; 12 Mod. 597. *Barnes* v. *Prudlen*, 1 Roll. Ab. 58.

(*x*) Lord Raym. 1007.

(*y*) 8 T. R. 130.

(*z*) See *Smead* v. *Badley*, Cro. J. 397; Sir W. Jones, 196.

(*a*) 1 Saund. 243, d.

(*b*) *Tilk* v. *Parsons*, 2 C. & P. 201; 1 Esp. C. 50.

(*c*) *Hartley* v. *Herring*, 8 T. R. 130. See Starkie on Libel, vol 1, p. 440, 2d ed.

In such a case, therefore, it should seem that general evidence of the loss of emolument would be admissible. Proof of special damage.

A plaintiff under an allegation of general injury, may show a general diminution of business; but if he seeks specific damages he must give specific evidence (*d*).

Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts; but that they could not be asked whether particular persons had not given up their boxes (*e*).

The jury are not bound to confine the damages to those sustained between the publication and the action (*f*).

In case for libel on the plaintiff in the way of his trade, imputing insolvency, and in other counts alleging special damage by the stopping of the partnership in which the plaintiff was engaged; held, that the plaintiff was entitled to maintain the action alone, as the words were not necessarily injurious to the firm, in which case only a joint action could be maintained (*g*).

The plaintiff must also prove that the damage was the consequence of the defendant's act (*h*). That the damage followed from the act.

The connection between the wrong done by the defendant, and the loss to the plaintiff, is matter of evidence. It is nevertheless a rule of law that the damage must be the natural and immediate consequence of the wrongful act. The defendant asserted that the plaintiff had cut his master's cordage, upon which the master had discharged the plaintiff from his service, although he was under an engagement to employ him for a term; but the Court held that the discharge was not a ground of action, since it was not the natural consequence of the words spoken (*i*). The damage must be attributable *wholly* to the words (*k*).

Where the reason which a party assigned for not employing the plaintiff was founded *partly* on the defendant's words, and partly on the circumstance that he had been previously discharged by another master; it was held that no action was maintainable (*l*).

Where the defendant libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged, as special damage, that his oratorios had in consequence been more thinly

(*d*) *Delegal* v. *Highley*, 8 C. & P. 444.

(*e*) *Ashley* v. *Harrison*, 1 Esp. C. 48.

(*f*) 6 Bing. N. C.; 9 C. & P. 326.

(*g*) *Harrison* v. *Bevington*, 8 C. & P. 713.

(*h*) But words are not actionable, although special damage may have ensued, unless the words be disparaging. *Kelly* v. *Partington*, 5 B. & A. 645; 3 N. & M. 116.

(*i*) *Vicars* v. *Wilcocks*, 8 East, 1. And see *Morris* v. *Langdale*, 2 B. & P. 284, where it was doubted, whether the occasioning a third person to break his contract with the plaintiff was a sufficient special damage, since the plaintiff might obtain a satisfaction by action for the breach of contract; but *qu.* whether in actions for words, by means of which the plaintiff has lost a marriage, it would be a bar to the action to show that a promise of marriage had been made; and *qu.* whether it be not a sufficient damage that the plaintiff, by the defendant's wrongful act, has had a benefit in possession wrested from him, and converted into a bare right to be enforced by action.

(*k*) The declaration alleged, that by reason of the defendant's false and slanderous words, one *J. B.* refused to trust the plaintiff; and the evidence was, that the words were spoken to one *E. B.*, who of his own accord repeated the words to *J. B.* without any authority from the defendant; held that a nonsuit was proper. *Ward* v. *Weeks*, 7 Bing. 211. And see *M'Pherson* v. *Daniels*, 10 B. & C. 263, overruling the 4th resolution in *Lord Northampton's Case*, 12 Co. 134.

(*l*) 8 East, 1.

Proof of special damage.

attended, it was held by the Judge at the trial that the injury was too remote (*m*), and that it did not appear but that the refusal to perform arose from caprice or indolence.

The plaintiff having once recovered damages, cannot afterwards recover any ulterior compensation for any loss resulting from the same words (*n*).

By the rules H. T. 4 W. 4, in actions on the case, "not guilty" shall operate only as a denial of the breach of duty or wrongful act charged, and not of facts in the inducement. In an action of slander of a plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged. All matters in confession or avoidance, shall be pleaded as in *assumpsit*.

Proof in defence.

5thly. The defendant may, under the general issue, give in evidence any matter which tends to disprove either the speaking of the words, or the publication of the libel; or to bar the action or rebut the evidence of malice (*o*), or of special damage. He may prove under this issue, in bar of the action, that the publication was made by the defendant as a member of Parliament, in the course of his duty as such (*p*), or as a Judge (*q*), juror, witness (*r*), or party, in the course of a judicial proceeding (*s*), whether civil or criminal (*t*), even although the Court wanted jurisdiction (*u*), and, as it seems also, where the process was improper (*x*); or upon an application made in the usual course to a magistrate or peace officer (*y*); or in the course of offering a petition to the King (*z*), or Parliament (*a*), or to a committee of the House of Commons appointed by the Commons to hear and examine grievances (*b*); or Secretary at War (*c*), or other person or authority supposed to have the

(*m*) Lord Kenyon, *Ashley* v. *Harrison*, 1 Esp. C. 48.

(*n*) B. N. P. 7.

(*o*) The defendant may, in general, show under the general issue that the communication was privileged by the occasion. *Lillie* v. *Price*, 5 A. & B. 645. *Stockdale* v. *Hansard*, 7 C. & P. 731. *Pattison* v. *Jones*, 8 B. & C. 578. *Blake* v. *Pilford*, 1 Mo. & R. 198. *Fairman* v. *Ives*, 5 B. & A. 644.

(*p*) See 4 Hen. 8, c. 8, and the declaration of the Bill of Rights, 1 Will. & Mary, stat. 2, c. 2; 1 Bl. C. 164. But the privilege does not extend to a publication out of Parliament. *R.* v. *Ld. Abingdon*, 1 Esp. C. 226. *R.* v. *Creevey*, 1 M. & S. 273.

(*q*) *Jekyll* v. *Sir John Moore*, 2 N. R. 341. *R.* v. *Skinner*, Lofft, 55.

(*r*) 2 Ins. 228; 2 Roll. R. 198; Pal. 144; 1 Vin. Ab. 387; Cro. Eliz. 230. *Brodie's Case*, Palm. 144. *Harding* v. *Bulman*, 1 Brownl. 2.

(*s*) *Astley* v. *Young*, 2 Burr. 807; Cro. Jac. 432. The rule extends to the case of *scandalum magnatum*. See *Beauchamp* v. *Sir R. Croft*, Dyer, 285. And see in Starkie on Libel and Slander; and *Weston* v. *Dobniet*, Cro. J. 432. *Ram* v. *Lamley*, Hutt. 113.

(*t*) 3 Bl. Com. 126; 10 Mod. 210. 219, 220; Str. 691. The remedy is by an action on the case for a malicious prosecution, or perhaps by indictment, where the jurisdiction of the Court has been abused by a malicious prosecution. Haw. P. C. c. 73, s. 8; 1 Will. Saund. 132.

(*u*) *Buckley* v. *Wood*, 4 Co. 14.

(*x*) 1 Vin. Ab. 389; 2 Lutw. 1571; *contra*, *Buckley* v. *Wood*, 4 Co. 14.

(*y*) *Ram* v. *Lamley*, Hutt. 113. See also *Barbaud* v. *Hookham*, 5 Esp. C. 109; *Johnson* v. *Evans*, 3 Esp. C. 32.

(*z*) *Hare* v. *Meller*, 3 Lev. 169; see also 4 Rep. 14.

(*a*) See the resolution of the House of Commons in *Kemp* v. *Gee*, 9 Feb. 8 Will. 3, in which it was declared, that all petitions to the House of Commons were lawful, or at least punishable by themselves only.

(*b*) *Lake* v. *King*, 1 Saund. 131; Lev. 241; 1 Mod. 58; Sid. 414.

(*c*) The defendant wrote a letter to the Secretary at War, with intent to prevail upon him to grant his authority to compel the plaintiff, an officer in the army, to pay the defendant a debt due to him, and not for the purpose of slander; and although the letter contained expressions derogatory of the plaintiff's character, yet it was held that the defendant might go into evidence,

means of granting redress for any real or supposed grievance (*d*). But the defence would fail if it appeared that the mode or extent of the publication was not warranted by the usual course of proceeding in such cases. Proof in defence.

In the case of *Lake* v. *King*, the main question was not whether the exhibiting the petition to Parliament was lawful, or not, but whether the defendant was warranted in printing his petition, and delivering copies to members of a committee of the House of Commons; and it was decided for the defendant, on the ground that such a publication was according to the order and course of proceeding in Parliament (*e*). It follows, that had he practised a mode of publication unwarranted by the usual course of proceeding, or by the necessity of the case, this defence would not have availed him (*f*).

So it is a bar to the action that the words suggesting particular facts, though false, were spoken by the defendant in the course of his duty as an advocate, provided they were *pertinent to the subject*, and were *suggested by the client* (*g*). And it will, it seems, be presumed till the contrary appear, that the fact was suggested in the brief (*h*). And no comment by the advocate upon the facts proved in evidence, or epithets used in commenting upon those facts, if the observations relate to the cause, will be actionable (*i*).

Where the alleged libel consists in a faithful report of a judicial proceeding, and the occasion, in point of law, amounts to a justification, doubt has been entertained whether it would be evidence under the general issue (*k*). But it is by no means a general rule, that even a correct report of parliamentary (*l*) or judicial proceedings (*m*) will furnish a legal defence to an action or indictment.

An *ex parte* statement of a criminal proceeding before a magistrate (*n*)

under the plea of the general issue, to prove the truth of the facts which he had stated, in order to show that he had acted *bonâ fide*. *Fairman* v. *Ives*, 5 B. & A. 642; and see *R.* v. *Baillie*, Bac. Ab. tit. Libel, A. 2.

(*d*) As to the postmaster-general, *Woodward* v. *Lander*, 6 C. & P. 548; and see *Blake* v. *Pilfold*, 1 M. & R. 198; and see *Flint* v. *Pike*, 4 B. & C. 484; 1 B. & A. 245, n.

(*e*) 1 Lev. 241; 1 Mod. 58; Sid. 414; of which, it was said, the Court would take notice.

(*f*) Ibid.; and see *Browne* v. *Croome*, 2 Starkie's C. 297.

(*g*) *Brook* v. *Sir Henry Montague*, Cro. J. 90. *Hodgson* v. *Scarlett*, 1 B. & A. 232.

(*h*) *Wood* v. *Gunston*, Styles, 462.

(*i*) *Hodgson* v. *Scarlett*, 1 B. & A. 232. As to mere words of opinion, see Com. Dig. Action on the Case for Defamation, F. 13.

(*k*) *Currie* v. *Walter*, 1 B. & P. 525, where such evidence was admitted under the general issue; but after a verdict for the defendant, it was objected, on motion, that such evidence had been improperly received under that issue; but the case stood over, and no judgment was ever given. In the subsequent cases of *Astley* v. *Yonge*, 2 Burr. 807, and *Styles* v. *Nokes*, 7 East, 493, the defence was pleaded specially. So also in *Lewis* v. *Clement*, 3 B. & A. 702. See also *Lewis* v. *Walter*, 4 B. & A. 613. *R.* v. *Wright*, 8. T. R. 298. *R.* v. *Fisher*, 2 Camp. 563. *Styles* v. *Nokes*, 7 East, 504. *Roberts* v. *Brown*, 10 Bing. 523. It should seem that the defence, where available, is admissible under the general issue, as either excluding altogether the right to maintain the action, or as negativing malice by showing a privileged occasion.

(*l*) *R.* v. *Creevey*, 1 M. & S. 273.

(*m*) See the observations of Ld. Ellenborough, C. J. and Grose, J. in *Styles* v. *Nokes*, 7 East, 493; and *R.* v. *Creevey*, 1 M. & S. 273. See *R.* v. *Lofield*, 2 Barnard, K. B. 128; and *qu.* whether the defendant can justify the publication of a judicial proceeding, which is defamatory, of one who is not a party to the suit, nor present at the inquiry. *Lewis* v. *Clement*, 3 B. & A. 702.

(*n*) *R.* v. *Lee*, 5 Esp. C. 123. *R.* v. *Fisher*, 2 Camp. 563. Where a newspaper professed to give a statement of proceedings before a magistrate, it was held that the insertion of libellous remarks purporting to have been made by persons present, could not be justified. *Delegal* v. *Highley*, 8 C. & P. 444.

Proof in defence.

or coroner (*o*) cannot be justified, for such publications tend to deprive the accused of the benefit of a fair and impartial trial. So the publication of such an account will not be justifiable, if it contain matter of a scandalous, blasphemous, or indecent nature (*p*).

In general, in all cases where the real intention of the defendant is the test of civil liability, that is, as it seems, in all cases where the defendant made the communication upon a fair and honest occasion, with a view to benefit himself or others, but where the circumstances are not such as to furnish an absolute bar, independently of the question of malice, the defence not only may, but must, be given in evidence under the general issue; to plead the defence specially, would be to remove the question of actual malice from the consideration of the jury.

The defendant may therefore prove under the general issue, that the words were spoken or written for the purpose of admonition or advice, or in giving the character of a servant (*q*), in order to bring an offender to justice (*r*), or by way of criticism on a literary work (*s*).

The defendant may also prove, by way of defence, under the general issue, that the publication was procured by the contrivance of the plaintiff, for the purposes of the action (*t*), for the latter cannot complain of that as an injury which he has willingly occasioned. The truth of the publication is not admissible in evidence under the general issue in bar of the action, even to disprove malice (*u*); proof that the plaintiff has been in the habit of libelling the defendant is no bar to the action, but is, it has been said, evidence in mitigation of damages (*x*). It seems, however, that the defendant cannot, even in mitigation, prove that the plaintiff has published libels upon him, unless they constituted the provocation for publishing the principal libel (*y*). General evidence that the plaintiff has been in the habit of libelling the defendant is, it seems, also inadmissible (*z*).

The defendant may also prove accord and satisfaction under this issue. The plaintiff had agreed to waive his right of action, in consideration that

(*o*) *R.* v. *Fleet*, 1 B. & A. 379. Or before a royal commissioner, *Charlton* v. *Walton*, 6 C. & P. 385.

(*p*) *R.* v. *Mary Carlile*, 3 B. & A. 167.

(*q*) *Edmonson* v. *Stevenson*, B. N. P. 8. *Weatherstone* v. *Hawkins*, 1 T. R. 110. *Rogers* v. *Clifton*, 3 B. & P. 587. *King* v. *Waring and Ux.* 5 Esp. C. 13. *Childs* v. *Affleck*, 9 B. & C. 403. Ld. Alvanley, in *Rogers* v. *Clifton*, 3 B. & P. 592, says, "I do not mean to intimate that if a servant were strongly suspected of having committed a felony while in his master's service, he is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." And see the observations of Bayley, J. in *Pattison* v. *Jones*, 8 B. & C. 578.

(*r*) *Johnson* v. *Evans*, 3 Esp. C. 32.

(*s*) *Carr* v. *Hood*, 1 Camp. C. 354. *Tabart* v. *Tipper*, 1 Camp. C. 350. *Dunne* v. *Anderson*, 3 Bing. 88. *Soane* v. *Knight*, 1 M & M. 64. *Thompson* v. *Shackell*, Ib. 187.

(*t*) *King* v. *Waring and Ux.* 5 Esp. C. 13. See *Weatherstone* v. *Hawkins*, 1 T. R. 110, where the letter was written on the application of the plaintiff's brother-in-law, and the writ was sued out the day after the letter was written, and the Court held that the action was not maintainable, the plaintiff having been entrapped into writing it. See also *Smith* v. *Wood*, 3 Camp. 323, where the defendant showed to the witness, at the request of the latter, a caricature of the plaintiff, and it was held that this was not sufficient to support the action; *tam qu.* for it does not appear that the witness had been sent by the plaintiff.

(*u*) *Underwood* v. *Parkes*, Str. 1200.

(*x*) *Finnerty* v. *Tipper*, 2 Camp. 76. See *Pasquin's Case*, Ibid. and *Tabart* v. *Tipper*, 1 Camp. 350.

(*y*) *May* v. *Brown*, 3 B. & C. 113. *Watts* v. *Fraser*, 7 A. & E. 223; having come to his knowledge before the libel in question. *Ib.*

(*z*) *Finnerty* v. *Tipper*, 2 Camp. 76. *Wakley* v. *Johnson*, 1 Ry. & M. 422. *Turpley* v. *Blakey*, 2 Bing. N. C. 473. But see *May* v. *Brown*, 3 B. & C. 113.

defendant would destroy certain documents, which the defendant accordingly did, and evidence of this was held to be admissible as an accord and satisfaction under the general issue (*a*). Proof in defence.

Although, in the ordinary action for slander, the defendant cannot, under the general issue, give evidence of the truth of the defamatory charge (*b*), it is otherwise in special actions, where malice and the want of probable cause are of the essence of the action. For there to adduce such evidence is but to rebut that which is essential to the maintenance of the action. Thus in an action for slander of title, where the slander consists in alleging that the plaintiff had encroached on his landlord's land, the defendant may prove that encroachments have in fact been made (*c*).

The defendant may under the general issue prove in mitigation of damages, that the plaintiff at the time of the publication laboured under a general suspicion of having been guilty of the charge imputed by the words (*d*). For it is material to know what character the plaintiff possessed, in order to ascertain the injury which has been sustained (*e*). In mitigation.

(*a*) *Lane* v. *Applegate*, 1 Starkie's C. 97.

(*b*) In the case of *Stockley* v. *Clement*, 4 Bing. 162, where the alleged libel was contained in a public advertisement, relating to a forged bill of exchange, the defendant was allowed to go into evidence of the facts stated under the general issue; but in that case the Court held that it was no libel on the plaintiff. In an action for a libel against an officer of a court of justice, imputing negligence, the defendant cannot under the general issue prove negligence, in order to negative the general allegation of performance of duty. *Dance* v. *Robson*, 1 M. & M. 295. But in an action for a libel on the plaintiff in the way of his trade as a manufacturer of bitters, which trade it was averred he carrried on in an honest and lawful manner, it was held that, under the general issue the defendant might give in evidence that the plaintiff, under the pretence of manufacturing bitters, made and sold a composition of a very different description, not by way of justification of the libel, but as to the truth of the plaintiff's allegation as to his trade. *Manning* v. *Clements*, 7 Bing. 362, and 5 M. & P. 211.

(*c*) *Watson* v. *Reynolds*, 1 M. & M. 1; and see *Hargreave* v. *Le Breton*, 4 Burr. 2422. *Smith* v. *Spooner*, 3 Taunt. 246. *Pitt* v. *Donovan*, 1 M. & S. 639. Starkie's L. L. vol. 2, p. 103, 2d edit. In the case of *Pattison* v. *Jones*, 8 B. & C. 578, which was an action by a servant against a master, for defamation, in professing to give a character, Lord Tenterden, C. J. received evidence on the part of the defendant to show the truth of the statement contained in the alleged libel, of drunkenness, &c.; but is said to have expressed doubts whether such evidence was admissible under the general issue, and left the matter to the jury, on the question whether the communication had been made *bonâ fide*.

(*d*) *Earl of Leicester* v. *Walter*, 2 Camp. 251, cor. Mansfield, C. J. —— v. *Moor*, 1 M. & S. 284. Note, that in these cases there were general allegations of the plaintiff's previous good character, and of the loss of character sustained by reason of the words; and the words were actionable *per se*.

(*e*) *Supra*, note (*d*); and *Williams* v. *Callender*, Holt's C. 307; *Rodriguez* v. *Tadmire*, 2 Esp. C. 720; where, on an action for a malicious prosecution, Lord Kenyon allowed the defendant's counsel to ask whether the plaintiff was not a man of general bad character. And see the observation of Wood, B. in *Newsam* v. *Carr*, 2 Starkie's C. 70. And see *Ellershaw* v. *Robinson*, Lanc. Sp. Ass. 1824, Starkie's L. Libel, 90, 2d edition; which was an action for words imputing adultery to the plaintiff, a widow, Holroyd, J. held that it would be competent to the defendant to go into general evidence to impeach the plaintiff's general character for chastity. See also *Eamer* v. *Merle*, cited in *The Earl of Leicester* v. *Walter*, 2 Camp. C. 251. —— v. *Moor*, 1 M. & S. 284. It is not, however, competent to the defendant, in such cases, to do more than give *general* evidence of bad character; he cannot inquire as to particular facts. *Waithman* v. *Weaver*, 1 D. & R. 10. *Rodriguez* v. *Tadmire*, 2 Esp. C. 720. But in the case of *Jones* v. *Stevens*, 11 Price, 235, which was an action for a libel on the conduct of the plaintiff as an attorney, where the defendant pleaded the general issue, and several pleas of justification, which alleged in general terms that the plaintiff had conducted himself in a disreputable and unprofessional manner; it was held that a witness could not be asked whether the plaintiff was of general bad character and repute in his profession. It is said to have been held by Chambre, J. (*Snowden* v. *Smith*, Devon Lent Assizes, 1811) that where a justification was pleaded, such general evidence was not admissible. But the ground of distinction is not very clear;

Proof in mitigation.

It has been said that any evidence short of such as would be a complete defence to the action, had a justification been pleaded, is admissible, in mitigation of damages (*f*); and accordingly in an action for a libel, charging the plaintiff with being concerned with one Knowles in procuring money from the friends of a capital convict, under the pretence of being able to procure a pardon, through the medium of the Duke of Portland, evidence was admitted, under the plea of the general issue, of an admission by the plaintiff that he had received money for conveying a letter to the Duke. To admit such evidence would however be a violation of the rule established in *Underwood* v. *Parkes* (*g*), where it was agreed by all the Judges that evidence of the truth could not be admitted, either in bar of the action, or in mitigation of damages, unless it were pleaded. For if facts *tending* to prove the truth of the charge were to be admitted in mitigation of punishment, how would it be possible to draw the line, and stop short of actual conviction (*h*)?

General evidence of bad character seems to be admissible, although the defendant has justified that the imputation is true; for if the justification should fail, the question as to the quantum of damages would still remain (*i*).

Where the defendant has in his libel referred to the source from which he derived the information, he may, although he has not justified, prove, under the general issue, in mitigation of damages, that he did in fact so receive the information (*k*). As where the libel refers to a newspaper as the medium of communication (*l*).

In a late case the defendant was allowed to inquire whether the witness had not read the substance of the alleged libel in a public newspaper (*m*).

The defendant is entitled to have the whole of the publication read from which the alleged libel is extracted (*n*).

and in the case of *Mawby* v. *Barber*, Lincoln Summer Assizes, 1826, Lord Tenterden, C. J. admitted such evidence, as being the safer course, although a justification was pleaded. Vide *supra*, note (*e*). Such evidence was also received by Lord Denman, C. J. after consulting Parke, B. in the case of *Moore* v. *Oastler*, York Sp. Ass. 1836, where the defendant was allowed to give such general evidence, but not to go into particulars; and by Coltman, J. in the case of *Hardy* v. *Alexander*, Liv. Summ. Ass. 1837. See Roscoe on Ev. 398.

(*f*) *Knobell* v. *Fuller*, sittings after Trin. T. 1707, per Eyre, C. J.; and the case of *Curry* v. *Walter* was referred to, in which it was said that his lordship had received similar evidence; but it seems that in that case the evidence was received in bar of the action, and to show that the defendant had merely published a report of proceedings in a court of justice.

(*g*) Str. 1200; and see *Mullett* v. *Hulton*, 4 Esp. C. 248.

(*h*) See Starkie's L. L. vol. 2, p. 88, 2d ed.; and see *Mills* v. *Spencer*, Holt's C. 534, where Gibbs, C. J. observed, that "general reports have been admitted in mitigation of damages, but not the specific facts." And it has since been held that a defendant is not at liberty to give evidence in mitigation of damages of any *fact* which would be evidence to prove a justification of any part of the libel; he ought to have justified as to that part. *Vessey* v. *Pike*, 3 C. & P. 512.

(*i*) *Supra*, tit. CHARACTER.

(*k*) *Mullett* v. *Hulton*, 4 Esp. C. 248.

(*l*) Ibid.; and see *R.* v. *Burdett*, 4 B. & A. 717. Where a libel in a newspaper purported to be a correct account of what took place on a coroner's inquest, a statement of what took place there was held to be admissible in mitigation of damages. *East* v. *Chapman*, 1 M. & M. 46; 2 C. & P. 507. *Charlton* v. *Watson*, 6 C. & P. 385. Where the defendant had published an imperfect account of a trial, which was libellous, he was allowed in mitigation under the general issue to show that he had copied the statement from another newspaper. *Saunders* v. *Mills*, 6 Bing. 213. But in *Creevey* v. *Carr*, 7 C. & P. 64, it was ruled that the defendant could not in mitigation of damages show that the libel had appeared in another newspaper, and that the plaintiff had recovered in an action against the proprietors; but he was allowed to show that it was copied with the omission of passages reflecting on the plaintiff.

(*m*) *Wyatt* v. *Gore*, 1 Holt's C. 303; and *supra*, 641.

(*n*) *Cooke* v. *Hughes*, R. & M. 112.

As the truth, when offered as a defence in bar of an action for slander or libel, must be specially pleaded (*o*), the evidence of course must be governed by the specific allegations upon the record. There seems to be little, if any, difference between the evidence in proof of a specific charge thus involved in a civil proceeding, and the evidence which is essential to support an indictment for a similar charge (*p*). It may happen, indeed, that greater precision may be necessary in the former case than in the latter, and that a variance as to sums or magnitudes, which would not be fatal upon an indictment, would be so upon issue taken on a justification in slander; for there the defendant may, by the specific nature of the charge which he has made, with which his plea must correspond, be bound to prove it with equal precision. If the defendant fail in proving all the matters of exaggeration stated in the libel and alleged in the justification to be true, the plaintiff will be entitled to a verdict on the plea of justification (*q*), although the plea may merely allege that the matters alleged in the libel are true in substance and effect (*r*); but it is otherwise where the part not proved forms no ingredient in the libellous charge (*s*). If the justification does not cover the slander to the full extent, the plaintiff will be entitled to damages for the excess not justified (*t*). Proof in justification.

An acquittal of the plaintiff on an indictment charging him with the same offence as is specified in the plea of justification, does not preclude the defendant from proving the truth of the charge (*u*); and, in strictness, is not evidence at all (*x*). The general good character of the plaintiff is evidence to rebut the presumption of guilt (*y*).

Where the defendant justifies, alleging that he heard the words from another, and mentioned the author when he published them, the proof depends upon the form of the issue taken (*z*). Upon issue taken on the

(*o*) *Smith* v. *Richardson*, Willes, 20; 1 Saund. 130 (*n*). *Underwood* v. *Parker*, 2 Str. 1200. This rule does not, it seems, extend to an action on the case for slander of title. *Watson* v. *Reynolds*, 1 M. & M. 1. Nor does the rule operate to the exclusion of such evidence as is otherwise properly admissible under the general issue. *Manning* v. *Clement*, 7 Bing. 362. *Rogers* v. *Clifton*. The rule does not apply to a special action on the case for consequential damage, as where the action is brought for slander of title. In such a case the truth is evidence under the general issue. *Watson* v. *Reynolds*, 1 M. & M. 1; and see *Hargreave* v. *Le Breton*, 4 Burr. 2422. *Smith* v. *Spooner*, 3 Taunt. 246; *supra*, 641, note (*c*).

(*p*) *Cook* v. *Field*, 3 Esp. C. 133. A plea that the plaintiff had been guilty of bigamy requires as strong proof as on an indictment for that offence; a plea, justifying a charge of polygamy, held sustained by proof of actual marriage in two instances, and of cohabitation and reputation as to a third. *Willmett* v. *Harmer*, 8 C. & P. 695.

(*q*) *Weaver* v *Lloyd*, 2 B. & C. 678.

(*r*) Ibid.

(*s*) *Edwards* v. *Bell*, 1 Bing. 403.

(*t*) The words were, "he has robbed me to a serious amount;" justification as to the words "he has robbed me," which was proved; but the jury gave 40*s*. damages for the excess not justified, and the Court sustained the verdict. *Cooban* v. *Holt*, Lancaster Spr. Ass. 1825, and afterwards cor. Bayley and Holroyd, Justices. Where the statement in a newspaper, professing to give a report on an election petition, went on to comment on a party, bail for one of the petitioners, stating, "he is hired for the occasion," and the plea justified only the former part of the libel; held, that if the part left uncovered would by itself have formed a substantive ground of action, the plaintiff would be liable in damages; *aliter*, if the comment were only a necessary inference from the facts stated. *Cooper* v. *Lawson*, 1 P. & D. 15. Where the plaintiff's ship being advertised for passengers, &c., the defendant published that she was unseaworthy, and had been bought by Jews to take out convicts; held, that a plea to the whole declaration, that the ship was unseaworthy, was insufficient, as the latter allegation in the libel was calculated to deter passengers from applying. *Ingram* v. *Lawson*, 5 Bing. N. C. 66; 7 Dowl. P. C. 125; 6 Sc. 775.

(*u*) *England* v. *Bourke*, 3 Esp. C. 80.

(*x*) *Supra*, Vol. I. and Index. tit. JUDGMENT.

(*y*) Vide *supra*, tit. CHARACTER.

(*z*) This defence cannot, it is said, be set

Proof in justification.

general replication *de injuriâ suâ propriâ*, the *onus* of proving the facts, that he heard the very words spoken by the third person, as alleged in the plea, and that, on repeating them, he gave up his author, lies on the defendant, for the object of the plea is to show that the defendant has afforded to the plaintiff a certain cause of action against another (*a*); it would not be sufficient under this issue to prove that the third person spoke words to the same effect with those laid (*b*).

A plaintiff cannot upon the trial object to the insufficiency of a plea of justification in point of law (*c*).

Libel. Indictment.

II. Upon an *indictment* for publishing a libel, the prosecutor must prove, 1st, The fact of *publication*. 2dly, The introductory *averments* and the *innuendos* (*d*). 3dly, The *malice* of the defendant.

1st. The evidence of publication has already been adverted to. In the case of an indictment, a publication to the prosecutor himself is, as has been seen, sufficient to constitute the offence, on the ground of its tendency to produce a breach of the peace, although a publication to the plaintiff alone would not support an action, since without some further publication no detriment can have resulted to the plaintiff (*e*). The defendant may be found guilty of the publishing, and acquitted of the composing or printing of a libel, where both are conjunctively alleged (*f*).

Proof of malice.

3dly. Many of the observations which have been already made (*g*) apply to the proof of malice. Malice is essential to the offence (*h*); and of the existence of malice, where express malice is essential, the jury are to judge. The defendant's malice consists in his intention to effect the particular mischief; and, as in all other cases, what he intends must be inferred from what he does. If nothing appear from which the intention is to be collected, except the publication of the libel itself, unexplained by any context of circumstances, if the very terms of the document itself tend to scandalize, degrade, and injure the individual, or to excite to acts of outrage and sedition, the *intention* on the part of the defendant to effect those objects must necessarily be inferred, without the aid of any extrinsic proof (*i*).

up under the plea of the general issue. *Mills* v. *Spencer*, Holt's C. 534.; but see Starkie's L. L. vol. 1, p. 458, 2d. ed.

(*a*) See *Ld. Northampton's Case*, 12 Rep. *Crawford* v. *Middleton*, 1 Lev. 82. *Maitland* v. *Goldney*, 2 East, 425. *Woolnoth* v. *Meadows*, 5 East, 463.

(*b*) 2 East, 425. See also *M'Gregor* v. *Thwaites*, 3 B. & C. 24. *Lewis* v. *Walter*, 4 B. & A. 605. And it seems also, that this defence would not be available unless the defendant himself believed the words to be true, and spoke them on a justifiable occasion. *M'Pherson* v. *Daniells*, 10 B. & C. 263.

(*c*) *Edmonds* v. *Walter*, 3 Starkie's C. 7.

(*d*) Vide *supra*, 628.

(*e*) *Supra*, 617.

(*f*) *R.* v. *Hunt & another*, 2 Camp. 583. *R.* v. *Hart*, 10 East, 94. *R.* v. *Williams*, 2 Camp. 646, cor. Lawrence, J. As where the record varies from the printed libel, but agrees with the manuscript delivered by the defendant to the printer. Ibid.; and *R.* v. *Burdett*, 4 B. & A. 717; and see tit. VARIANCE.

(*g*) *Supra*, 629. See the observations of Grose, J., *R.* v. *Creevey*, 1 M. & S. 280. Subsequent publications, if connected with the subject, are evidence to show *quo animo*, &c. Per Lord Ellenborough. *Stuart* v. *Lovell*, 2 Starkie's C. 93.; *R.* v. *Evans*, cor. Bayley, J. Lancaster.

(*h*) *R.* v. *Hart*, 1 Bl. R. 386. *R.* v. *Paine*, 5 Mod. 167.

(*i*) Vide *supra*, tit. INTENTION and LIBEL, 620; and *R.* v. *Creevey*, *supra*, 862; and 1 M. & S. 273. *R.* v. *Burdett*, 4 B. & A. 95. In case of libels, where the publication is proved, the law will infer malice. Per Lord Ellenborough, in *R.* v. *Phillips*, 6 East, 470. But as malice is a material averment on the record, which cannot be established but by the aid of a jury, and malice in law cannot be inferred from a legal act, the verdict, so far as malice is concerned, must, in such a case, depend on the question whether the matter published be or be not a libel, which is of course mere matter of law.

Proof in defence.

The defendant may in his turn rebut the inference of malice by evidence; he may show that he delivered the libel as the innocent agent of another, being himself ignorant of its contents; or that it was published by an agent without his knowledge or authority (*k*); or that he delivered it by mistake (*l*); or give in evidence any circumstances which show that what he did was done in the fair and honest discharge of any duty to society, or even that he acted *bonâ fide* in the prosecution of any claim, where he supposed himself entitled to a remedy, or to possess an interest (*m*). Where the alleged libel is contained in a newspaper, the defendant has a right to have other parts of the same paper, connected with the subject-matter, read in evidence, although they are contained in a different part of the paper (*n*). The defendant may also give in evidence any matter in defence which negatives any of the material allegations contained in the indictment. It is no defence to show that the same libel had already been published by another (*o*); neither is the defendant permitted to give the truth of the libel in evidence (*p*), but he may disprove the fact of publication, or negative the material facts averred, or the truth of the innuendos; as by evidence which shows that the matter published did not relate to the party or subject-matter alleged in the indictment (*q*).

In a late instance a defendant was allowed to prove that he had stopped the sale of a libellous publication, with a view to mitigation of punishment in case of conviction, and to avoid the expense of bringing the fact before the Court by affidavit (*r*).

Effect of the statute 32 G. 3, c. 60.

By the stat. 32 Geo. 3, c. 60, it is declared and enacted, that upon a prosecution for libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue; and by the second section it is provided that the Court or Judge shall, according to their or his discretion, give their or his opinion to the jury on the matter in issue, *as in other criminal cases*. The effect of this statute seems to be simply that of placing the trial for a libel upon the same footing with trials for any other offence, by removing an anomaly which before existed. The statute does not require that the Court shall advance any opinion upon the case, except such as is given at the discretion of the Court in parallel cases (*s*). The offence consists of

(*k*) *R.* v. *Almon*, 5 Burr. 2686; Starkie's L. L. vol. 2, p. 20, 2d. ed. As to the *primâ facie* liability of the proprietor of a newspaper, see *R.* v. *Gutch*, 1 M. & M. 485.

(*l*) Per Cur. *R.* v. *Paine*, 5 Mod. 163.

(*m*) 4 Bl. Comm. 151; 5 Rep. 125; Starkie's L. L. vol. 1, p. 292, and the cases there cited.

(*n*) *R.* v. *Lambert & Perry*, 2 Camp. 398. See *R.* v. *Evans*, 3 Starkie's C. 35, Appendix.

(*o*) *R.* v. *Holt*, 5 T. R. 436.

(*p*) 4 Comm. 151. 5 Rep. 125. And see the cases cited Starkie's L. L. vol. 1, p. 229, 2d ed.

(*q*) *R.* v. *Horne*, 2 Cowp. 672. 675.

(*r*) *R.* v. *Hone*, cor. Ld. Ellenborough, Guildhall sittings after Hil. T. 1817; but *semble*, this is entirely *ex gratiâ*. Vide *supra*, 642.

(*s*) See *Parmiter* v. *Coupland*, 6 M. & W. 105; where the practice is stated to be for the Court to give a legal definition of the offence of libel, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that the rule is the same both in civil and criminal cases; and that the Court is not bound to give an opinion as to the nature of the publication as a matter of law. Hence it may be inferred, that the Libel Act does not, in this respect, distinguish a criminal from a civil proceeding. Where the publication and innuendos are proved or admitted, there is, in reality, no fact for the jury to try, and, if the process of applying the terms of a dry legal definition to the terms of the alleged libel be left to them, some danger of mistake is incurred. Such application is usually matter of law within the province of the Court to decide upon, the making of which, without more special direction, the jury may easily make a mistake. If they mistake in finding that to be a libel which is not a libel, the defendant being improperly convicted (malice in law having been impor-

Effect of the statute 32 G. 3, c. 60.

certain *facts* done, and the *intention* with which they were done. Whether the *facts* be proved is in all cases for the consideration and decision of the jury, aided by the advice of the Court in doubtful cases, as to the weight of evidence.

Whether a particular publication be so far noxious in its bearing and tendencies, either *per se* or in conjunction with alleged facts, as to amount in the abstract to a *libel*, seems to be a pure question of law, just as much as it is a question of law what will constitute an obligation or forgery (*t*). If the publication in consideration of law be libellous, then it is a question of fact for the jury, whether it was *wilfully* and *maliciously* published, subject, however, to the ordinary presumption of law, that in the absence of proof to the contrary, a man intends that which is the natural consequence of the means which he employs. If collateral facts be proved in defence, it is for the Court to pronounce whether they furnish an absolute defence or a qualified one, dependent on the actual or express malice of the publisher, of the existence of which the jury are to decide. It follows that neither the jury nor the parties have a right to expect from the Court any specific and direct opinion upon the *whole* of the case, or any other than that which is ordinarily given at the discretion of the Court to the jury in parallel cases, with respect to the verdict which they ought to find in point of law, as dependent and contingent upon their conclusions in point of fact, drawn from the alleged libel itself, and all the circumstances of the case, as to the meaning, motives, and intention of the defendant (*u*).

LICENCE (*v*).

See TRESPASS.—LEAVE AND LICENCE.—FRAUDS, STAT. OF.

LIEN.

THE evidence to establish a right of lien is either of an *express agreement* (*x*) between the parties in the particular instance, or is *presumptive*,

perly found, as an inference from a lawful act), the mistake may be rectified at some trouble and expense to the defendant, by moving in arrest of judgment, or bringing a writ of error. If the jury should err on the other side, concluding that to be no libel which in law was a libel, the defendant, though guilty, would escape with impunity. It was also held, in the case of *Parmiter* v. *Coupland*, that it was not a misdirection to state to the jury, that in the absence of imputation of wicked or corrupt motives there was a distinction between publications as relating to public and private individuals.

(*t*) See the opinions of the Judges, Howell's St. Tr. *Archbishop of Tuam* v. *Robeson*, 5 Bing. 17. *Levi* v. *Milne*, 4 Bing. 195.

(*u*) See *R.* v. *Holt*, 5 T. R. 436. *R.* v. *Burdett*, 4 B. & A. 95. The observations of Parke, B., in *Parmiter* v. *Coupland*, *supra*, note (*s*). Starkie on Libel, vol. 2, 354, 2d edit.

(*v*) A licence to a lessee to alienc may be executed after a grant of the reversion. *Walker* v. *Bellamy*, Cro. Ja. 102. As to the effect of a licence, see 1 Saund. 287, C. A licence to alienc passes no interest; it merely removes a restraint set on a liberty, and therefore need not be shown in pleading. *Walker* v. *Bellamy*, Cro. J. 102. Any more than a warrant need be shown; for, being executed, it is returned to the sheriff. Cro. J. 372. Otherwise of a thing which has continuance.

(*x*) The owner *agreed* that a mare should remain with the livery-stable keeper as a security for monies advanced, and for her keep, with a power of sale if not otherwise liquidated; held, that he had such a lien upon her as entitled him to maintain trover against the sheriff taking her under an execution against the owner. *Donally* v. *Croucther*, 11 Moore, 479. A lien cannot be acquired by the voluntary and unauthorized act of the party who claims it. *Stone* v. *Lingwood*, 1 Str. 651: the defendant, being master of a ship, brought home a quantity of ivory for the defendant, the owner, and paid the duty; and it was held that he had no lien on the goods. So the finder of a dog cannot detain it against the owner, for the expenses of the keep. *Benstead* v. *Buck*, 2 Bl. 1117. But in *Stone* v. *Lingwood*, it was held that the defendant,

being founded either upon the mode of dealing between the same parties in former instances, or on the *general usage and custom* of the particular trade.

Proof of, by express agreement.

1st. An agreement amongst the members of a particular trade or business to insist upon a lien for their general balance, is legal, and is binding upon all those to whom notice of their terms of dealing has been communicated (*y*). In such a case it is necessary to prove that the employer had notice of the special terms; it is not sufficient to prove that general notice was given by advertisement in the public newspapers, or otherwise, without further showing, by reasonable evidence, that the party to be affected by it read the notice (*z*).

Notice.

Presumptive evidence.

2dly. The *presumption* from former dealings rests upon the general principle, that the parties intended to deal, in the particular instance, upon the same terms on which they had dealt on former occasions, in the absence of any reason for supposing that they intended in that instance either to deal independently of any contract (*a*), or to adopt a fresh one.

Proof. General usage of trade.

3dly. By evidence of a general usage in the particular trade, collected from the dealings of other persons engaged in the same employment, of such notoriety that the inference may fairly be drawn that the parties knew the usage, and adopted it in the particular instance, intending to deal as all others did, according to the known usage of trade. It is a question for a jury in such cases, whether the usage has been so general that the parties must be taken to have acted upon it (*b*).

The nature and force of the evidence requisite for this purpose has been already adverted to (*c*). The custom must be proved by means of witnesses who have had actual and frequent experience of the custom (*d*).

Where the claim attempted to be established is contrary to the general law of the land, the proof is, it is said, to be watched with jealousy (*e*).

Where a carrier claimed a lien for his general balance, and many instances were proved in which the right had been insisted upon, and acquiesced in within ten or twelve years back, and one case in which the same had been

on showing the sum paid, might deduct it from the damages. In *Green* v. *Farmer*, 4 Burr. 2218, the plaintiff recovered against the defendant, a dyer, after tender of the particular lien, but the price of dyeing was deducted in damages. See as to the effect of notice given by a carrier that all goods shall be considered as subject to a lien, not only for the freight due in respect of the particular goods, but also for the balance due from the respective owners, *Wright* v. *Snell*, 5 B. & A. 353; 3 B. & P. 48. Although such a notice may create a lien in respect of the balance due from the real owner, yet it does not create one in respect of the party to whom the goods are addressed, being the mere factor of the owner. *Ibid.*; and see *Oppenheim* v. *Russell*, 3 B. & P. 48; *Butler* v. *Woolcot*, 2 N. R. 64. The carrier's lien does not, as has been seen, devest the consignor's right to stop *in transitu*. *Oppenheim* v. *Russell*, 3 B. & P. 42.

(*y*) *Kirkman* v. *Shawcross*, 6 T. R. 14; and see *Oppenheim* v. *Russell*, 3 B. & P. 42. It has been doubted whether innkeepers, common carriers, &c. can, by notice, entitle themselves to a lien for the general balance. *Ibid.* But it is settled that carriers at least may do this, as they are in the constant habit of making special contracts in opposition to their common-law liability. And see *Rushforth* v. *Hadfield*, 7 East, 224; 6 East. 519.

(*z*) Vide *supra*, tit. ASSUMPSIT.—CARRIERS; *infra*, tit. PARTNERS.

(*a*) *Supra*, 32. *Kirkman* v. *Shawcross*, 6 T. R. 14. 19. *Downman* v. *Matthews*, Prec. in Chan. 580. *Demrinbray* v. *Metcalfe*, 2 Vern. 691. 698.

(*b*) See *Rushforth* v. *Hadfield*, 7 East, 224, and Lord Ellenborough's observations there. Where the usage of wharfingers to claim a general lien had frequently been matter of dispute, and had, in many instances, been rejected, it was held that it could not be supported. *Holderness* v. *Collinson*, 7 B. & C. 212; 1 Ry. & M. 55.

(*c*) *Supra*, tit. CUSTOM.

(*d*) Ibid. And see *Holderness* v. *Collinson*, 7 B. & C. 214; *Bleadon* v. *Hancock*, 4 C. & P. 156.

(*e*) See *Rushforth* v. *Hadfield*, 7 East, 224.

Proof. General usage of trade.

done thirty years ago, and evidence was also given that this had been the *general practice* in the North (where the contract arose), for twenty or thirty years, it was left to the jury to decide whether the usage was so general as to warrant them in presuming that the party employing the carrier knew it, and intended to contract in conformity with it. The jury by their verdict negatived the right of lien, and the Court of King's Bench afterwards refused a new trial (*f*).

It seems to be a general rule, that all tradesmen have a lien on a particular chattel, in respect of the labour bestowed upon it (*g*).

Where the right to insist upon a general lien has frequently been established by evidence, the custom becomes part of the law of the land, and the courts will not afterwards permit it to be disputed (*h*).

(*f*) See *Rushforth* v. *Hadfield*, 7 East, 224.

(*g*) *Naylor* v. *Mangles*, 1 Esp. C. 109. *Spears* v. *Hartley*, 3 Esp. C. 81. Although the work is to be done, and the chattel redelivered at a specific time. *Fairman* v. *Gamble*, 2 C. & P. 266. *Supra*, tit. CUSTOM. And see *Exparte Deeze*, 1 Atk. 228. A workman who bestows labour on a chattel for a stipulated sum may detain the chattel till the price be paid, although it be delivered at different times, if the work to be done under the agreement be entire. *Chase* v. *Westmore*, 5 M. & S. 180. *Secus*, as it seems, where the parties contract for a mode or time of payment inconsistent with the workman's claim to the possession. Ibid. Or where work is done under several distinct contracts. *Markes* v. *Lahee*, 3 Bing. N. C. 408. A lien for work done, must be for work done at the request of the owner. *Hiscox* v. *Greenwood*, 4 Esp. C. 174.

(*h*) As to the lien of an attorney, see 12 Mod. 554. *Mitchell* v. *Oldfield*, 4 T. R. 123. *Exparte Nisbitt*, 2 Scho. & Lef. 279. 315. 15 Ves. jun. 207. 16 Ves. jun. 164. 13 Ves. jun. 161. 195. 14 Ves. jun. 271. *Alger* v. *Hefford*, 1 Taunt. 38. Doug. 104. Ld. Raym. 738. *Hoare* v. *Parker*, 2 T. R. 376. 8 Mod. 306. *Welsh* v. *Hole*, Doug. 226. *Read* v. *Dupper*, 6 T. R. 361. *Griffin* v. *Eyles*, 1 H. B. 122. *Pyne* v. *Earle*, 8 T. R. 407. *Ormerod* v. *Tate*, 1 East, 464. *Glaister* v. *Hewer*, 8 T. R. 70. 1 H. B. 23. 217. 2 N. R. 99. 1 N. R. 22. *Stevenson* v. *Blakelock*, 1 M. & S. 535. By the General Rules, Hil. 2 W. 4, No. 91, no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular in which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted. The lien of a solicitor on a fund in a court of equity, for his costs, is not affected by the bankruptcy of his client pending the suit. *Pounsey* v. *Humphreys*, 1 Coop. 142. A court of equity will not allow the lien of the solicitor to interfere with the equities between the parties; and a party having a lien or right of set-off for costs, is not deprived of it by issuing a writ of attachment for such costs. Of bankers, for their general balance; *Jourdaine* v. *Lefevre*, 1 Esp. C. 66. *Bolland* v. *Bygrave*, R. & M. 271. *Bauctree* v. *Watson*, 2 Keene, 713. *Davis* v. *Bowsher*, 5 T. R. 488. *Saville* v. *Barchard*, 4 Esp. C. 53. *Bosanquet* v. *Dudman*, 1 Starkie's C. 1. Calico-printers, for a general balance; *Weldon* v. *Gould*, 3 Esp. C. 268. *Exparte Andrews*, Co. B. L. 429. Of carriers, for a lien on the particular goods; *Rushforth* v. *Hadfield*, 6 East, 519. 7 East, 224. *Aspinall* v. *Pickford*, 3 B. & P. 44, n. *Oppenheim* v. *Russell*, 3 B. & P. 42. 6 T. R. 14. By water, *Butler* v. *Woolcot*, 2 N. R. 64. Abbott, 112. 215. 244. 1 Esp. C. 23. Dyers, for a particular lien; *Kirkman* v. *Shawcross*, 6 T. R. 14. *Clarke* v. *Gray*, 4 Esp. C. 178. And in some instances, for a general lien; *Saville* v. *Barchard*, 4 Esp. C. 53. *Rose* v. *Hart*, 8 Taunt. 499. *Humphreys* v. *Partridge*, Mont. B. L. 18, (n). And see 6 East, 523. In some instances the evidence has been insufficient to establish a general lien; *Close* v. *Waterhouse*, 6 East, 523, (n). *Bennett* v. *Johnson*, 2 Chitty, 455. *Green* v. *Farmer*, 4 Burr. 2214. Roscoe on Evidence, 533. Factors, to a general lien; *Kruger* v. *Wilcox*, Ambl. 252. *Walker* v. *Birch*, 6 T. R. 262. 6 East, 25. *Hollingworth* v. *Took*, 2 H. B. 501. *Drinkwater* v. *Goodwin*, Cowp. 251. *Hammonds* v. *Barclay*, 2 East, 227. *Man* v. *Shiffner*, 2 East, 523. *Copland* v. *Stein*, 8 T. R. 199. *Houghton* v. *Matthews*, 3 B. & P. 485. Farriers; 7 East, 229. 1 Salk. 18. Bac. Ab. *Trover*, E. 4. *Brennan* v. *Currint*, Say. 224. Selw. 1289. See 6 G. 4, c. 94, and tit. TROVER. Of an innkeeper; *Thompson* v. *Lacy*, 3 B. & A. 283. *Jones* v. *Thurlow*, 8 Mod. 172. *Jones* v. *Pearle*, 1 Str. 556. 6 East, 23. Bac. Ab. tit. *Inns*. Burn's J., tit. *Alehouses*. Salk. 388. Ld. Raym. 867. *Johnson* v. *Hill*, 3 Starkie's C. 172. An innkeeper cannot sell or use a horse on which he has a lien as such, except by particular custom. *Jones* v. *Pearle*, 1 Str. 556. *Jones* v. *Thurlow*, 8 Mod. 172. Cowp. Yelverton, 67. *Thompson* v. *Lacy*, 3 B. & A. 283. *Proctor* v.

Proof. General usage of trade.

As the right of lien may be created, so may it be devested or determined by contract, either expressly or by implication, or by an abuse of the subject-matter, or by the voluntary relinquishment of that possession which is essential to its existence; or the right, though still existing, may be waived by the party entitled to it. Where his possession is determined by wrong, he is entitled to recover in trover. A lien for freight is determined by the receiving and negotiating a bill, although payment was to be made in good and *approved* bills, and the shipowner objected in

Nicholson, 7 C. & P. 67. He cannot take off the clothes of his guest, or detain his person, to secure payment of his bill. *Sunbolf* v. *Alford*, 3 M. & W. 248. The lien is only a particular one on the thing itself in respect of which the debt is incurred; a horse can be detained only for its own meat, &c. 1 Bulstr. 207. Bac. Ab. tit. *Fines*. Burn's J., tit. *Alehouses*. Whitaker on Lien, 118. A livery-stable keeper has not a lien on horses in his stable for their keep, without express agreement. *Wallace* v. *Woodgate*, R. & M. 194. *Johnson* v. *Etheridge*, 1 C. & M. 743. *York* v. *Greenough*, 2 Ld. Raym. 866. A trainer of horses has a lien on a horse for keeping and training. *Bevan* v. *Walters*, M. & M. 236. Insurance *brokers*, for a general balance; *Whitehead* v. *Vaughan*, Co. B. L. 566. *Parker* v. *Carter*, Co. B. L. 567. *Maans* v. *Henderson*, 1 East, 335. *Man* v. *Shiffner*, 2 East, 523. *Snook* v. *Davidson*, 2 Camp. 218. *George* v. *Claggett*, 7 T. R. 359. *Rabone* v. *Williams*, 7 T. R. 360. *Lanyon* v. *Blanchard*, 2 Camp. 597. *Richardson* v. *Goss*, 3 B. & P. 119. *Pulteney* v. *Keymer*, 3 Esp. C. 182. *Mann* v. *Forrester*, 4 Camp. 60. *Maans* v. *Henderson*, 1 East, 335. Of a miller, on the corn ground by him; *Exparte Ockenden*, 1 Atk. 235; 1 M. & S. 180. Packers, for a general balance; *Savill* v. *Barchard*, 4 Esp. C. 53. *Green* v. *Farmer*, 1 Bl. R. 651; 4 Burr. 2222. Pawnees, *Houre* v. *Hartopp*, 3 Atk. 44; Bro. Pledges, 28; Vin. Ab. tit. *Pawn*. E. *M'Combie* v. *Davies*, 6 East, 538. *Paterson* v. *Tash*, 2 Str. 1178. *Newsom* v. *Thornton*, 6 East, 17. *Fitzroy* v. *Gwyllim*, 1 Tr. 153. *Astley* v. *Reynolds*, 2 Str. 915. *Parker* v. *Patrick*, 5 T. R. 175. Tailor; *Hussey* v. *Christie*, 9 East 433; 6 Bac. Ab. 604; Yelv. 67. A printer employed to print numbers of a work not consecutive has a lien on the copies not delivered, for the general balance for the whole of such numbers. *Blake* v. *Nicholson*, 3 M. & S. 167. The part owner of a whale-ship has a lien for salvage. *Holderness* v. *Shackell*, 8 B. & C. 612. A person who by his own labour preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of England to retain the possession of the goods saved until a proper compensation is made him for his trouble. Abbott on Shipp. 398. *Hartford* v. *Jones*, 1 Ld. Ray. 393. *Baring & others* v. *Day*, 8 East, 57. This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury, in an action brought by the salvor against the proprietor of the goods, or the proprietor may tender to the salvor such sum of money as he thinks sufficient; and on refusal to deliver the goods, bring an action against the salvor, and if the jury think the sum tendered sufficient, he will recover his goods, or their value, in trover or detinue. Abbott, Ibid. Of a shipwright, for the repairs of a ship; *Franklin* v. *Hosier*, 4 B. & A. 341. Of a ship-owner; *Horncastle* v. *Farran*, 3 B. & A. 497. *Christie* v. *Lewis*, 2 B. & B. 410. *Hulton* v. *Bragg*, 7 Taunt. 14. *Faith* v. *East India Company*, 4 B. & A. 630. A master of a ship has no lien on the receipt for wages, &c.; 1 B. & A. 575. Of a master of a vessel on the luggage of his passengers, for passage-money; *Wolfe* v. *Summers*, 2 Camp. 631. Of a tailor, on cloth delivered to and made up by him; *Hussey* v. *Christie*, 9 East, 433. A trainer has a lien on a race-horse for the expenses and skill bestowed in the keeping and training him. *Bevan* v. *Waters*, 1 M. & M. 230. And see *Jacobs* v. *Latour*, 5 Bing. 130; 2 M. & P. 201. The plaintiff put a pipe of wine in the defendant's cellar, which he was in the habit of letting, and partly bottled it there, and upon a demand of rent, offered to pay the usual charge, which was refused; held that the defendant was entitled to detain the wine until a reasonable sum was paid for the occupation. *Gray* v. *Chamberlain*, 4 C. & P. 260. A vendor has by the common law a lien upon the property so long as it remains in his possession unpaid for. Hob. 41. *Mason* v. *Lickbarrow*, 1 H. Bl. 363; 2 Bl. Comm. 448. *Hodgson* v. *Loy*, 7 T. R. 440. *Feize* v. *Wray*, 3 East, 93; Noy's Maxims, 88; 7 East, 571. *Dunmore* v. *Taylor*, Peake's C. 41. *Slubey* v. *Hayward*, 2 H. B. 504. *Hammonds* v. *Anderson*, 1 N. R. 69. And may maintain trover if his possession be devested by fraud. *Hawse* v. *Crowe*, R. & M. 414. Of a wharfinger; *Crawshay* v. *Homfray*, 4 B. & A. 50. Where, by the usage of trade, a specific time is given to the importer for the payment of wharfage, the bankruptcy of the importer subsequent to that time does not give a right to detain as against a purchaser, previous to that

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the first instance (*i*). A lien is not destroyed or prevented by a special agreement, unless it be inconsistent with the right (*k*). So a lien is determined by abuse of the lien in pledging the goods (*l*). So a lien is waived by parting with the possession (*m*). If an agent part with papers by mistake on which his principal has a lien, the lien is at an end (*n*).

If a party having a lien on goods, does not, when they are demanded of him, insist on his lien, but rests his refusal to deliver the goods on other grounds, it is evidence of a waiver of his lien (*o*). But where a defendant having a lien on goods, purchased them of the bailor after the latter had become a bankrupt, and on demand made by the assignees, said, "I may as well give up every transaction of my life;" it was held that these words were no waiver, and that the lien had not merged in the purchase (*p*).

A claim to hold for a general balance does not waive a particular lien (*q*); but if possession be wrongfully devested, the lien revives on repossession taken without force (*r*). The lien remains although the vendor recover from the vendee for goods bargained and sold. But it would, it seems, be otherwise if the vendor recovered for goods sold and delivered (*s*). A lien is not devested by reason of a set-off to a larger amount, without a special agreement to deduct the one from the other (*t*); nor by the depositing of goods, on which the captain of a vessel has a lien, in the King's warehouse, under the direction of a statute (*u*). A general lien cannot be sustained against a party having a right to stop *in transitu* (*v*).

time. Ib. *Qu.* whether a lien is barred by the Statute of Limitations. *Spears* v. *Hartley*, 3 Esp. Ca. 81.

(*i*) *Horncastle* v. *Farran*, 3 B. & A. 497.

(*k*) *Chase* v. *Westmore*, 5 M. & S. 180. If wharfage is to be due at Christmas, whether the goods be or be not removed, there is no lien. *Crawshay* v. *Homfrey*, 4 B. & Ad. 52.

(*l*) *Scott* v. *Newington*, 1 Mo. & R. 252.

(*m*) *Jacobs* v. *Latour*, 5 Bing. 130. *Hartley* v. *Hitchcock*, 1 Starkie's C. 408. And where that is wrongfully done, the owner may maintain trover without tendering what is due on the lien. *Jones* v. *Cliff*, 1 C. & M. 540. *Scott* v. *Newington*, 1 Mo. & R. 252.

(*n*) *Dicas* v. *Stockley*, 7 C. & P. 587.

(*o*) *White* v. *Gainer*, 2 Bing. 23.

(*p*) *Boardman* v. *Sill*, 1 Camp. 410. n.

(*q*) *Scaife* v. *Morgan*, 4 M. & W. 271.

(*r*) *Wallace* v. *Woodgate*, R. & M. 193. *Dicas* v. *Stockley*, 7 C. & P. 587. And see *Levy* v. *Barnard*, 8 Taunt. 149.

(*s*) *Holditch* v. *Desanges*, 2 Starkie's C. 337.

(*t*) *Pinnock* v. *Harrison*, 3 M. & W. 532.

(*u*) *Ward* v. *Felton*, 1 East, 512.

(*v*) *Morley* v. *Hay*, 3 M. & Ry. 396. A house in *N.* directed foreign merchants at *A.* (the appellants), to contract for building a ship, except rigging, and to advise them in good time, to enable them to send it out, and a master, allowing them commission for trouble; such agency was usual. The agents entered into contracts with the builders, made advances to them, and drew from time to time for such advances on their principals. The *N.* house then directed their correspondents at *L.* (the respondents) to send out the rigging, which was done, and delivered to the appellants at *Q.*; held, that the property thereby vested in the *N.* house, and that the agents at *Q.* were entitled to retain the goods as against the *L.* correspondents, as a lien for the advances they had made to the builders, and the custom-house expenses, notwithstanding they had previously to such delivery obtained an assignment of the ship, and procured its registry, in the name of one of their partners; that appearing to have been done for securing the ship, and facilitating an equitable arrangement with the *N.* house. *Rogerson* v. *Reid*, 1 Knapp, 362.

LIMITATIONS (*w*).

1. *Provisions of the stat.* 3 & 4 *Will.* 4, *c.* 27, *as to making entry or distress, or bringing an action to recover any land or rent*, p. 651.
2. *Of the stat.* 3 & 4 *Will.* 4, *c.* 42, *as to actions of debt for rent on indentures of demise, actions of covenant, debt on bond or other specialty, actions of debt or* scire facias *on recognizance*, p. 656.
3. *Proof of an issue taken on the plea of* actio non accrevit, *&c. under the stat.* 21 J. 1, p. 657.
4. *Evidence of subsequent acknowledgments, mutual accounts, &c.*, p. 670.
5. *Proof of disability, &c.*, p. 672.

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By the stat. 3 & 4 Will. 4, c. 27, s. 2, it is (*y*) enacted, that after the 31st day of December 1833, no person shall make an entry or distress, or bring an action to recover any land (*z*) or rent but within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which the right to make such

(*w*) A decree in equity is not affected by the Statute of Limitations (21 J. 1). *Mildred* v. *Robinson*, 19 Ves. 587. Knapp's Case, 202. Where there is a term to attend the inheritance, and the right to the inheritance is lost by fine and nonclaim, equity follows law, and cannot consider him who has lost the inheritance as entitled to claim in equity the term which is to attend it. *Reynolds* v. *Jones*, 2 Sim. & Stu. 206. An estate was by deed of settlement conveyed to trustees, in trust for a tenant for life, who assigned her interest; the possession of the assignee is not to be deemed adverse to the trustee until the death of the *cestui que trust*. *Fauset* v. *Carpenter*, 1 Dow & C. 233.

(*y*) The main objects of the statute are: 1, to make 20 years the limit for the recovery of land or rent, with an allowance for disabilities, and to prevent the remedy being lost during that period; 2, to make 40 years the extreme limit for the recovery of land or rent, notwithstanding the existence of disabilities; 3, to alter the previous law where a person has different rights; 4, to alter the previous law in the case of entails and unbarred remainders; 5, to apply to equitable the same limitation as is provided for legal estates; 6, to provide a limitation as between mortgagor and mortgagee; 7, to provide a limitation as to claims of ecclesiastical and eleemosynary corporations sole, and in respect to advowsons; 8, to abolish all actions, real or mixed, except writs of dower and *quare impedit* and an ejectment, and except plaints for freebench; and 9, to provide a limitation in respect to money secured out of land or rent, or to any legacy and arrears of dower, and of rent, or interest. See Mr. Stalman's notes on this Act, p. 93.

(*z*) By the 1st clause of the Act land extends to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes other than tithes belonging to a spiritual or eleemosynary corporation sole; and also to any share, estate or interest in them or any of them. Before this statute there was no limitation applicable to the right to impropriate tithes, nor could there have been a prescription *de non decimando* against a lay impropriator. See below, tit. TITHES. As nonpayment furnished no presumption of a grant, the consequence was, that time, instead of justifying, as in other cases, has opened the title to exemption from tithes, by rendering such proof as was sufficient to show a discharge the more difficult. See below, tit. TITHES, and *Peters* v. *Blencowe*, Gwill. 1483. And see above, tit. EJECTMENT. The statute operates, as has been seen, *supra*, 400, to do away with the doctrine of non-adverse possession, and to bar the action unless it has been brought within twenty years from the time when the right first accrued to the claimant or party through whom he claims in the manner pointed out by the statute. Where a party has had possession of land for twenty years, he cannot be ejected but by one who can show either that his right accrued within the twenty years in one of the modes, or that he laboured under one of the disabilities specified in the statute. And should a party after such possession of twenty years be dispossessed or discontinue his possession, he would be entitled to recover in ejectment at any time within twenty years

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entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*a*).

By sec. 3, That in the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken (*b*).

Sec. 4 provides, that the right to make an entry or distress, or bring an

after, for by the third clause the right to recover would be deemed to have accrued at the time of the discontinuance of the possession; so that he would not be barred by the statute, and his title by possession for twenty years would prevail against the defendants, whose title is, by sect. 34, expressly extinguished at the expiration of the period of limitation. *Supra*, 405 (*s*).

(*a*) The effect of the statute is, that twenty years adverse possession will be a bar to all adverse claims, with an allowance of ten years to persons under disability to pursue their rights. The limitation runs,

1. In the case of an estate in possession, from the period of dispossession.

2. In the case of a person dying in possession, from the period of his death.

3. In the case of a person claiming by alienation, from the period of such alienation.

4. In the case of a future estate or interest, from the period of its falling into possession.

5. In case of a forfeiture or breach of condition, from the period of such forfeiture incurred or condition broken.

(*b*) See note ( ), and *supra*, tit. EJECTMENT, 400, as to the effect of this clause as superseding the former doctrine of non-adverse possession.

action to recover land, shall, in respect of an estate in reversion or remainder, be deemed to have accrued at the time when such estate shall have come into possession (*c*). Right of entry.

Sec. 5 provides, that the right shall be deemed to accrue to the reversioner when the estate vests in possession, by the determination of any estate in respect of which such land shall, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previous to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Sec. 6. An administrator is to claim as if he obtained the estate without interval after the death of the deceased (*d*).

Sec. 7. In the case of a tenancy at will, the right shall be deemed to accrue either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy. No mortgagee or *cestui que* trust to be deemed a tenant (*e*) at will within the meaning of the clause.

Sec. 8. In the case of a tenancy from year to year, or other period, without lease in writing, the right shall be deemed to have accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen.

Sec. 9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20*s.* or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease, to the person rightfully entitled (*f*).

Sec. 10. No person shall be deemed to have been in possession of any land, merely by reason of having made an entry thereon (*g*).

(*c*) As to the former law, see *Doe* v. *Danvers*, 7 East, 299; 1 Ves. 278.

(*d*) Before this, the time was from the time of taking out administration. See *Stanford's Case*, Cro. J. 61; *Cary* v. *Stephenson*, Salk. 421; *Murray* v. *East India Company*, 5 B. & A. 204. *Supra*, tit. EJECTMENT, 407.

(*e*) The stat. 21 J. 1, did not apply where the person in possession was tenant at sufferance; *Doe* v. *Hull*, 2 Dow. & R. 38. Nor in the case of a mortgagor in possession by consent of mortgagee; *Hall* v. *Doe*, 3 B. & A. 187; *Doe* v. *Maisey*, 8 B. & C. 767.

(*f*) The stat. of James did not begin to run against the remainder-man till the expiration of the lease; *Doe* v. *Danvers*, 9 East, 290.

(*g*) To make an entry or claim available to avoid a fine with proclamations, possession must now be taken, &c. The stat. 4 & 5 Ann. c. 16, *s.* 16, enacted, that an action should be brought within the year. See the law on this subject previous to the statute, EJECTMENT, 401, 2.

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Sec. 11. No continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action (*h*).

Sec. 12. When any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them (*i*).

Sec. 13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir (*k*).

Sec. 14. Provided, that when any acknowledgment of the title of the person entitled to any land or rent, shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

Sec. 15. When no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this Act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of 20 years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest. at any time within five years next after the passing of this Act.

Sec. 16. Persons under disability of infancy, coverture, idiotcy, lunacy,

(*h*) See Co. Litt. 250, a. b. n. (1). By the present Act the right of entry will not be tolled by a descent cast.

(*i*) See tit. EJECTMENT, 400, as to the former law on this subject; see also 429, Whether a writing amounts to an acknowledgment of title within the above clause, is a question for the Judge and not for the jury to decide. A party in possession adversely of land being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows, "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years." The bargain subsequently went off, and no rent was paid or lease executed. Held, that this letter was not an acknowledgment of title within the statute. *Doe* v. *Edmonds*, 6 M. & W. 295. Lands in 1786 were settled on the wife for life, with remainder to her issue in tail, and in 1818 the estate tail was enlarged into a fee, and a new estate tail carved out, with limitation in tail to the lessor of plaintiff; held, that the latter tenant in tail had the same time for bringing ejectment as the original tenant in tail had when his remainder came into possession, viz. twenty years. *Ib.*

(*k*) See Co. Litt. 242, a.

unsoundness of mind, or absence, or beyond seas, and their representatives, to be allowed 10 years from the termination of their disability or death (*l*). Right of entry.

But by sec. 17, No action, &c. shall be brought beyond 40 years after the right of action accrued (*m*).

And by sec. 18, No further time is to be allowed for a succession of disabilities (*n*).

Sec. 20. When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

Sec. 21. Where the tenant in tail is barred, the remainder-men, whom he might have barred, shall not recover (*o*).

Sec. 22. Possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

Sec. 23. Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of 20 years after the time when the assurance, if then executed, would have barred them.

Sec. 24. No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action (*p*).

Sec. 25. In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser (*q*).

Sec. 26. In cases of fraud no time shall run whilst the fraud remains concealed (*r*).

Sec. 27. Saves the jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise, to a party whose right may not be barred under the Act.

Sec. 28. A mortgagor is to be barred at the end of 20 years from the time when the mortgagee took possession, or from the last written acknowledgment (*s*).

Sec. 29. No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or 60 years (*t*).

Sec. 30. No advowson is to be recovered but within three incumbencies, or 60 years.

Sec. 31. Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

Sec. 33. No advowson to be recovered after 100 years from the time of possession adversely claimed.

(*l*) Imprisonment is not included, as in the stat. of James; for it does not prevent a party from pursuing legal measures.

(*m*) This clause gives a title, notwithstanding a succession of disabilities.

(*n*) It was doubtful before this whether there might not be a succession of disabilities, provided there was no instant of time during which the disability was suspended. 4 T. R. 310; *Doe* v. *Jesson*, 6 East, 80.

(*o*) *Cotterell* v. *Dutton*, 4 Taunt. 826; 3 Cru. Dig. 493; and see, as to the effect of these and the two following clauses, Mr. Stalman's Notes to the statute.

(*p*) This clause places equitable interests on the same footing with legal estates.

(*q*) By the rule in equity no length of time bars an express trust; but this rule is applicable only as between the trustee and *cestui que* trust. *Beckford* v. *Rode*, 19 Ves. 97.

(*r*) See *Brown* v. *Howard*, 2 B. & B. 73; see also p. 659.

(*s*) See *Swanton* v. *Raven*, 3 Atk. 105; *Stockly* v. *Stockly*, 1 Ves. & B. 23.

(*t*) Previously ecclesiastical persons were not bound by the Statute of Limitations. Co. Litt. 115, a; 11 Rep. 78, b; 3 Cr. Dig. 513. As to fines under stat. 4 H. 7, c. 24, *see* 5 Cr. Dig. 232.

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Sec. 34. At the end of the period of limitation the right of the party out of possession to be extinguished (*u*).

Sec. 35. The receipt of rent is to be deemed the receipt of profits.

Sec. 36. Real and mixed actions, except of dower, quare impedit, and ejectment, are abolished.

Sec. 39. No descent cast, discontinuance, or warranty, shall toll or defeat a right of entry.

Sec. 40. Money charged upon land and legacies to be deemed satisfied at the end of 20 years, if there shall be no interest paid or acknowledgment in writing in the meantime.

Sec. 41. No arrears of dower shall be recovered for more than six years.

Sec. 42. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent, or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to such subsequent mortgage, or incumbrance, may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

2. By the stat. 3 & 4 Will. 4, c. 42, s. 3, actions of debt for rent upon an indenture of demise, actions of covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, shall be commenced and sued within ten years after the end of that session, or within twenty years after the cause of such actions or suits but not after; all actions for penalties, damages, or sums of money given to the party grieved by any statute then or thereafter to be in force within one year after the end of that session, or within two years after the cause of such actions or suits but not after; actions of debt upon any award when the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any *fieri facias*, within three years after the end of the then present session, or within six years after the cause of such actions or suits, but not after; provided that nothing therein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

Sec. 4. Provides for the case of an infant, feme coverte, non compos, or person beyond sea, as to whom the limitation begins to run from the time of disability removed.

Sec. 5. Provides, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the party entitled to bring his action within twenty years after such

(*u*) See as to the effect of this clause, *supra*, 651, note (*w*), and tit. EJECTMENT, 405 (*s*).

acknowledgment; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas; and the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute.

Sec. 6. After reversal of judgment for the plaintiff, or arrest of judgment, or reversal of the defendant's outlawry, the plaintiff, or his personal representative, may commence a fresh action within one year, and not after.

Sec. 7. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, Sark, nor any islands adjacent to any of them, being part of his Majesty's dominions, shall be deemed to be beyond seas within the Act.

By the stat. 21 J. 1, c. 16, s. 3, the following limitations are prescribed, viz. actions on the case (other than for slander), and actions for account, and actions for trespass, debt, detinue and replevin for goods or cattle, and an action for trespass, *quare clausum fregit*, within six years next after the cause of such action or suit, and not after; and actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and actions upon the case for words, within two years next after the words spoken, and not after (*w*).

Proof on issue of actio non accrevit.

On issue taken on the plea of this statute (*x*), that the cause of action accrued (*y*) within six years, the burthen of proof lies on the plaintiff, and he must prove a cause of action within the limit (*z*). After proof of the cause of action itself, he must show the commencement of the action according to the issue taken. Where the issue was on the question whether the cause accrued within six years of the *exhibiting of the bill*, the memorandum on the record was held to be evidence to show the day when the bill was exhibited (*a*).

Commencement of the action.

(*w*) The statute will bar a foreign debt. A bill having been accepted in France by a Scotchman, the acceptor left France, and was absent till his death; but after he had left France, a suit was instituted, and judgment obtained against him in a French court; six years afterwards elapsed before a proceeding instituted in a Scotch court; it was held that the debt was barred, being no longer enforceable in the country according to the law of which it was sought to be enforced. *Don* v. *Lippman*, 4 Cl. & F. 1. The plea of the statute was held to bar an action in this country brought on an instrument of obligation in Scotland, although by the law of that country the cause of action thereon continued for 40 years from the execution of it. *British Linen Com.* v. *Drummond*, 10 B. & C. 903.

(*x*) The statute must be pleaded by the defendant (as to a set-off, see tit. SET-OFF). But although the statute be not pleaded, yet if more than six years have elapsed, it may still be left to the jury to presume from lapse of time, under the special circumstances, that the debt has been satisfied. See 2 Starkie's C. 407, and tit. PAYMENT. The statute bars the remedy, not the debt. *Higgins* v. *Scott*, 2 B. & A. 413. And therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, and the sheriff levied the damages and costs; it was held, that the attorney (though he had taken no step in the cause within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods. *Higgins* v. *Scott*, 2 B. & Ad. 413.

(*y*) A limitation of action for anything *done*, &c. does not, it seems, apply to an action for money had and received. *Umphelby* v. *Maclean*, 1 B. & A. 42.

(*z*) *Hurst* v. *Parker*, 1 B. & A. 92.

(*a*) And now see the Process Act, tit.

Proof of the cause of action, within, &c.

Where the bill is intitled generally of the term, it has relation to the first day of the term (*b*).

Where the declaration had been filed in the vacation, and was intitled of the preceding term, it was held to be competent to the defendant to prove that the action was in fact commenced after the expiration of the six years (*c*).

If the plaintiff, to a plea of the statute, reply a writ (*d*) sued out within the time, and the defendant, by his rejoinder of *nul tiel* record, deny the existence of such a writ, the trial is by the Court on inspection of the record (*e*).

If the plaintiff, reply the writ *generally*, the defendant may in his rejoinder show the time when it really issued, and plead that the cause of action did not accrue within six years from that date. In this case (*f*), if the plaintiff in his sur-rejoinder allege a cause of action within the six years, and take issue on the fact, the day in the rejoinder will be taken to be the commencement of the action.

If the cause has been removed by *habeas corpus* from an inferior court, and after a declaration *de novo* in the superior court, the defendant plead that the cause of action did not accrue within the six years next before the *teste* of the *habeas corpus*, the plaintiff may reply the suit below, and show it to have been commenced within time to save the statute (*g*). So if the plaintiff having commenced a suit within due time die (*h*), or being a feme sole at the commencement of the action, marry; the representative in the one case, or husband and wife in the other, if they *commence* a new action within a reasonable time afterwards (and this is usually understood to be a year), may reply the fact to a plea of the statute. The proof will be either by inspection of the record by the Court, or by evidence of the cause of action within the time limited, according to the nature of the rejoinder, which may either deny the existence of such a record, or deny that the cause of action arose within the time.

In the case of trespass *quare clausum fregit*, and, as it seems, in other actions of *tort*, it is not sufficient to prove an acknowledgment of the trespass or *tort*, and a promise to make compensation within the limit (*i*). It has even been held, where there was no distinct evidence as to the time of committing the trespass, and it was doubtful whether it had been committed within six years, that such an acknowledgment by the defendant, and a promise to make compensation, was not evidence to go to a jury of a trespass within the six years (*k*). Although fraud will take a case out of the

HUNDRED.—TIME. Formerly the plea stated the day when the bill was exhibited. 2 Will.Saund. 123, n. 5.

(*b*) 1 T. R. 116.

(*c*) *Snell* v. *Phillips*, Peake's C. 209, The defendant might show by the writ that it was not sued out till the 20th of November, the memorandum being general of Michaelmas term. *Granger* v. *George*, 5 B. & C. 149, *supra*, note (*a*).

(*d*) A special *testatum copias*, though irregular, is a sufficient commencement to save the statute. *Beardmore* v. *Rattenbury*, 5 B. & A. 452. *Darwin* v. *Lincoln*, 5 B. & A. 444.

(*e*) *Smith* v. *Bower*, 3 T. R. 662. And regular continuances must be shown on the record. An attachment of privilege is not a continuance of a bill of Middlesex, to save the statute. Ibid.

(*f*) Vide *supra*, 449.

(*g*) *Matthews* v. *Phillips*, Salk. 424; for although this suit above be no continuance of the suit below, yet the plaintiff has legally pursued his right.

(*h*) *Forbes* v. *Ld. Middleton*, Willes, 259, note E; Salk. 424.

(*i*) Salk. 424. *Hurst* v. *Parker*, 1 B. & A. 92.

(*k*) Ibid. Note, there was no acknowledgment of a trespass committed within six years of the commencement of the suit, for even although the acknowledgment might prove a cause of action then exist-

statute, yet the statute will be a bar, if six years elapse after the discovery of the fraud (*l*).

Proof of the cause of action within, &c.

In an action against an attorney for negligence, it has been held that the statute runs from the time of the negligence, and not from the time when special damage accrued in consequence of such negligence (*m*).

So on an implied promise to indemnify, the statute runs from the damnification (*n*).

In an action for words actionable in themselves, the statute runs from the time of the speaking, although they have occasioned special damage (*o*), and the action must be brought within two years. Where special damage is the gist of the action, the statute runs from the time of the special damage only; and the limitation is six years (*p*).

In an action for the consideration money for an annuity avoided by the grantor, the limitation runs from the time when the grantor made his election (*q*).

Where the limitation is as to anything *done* under the Act, if the action be *trespass*, it must be brought within the limit from the act of trespass; but if the action be case for consequential damage, the time runs from the time of the damage (*r*).

ing, it does not follow that it existed at a subsequent time.

(*l*) Per King, Ld. C. in *The South Sea Company* v. *Wymondsell*, 3 P. Wms. 143. *Bree* v. *Holbech*, Doug. 630. A law agent was held to be responsible for negligence after a lapse of twenty-five years, and acquiescence in the loss and settlement of account and discharge by the client's representative; it appearing that the defendant had concealed the real state of the transaction, and had not communicated the insolvent state of the parties with whom he dealt. *Macdonald* v. *Macdonald*, 1 Bligh, 315. It is the policy of the statute to prevent the discussion of title where evidence has perished: even in cases where it is not too late to bring ejectment, courts of equity have refused to interfere because evidence has been lost; in a suit by an heir to set aside a deed as fraudulent, it was held that the cause of action arose at the moment when the deed was executed, or as soon after as the parties interested were apprised of the facts. *Whalley* v. *Whalley*, 3 Bligh, 12.

(*m*) The declaration stated the retainer of the defendant, an attorney, to ascertain whether certain mortgages, and a warrant of attorney, were a valid and sufficient security for a loan, and alleged his misrepresentation and misconduct in the premises, and that the securities afterwards turned out wholly insufficient; to which the Statute of Limitations was pleaded; it appeared that the loan was made, and securities were given in 1814, and the interest regularly paid until 1820; it was held that the allegation of special damage did not alter the gist of the action, which was the misconduct of the defendant, which having taken place more than six years since, although the discovery was only recent, the plea was a good bar. *Howell* v. *Young*, 5 B. & Cr. 259; and 8 D. & Ry. 14. And see *Bree* v. *Holbech*, Doug. 630. *Fetter* v. *Beal*, 1 Salk. 11. And *Brown* v. *Howard*, 2 B. & B. 73. But see *Compton* v. *Chandless, one, &c.* 4 Esp. C. 18. See *Hickman* v. *Walker*, Willes, 27. *Littleboy* v. *Wright*, 1 Lev. 69. *Peake* v. *Ambler*, W. Jones, 320. 15 Vin. Ab. tit. *Limitation*.

(*n*) *Huntley* v. *Sanderson*, 3 Tyr. 469.

(*o*) According to the stat. 21 Jac. 1, c. 16, s. 3. 6 Bac. Ab. 241. Cro. Car. 193. Salk. 206. 1 Sid. 95.

(*p*) Ibid. An action for *scan. mag.* may be brought within six years. Cro. Car. 535.

(*q*) *Cowper* v. *Godmond*, 9 Bing. 748. The statute does not run till the action is maintainable, Ib.

(*r*) *Roberts* v. *Read*, 16 East, 215. And see *Sutton* v. *Clarke*, 6 Taunt. 29. An illegal seizure was made by a Canal Company for rates, and a sale was afterwards made of coal, &c. in respect of the lessee of the colliery; the limitation runs from the time of seizure; but in respect of a mortgagee out of possession, and his administrator, from the sale. *Fraser* v. *Swansea Nav. Comp.* 1 Ad. & Ell. 354. Where trespass is barred by limitation, ejectment is still maintainable. Per Parke, J., *Trotter* v. *Simpson*, 5 C. & P. 60. In *Gillon* v. *Boddington*, 1 Ry. & M. C. 161, the defendants had undermined a wall of a wharf, so that on any great tide the water washed away some of the materials of the wall, more than six months (the period of limitation fixed by a Dock Act) before the action, but the wall fell within the six months; the action was held to be maintainable, although the wall was undermined in the lifetime of the plaintiff's father, and where the plaintiff

Proof of cause of action within, &c.

Such a limitation does not, it seems, extend to an action for money had and received (*s*).

In trover the statute runs from the conversion, though it were not known to the plaintiff, provided no means have been used to conceal it (*t*). The plaintiff's want of knowledge makes no difference (*u*).

In an action of *assumpsit* the statute runs from the time of the breach of promise (*x*). On a promise to indemnify, from the time of damnification (*y*).

Non assumpsit, &c.

Where the cause of action and promise are contemporary, as in cases of

had only an interest in remainder. Note, that the declaration alleged the plaintiff to be seised in fee of a third part, &c. whilst the wall was kept and continued, and suffered and permitted to be, remain and continue undermined. From the language of the Court in the case of *Umphelby* v. *Maclean*, 1 B. & A. 42, it should seem that where the limitation is as to anything *done*, there must, according to the expression of Lord Ellenborough, be *a positive act done*. See also *Gaby* v. *Wilts & Berks Canal Com.* 3 M. & S. 580. And see *Blakeman* v. *Glamorgan Canal Com.* 3 Y. & J. 60; where it seems to have been doubted whether a matter of complaint arising from omission and nonfeasance would be within the protection of the restrictive clause. In that case the Act contained a limiting clause as to anything *done* within six calendar months before action brought, unless there was a *continuation*; and it was held, that the latter words meant an uninterrupted unintermitting damage, and did not apply to a damage which had ceased previous to the period of limitation. In *Smith* v. *Shaw*, 10 B. & C. 277, Bayley, J. observed that it was not necessary to go to the length of *Sellick* v. *Smith*, 2 C. & P. 284, nor to say whether a mere nonfeasance would be an act done within the meaning of such words; a point much doubted in the case of *Blakemore* v. *Glamorganshire Canal Com.* In *Smith* v. *Shaw*, above cited, the giving of directions by a dock-master as to the transporting a vessel into dock, was held to be a *thing done*. In *Sellick* v. *Smith*, it was held (at *nisi prius*, and afterwards by the Court of Common Pleas), that a refusal by a Dock Company to deliver up wines, was within the terms of a similar clause. In an action by a reversioner against a surveyor of the highways, for *building* a wall on the plaintiff's close, and *separating* a portion which was thrown into the road, the digging of the soil and erecting the wall had been done more than three months before the action brought, but the wall had been subsequently, and within that period, raised higher; it was held that the action was too late. *Wadsworth* v. *Harley*, 1 B. & Ad. 391. Where the wall had been commenced more than three months before the action brought, but not completed until within that period, held that the plaintiff was entitled to recover for any part of the trespass within this time; or if there had been any encroachment, might bring ejectment. *Trotter* v. *Simpson*, 5 C. & P. 51. Action against commissioners under a local Act requiring the action to be brought within six months after *the matter or thing done*, the grievance alleged was an injury to the plaintiff's house in digging a sewer, whereby the foundation sank and the walls were cracked, and the plaintiff was disturbed in the enjoyment and customers prevented from having access to the house; held that the action not being brought within six months after the digging the sewer which occasioned the crack in the wall, the action could not be supported; the continuance of the crack was not a continuing damage nor repetition of the injury. And that the notice of action and declaration not alleging the *keeping up the shores* as a distinct ground of injury, the action could not be sustained in that respect although continued up to within the time limited for the action. *Lloyd* v. *Wigney*, 6 Bing. 489.

(*s*) *Umphilby* v. *Maclean*, 1 B. & A. 47.

(*t*) *Granger* v. *George*, 5 B. & C. 149. The defendant had delivered up, on the 10th November 1808, to the plaintiff's assignees, the box of papers, &c. for which the action was brought; held, that not having had them in his possession within that period, there could have been no conversion, and that the plea of the Statute of Limitations was a bar, and that the want of knowledge in the plaintiff made no difference. It appearing also that the plaintiff's writ was returnable on the 29th November, although filed generally as of Michaelmas term; held, that the Court was bound to consider the bill as exhibited on that day.

(*u*) Ib. and *Short* v. *Macarthy*, 3 B. & A. 626. *Brown* v. *Howard*, 2 B. & B. 73.

(*x*) *Brown* v. *Howard*, 2 B. & B. 73. *Short* v. *Macarthy*, 3 B. & A. 626. *Battley* v. *Falkner*, 3 B. & A. 288. *Wheatly* v. *Williams*, 1 M. & W. 533. *Wittersheim* v. *Countess of Carlisle*, 1 H. B. 631. *Howell* v. *Young*, 5 B. & C. 259, *supra*.

(*y*) *Huntley* v. *Sanderson*, 1 C. & M. 467.

indebitatus assumpsit, the plea of *non assumpsit infra sex annos* is proper; but where the cause of action arises subsequently to the promise, as in cases of executory contracts, the plea of *non accrevit infra sex annos* is the proper plea; for although the promise was not made within the limit, the cause of action accrued within the time, which is sufficient to save the statute (*z*). Non assumpsit, &c.

Where goods are sold on an agreement for a fixed credit, the statute runs from the expiration of the time of credit (*a*).

Where money lent is the consideration for a bill of exchange, payable on a future day, or for a promise of repayment at a future day, the latter is the day from which the limitation is to be reckoned (*b*). And where a note is payable at a specified time after sight, the statute does not begin to operate till that time has expired after presentment of the note (*c*).

Where a note is payable on demand, the statute runs from the date (*d*).

Where a note is payable at so many months after demand, the statute runs from the demand and not from the date (*e*).

Where the cause of action does not arise until request made, the statute runs from the time of the request (*f*).

A factor impliedly contracts to account for such goods consigned to him for sale as he has sold, to pay over the proceeds, and to deliver the residue unsold on demand. An action for not accounting does not lie until a demand be made, and from that time the statute runs (*g*). But in such cases, after a reasonable time has elapsed, the jury may presume that the consignor has made a demand, and that the factor has accounted (*h*).

Where special damage has resulted from a breach of contract, the limitation is to be computed from the time (*i*) of the breach of contract, and not of the special damage.

(*z*) See 1 Saund. 33, n. 2.; 283, n. 2. 2 Saund. 63, c. n. 6. *Gould* v. *Johnson*, 2 Lord Ray. 838. Salk. 422. *Buckler* v. *Moor*, 1 Vent. 191. Debt for goods sold and delivered, plea *actio non accrevit infra sex annos*; evidence of goods delivered beyond the six years, but of an acknowledgment within the six years. Bayley, J. held that this did not take the case out of the statute, but that the plaintiff was entitled to recover on the count on an account stated. York Sp. Ass. 1827.

(*a*) Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option. Held, Parke, J. *dubitante*, that this was in effect a nine months' credit, and consequently that an action for goods sold and delivered, commenced within six years from the end of the nine months, was in time to save the Statute of Limitations. *Helps & another* v. *Winterbottom*, 2 B. & Ad. 431.

(*b*) *Wittersheim* v. *Countess of Carlisle*, 1 H. B. 631; which was an action by the payee against the drawer of a bill of exchange, to secure a sum lent by the payee to the drawer; and it was held that the statute began to operate, not from the loan, but from the time when the bill became due. And see Lord Holt's *dictum*, 3 Bac. Ab. 602.

(*c*) *Holmes* v. *Kerrison*, 2 Taunt. 323. *Savage* v. *Aldren*, 2 Starkie's C. 312.

(*d*) *Norton* v. *Ellams*, 2 M. & W. 461. *Christie* v. *Fonsick*, Sel. N. P. 121. But see Sel. N. P. 344, 7th edit.

(*e*) *Thorpe* v. *Booth*, 1 Ry. & M. C. 388. *Thorpe* v. *Coombe*, 8 D. & Ry. 347. Per Ld. Hardwicke, 1 Ves. 344. *Christie* v. *Fonsick*, Sel. N. P. 137. 344, 7th ed.; see *Harris* v. *Ferrand*, Hardr. 36. *Buckler* v. *Moor*, 1 Mod. 80. 15 Vin. Ab. tit. *Limitations*, pl. 14. A bill payable to one who dies intestate, being accepted after his death, the statute runs from the date of the letters of administration; for till then there is no cause of action in any one. *Murray* v. *East India Co.*, 5 B. & A. 204. *Pratt* v. *Swaine*, 8 B. & C. 285. See *Stamford's Case*, Cro. J. 81; *Cary* v. *Stephenson*, Salk. 421; and a special replication is unnecessary. 5 B. & A. 204. To a declaration on a debt to the bankrupt, and promise to his assignee, a plea that the action did not accrue to the bankrupt within six years, held bad, for it excludes the plaintiff from proof of a promise to himself. *Skinner* v. *Rebow*, Str. 919.

(*f*) *Gould* v. *Johnson*, 2 Salk. 422.

(*g*) *Topham* v. *Braddick*, 1 Taunt. 572.

(*h*) Ibid.; and fourteen years was held to be a reasonable time.

(*i*) *Battley* v. *Faulkner*, 3 B. & A. 290, where the damage was, the being obliged by a suit in Scotland to pay damages to a vendee on the resale to him of goods

Non assumpsit, &c.

On an agreement to indemnify the plaintiff against a distress, and all costs of action by replevying, the statute runs from the time of payment, not from the time of the delivery of the bill of costs (*k*).

Where six years had elapsed since the committing of a trespass by cutting down trees, it was held that an action could not be maintained for the produce of the sale of the trees within the six years (*l*).

Where the defendant had once been tenant to the plaintiff, and no notice to quit had been given, but the defendant had not occupied, paid rent, or done any act within the last six years from which a tenancy could be inferred, it was held that the Statute of Limitations was a good defence (*m*).

A debt is barred by the statute, although a warrant of attorney be given as a collateral security (*n*).

Replication of a promise within six years.

Upon issue taken upon the replication of a promise within six years, the plaintiff may give in evidence, not only an express promise within six years (*o*), to pay the debt, but even an acknowledgment that the debt still subsists, for the admission is evidence of a *new promise* to pay the debt (*p*); or the law implies an *assumpsit*, or creates a new debt (*q*); or the acknowledgment rebuts the presumption raised by the statute, that the debt has been paid (*r*). But great mischief and inconvenience have resulted from permitting the salutary provisions of the statute to be defeated by mere oral acknowledgments; a practice by which the statute itself was nearly in effect defeated, and probably more encouragement was given to vexatious litigation and perjury than if it had been altogether repealed (*s*). These

originally sold by the defendant to the plaintiff. So in *Short* v. *M'Carthy*, 3 B. & A. 626. But a plea to an action for deceitfully delivering goods to the plaintiff, as the proper goods of the defendants, by means of which they were subsequently damnified, that the defendants were not guilty within six years, was held to be bad on special demurrer. *Dyster* v. *Battye*, 3 B. & A. 448. And see Ld. Ellenborough's observations in *M'Fadzen* v. *Olivant*, 6 East, 387.

(*k*) *Collinge* v. *Heywood*, 10 Ad. & Ell. 633; 1 P. & D. 502.

(*l*) *Hughes* v. *Thomas*, 13 East, 474. The case was decided on the ground, that if a tenant for life levy a fine, and thus acquire a base fee, and cut down timber before the entry of the reversioner and owner of the inheritance, to avoid the fine and base fee, the reversioner cannot recover the value, the entry having no relation during the continuance of the base fee. And see *Berrington* v. *Parkhurst*, 13 East, 489; and *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433.

(*m*) *Leigh & Wife* v. *Thornton*, 1 B. & A. 625.

(*n*) *Clarke* v. *Figes*, 2 Starkie's C. 234.

(*o*) A promise made after the action brought, is, it seems, sufficient. *Yea* v. *Foursaker*, 2 Burr. 1099; *secus*, in the case of an infant, *Thornton* v. *Illingworth*, K. B. sitt. in Banc. after Easter T. 1824. Or in any case where the promise creates an entirely new debt. Per Bayley, J., *Holt* v. *Brien*, 4 B. & A. 252.

(*p*) So considered in *Hyeling* v. *Hastings*, Ld. Raym. 422. And by Ld. Ellenborough, in *Hurst* v. *Parker*, 1 B. & A. 93, and P. C. in *Ward* v. *Hunter*, 6 Taunt. 210; and *Pittam* v. *Foster*, 1 B. & C. 248. And see *Boydell* v. *Drummond*, 2 Camp. 162. *Gibbons* v. *M'Casland*, 1 B. & A. 690. The law, where there is a sufficient consideration, presumes a promise in fact, but the plaintiff may rely on any promise actually made, though long after the executed consideration; and a mere admission is evidence of such a promise on the account stated. See 2 H. B. 563; and *Tanner* v. *Smart*, 6 B. & C. 603.

(*q*) See the observations of Ld. Ellenborough in *Bryan* v. *Horseman*, 4 East, 599. It is not necessary that the acknowledgment should be made to the plaintiff. *Halliday* v. *Ward*, 3 Camp. 32. *Mountstephen* v. *Brooke*, 3 B. & A. 141. *Peters* v. *Brown*, 4 Esp. C. 46.

(*r*) The Statute of Limitations (it has been said) proceeds on a presumption that where a debt is really due, a party is not likely to suffer six years to elapse without procuring an acknowledgment of it. *Rowcroft* v. *Lomas*, 4 M. & S. 457. See the observations of Bayley, J. Ibid. 461; and of Lord Ellenborough, in *Thompson* v. *Osborne*, 2 Starkie's C. 98. But now see *Tanner* v. *Smart*, *infra*, 667.

(*s*) It is impossible to read the conflicting cases upon this subject without regretting that the Courts have ever departed from the plain letter of this wholesome statute. The following acknowledgments have been held to be sufficient: "I do not consider myself as owing Mr. *B.* a farthing, it being more than six years since I con-

evils have been in a great measure corrected by two measures, the one *legislative*, the other *judicial*.

Replication of a promise within six years.

tracted; I have had the wheat, I acknowledge, and I have paid some part of it, and 20 *l.* still remains due." There the Court thought themselves bound by the long train of previous decisions to hold that the acknowledgment was sufficient. *Bryan* v. *Horseman*, 4 East, 599, and see *Rucker* v. *Hannay*, Ibid. 604. *Coltman* v. *Marsh*, 3 Taunt. 380. *Leaper* v. *Tatton*, 16 East, 420. *Clarke* v. *Bradshaw*, 3 Esp. C. 157; but see *Bicknell* v. *Keppel*, 1 N. R. 20, *infra*. So where the defendant said, "Prove your debt, and I will pay you;" or, "I am ready to account; but nothing is due;" and even slighter acknowledgments than these have been held to be sufficient to take the case out of the statute. Per Ld. Mansfield, C. J. in *Trueman* v. *Fenton*, Cowp. 544.—So where the defendant meeting the plaintiff, said, "What an extravagant bill you have sent me," per Ld. Kenyon, *Lawrence* v. *Worrall*, Peake's C. 93, it was held to be an acknowledgment that some money was due. So where the debtor referred his creditor to his trustee (*Baillie* v. *Lord Inchiquin*, 1 Esp. C. 435). So where in an action on a promissory note, and no other debt appearing, the defendant wrote as follows, "Business calls me to *L.*; should I be fortunate in my adventures you may depend on seeing me in *B.* in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit." *Frost* v. *Bengough*, 1 Bing. 266; and see *Colledge* v. *Horne*, 3 Bing. 119. So where a surety on a promissory note, on a demand within six years, said, "You knew I had not any of the money myself, but I am willing to pay half of it," (B. N. P. 149; 2 Burr. 1099); there the acknowledgment was made after the commencement of the action. So, although in making the admission, the defendant denied his liability in point of law. As where being sued as acceptor of a bill of exchange, he acknowledged his acceptance, and that he had been liable, but denied his liability then, because it was out of date, it was held to be sufficient to take the case out of the statute. (*Leaper* v. *Tatton*, 16 East, 420.) So where the defendant said that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, and been discharged, as well by law as from the length of time since the debt accrued, Ld. Kenyon is said to have held, that it was sufficient to take the case out of the statute. *Clarke* v. *Bradshaw*, 3 Esp. C. 155; *qu. tam. & vid. Owen* v. *Woolley*, B. N. P. 148. So where the defendant said, "If others pay, I will pay." (*Loweth* v. *Fothergill*, 4 Camp 184.) So where the defendant, on a demand being made for seamen's wages, for services which took place during a Russian embargo, said, "I will not pay; there are none paid; and I do not mean to pay unless obliged; you may go and try;" for there was proof of the service, and an acknowledgment by the defendant that it had not been paid for. (*Dowthwaite* v. *Tibbut*, 5 M. & S. 75). So where the defendant said, "If you had presented the protest it would have been paid," no protest being necessary. *De la Torre* v. *Barclay*, 1 Starkie's C. 7.—In ordinary cases an acknowledgment by the wife will not be evidence against the husband. In an action against *A.* and his wife, on a note made by the wife and *C.* before her marriage, it was held that the acknowledgment of the wife after marriage was not sufficient to take the case out of the statute. *Pittam* v. *Foster*, 1 B. & C. 248. But an acknowledgment by a wife will be sufficient, if she has been entrusted with the management of the business out of which the debt arises. (*Palethorpe* v. *Furnish*, 2 Esp. C. 511, n. cor. Lord Mansfield, 2 Freem. 178; *Anderson* v. *Sanderson*, 2 Starkie's C. 204, cor. Richards, C. B., York, 1817. *Supra*, tit. ADMISSIONS.) So in general as to an acknowledgment by an agent (*Burt* v. *Palmer*, 5 Esp. C. 145. *Supra*, tit. AGENT). So a conditional promise to pay by instalments, if time should be given, has been held to take the case out of the statute (*Thomson* v. *Osborne*, 2 Starkie's C. 98); but in the previous case of *Davis* v. *Smith*, 4 Esp. C. 36, it was held by Ld. Kenyon that it was not enough to prove a promise to pay when the party should be able, without proving that he was able at the time of the action. And it is otherwise where the defendant, admitting the receipt of the money, denies the debt in *fact*; as where the defendant, acknowledging the receipt of money, claims it as a gift (*Owen* v. *Woolley*, B. N. P. 148). So if the defendant, insisting on the statute, deny the debt, as where he said, "I owe you not a farthing, it is six years since," this is not evidence to be left to a jury (*Coltman* v. *Marsh*, 3 Taunt. 380). See also *Hellings* v. *Shaw*, 1 Moore, 340; where the plaintiff, in an action on a promissory note, proved that within the six years he showed the note to the defendant, who said, "You owe me more money; I have a set-off against it;" no set-off having been pleaded, it was held by Bayley and Holroyd, Justices, Best, J. *dissentiente*, that this was not a sufficient acknowledgment to take the case out of the statute (*Swan* v. *Sewell*, 2 B. & A. 759). Where the defendant said, "I have paid the debt, and will send a copy of the receipt," his omission to do so was held to be sufficient to go to a jury; Holt's C. 381, per Gibbs, C. J. But see *Bird* v. *Guy*, 4 Esp. C. 184, where the defendant said, "I have paid the debt, and will send a copy of the receipt;" and Lord Ellenbo-

Non assumpsit, &c.

By the former, a *mere oral acknowledgment* is insufficient to revive a

rough held that it was not sufficient. So where the defendant stated, "I shall be able to satisfy him (the plaintiff) respecting the misunderstanding which has occurred between us" (*Craig* v. *Cox*, Holt's C. 380. See also *Ward* v. *Hunter*, 6 Taunt. 210). But where the acknowledgment was, that he would satisfy the plaintiff, for he could show his receipt, it was held that he was bound to produce it; and that in case he did not, there was at all events sufficient evidence to go to a jury. *Anon.* Holt's C. 381. Where the defendant, at the time when he admits the debt, insists that it has been discharged by a written instrument, the whole declaration must be taken together (*Partington* v. *Butcher*, 6 Esp. C. 66. Mansfield, C. J. 1806); and *Earl of Montague* v. *Lord Preston*, 2 Vent. 170; and *Bermon* v. *Woodbridge*, Doug. 751. But it was held that if it appeared that the instrument referred to did not amount to a discharge, it was a sufficient acknowledgment. (Ib.) Where an accountable receipt for the payment of money was shown to the defendant, the latter admitted his signature, but added, that he never would pay it; that it was out of date, and that no law should make him pay it; it was held to be insufficient to charge the defendant, since there was no acknowledgment, but the contrary, that the debt ever existed. *Rowcroft* v. *Lomas*, 4 M. & S. 457. The defendant alleged that the plaintiff's bill had been paid to Long, a deceased partner of the plaintiff, by the latter retaining the amount out of a floating balance which had been in his hands; and evidence was adduced by the plaintiff to falsify this, by showing the state of the accounts between the defendant and Long. After a verdict for the defendant, the Court held, that even admitting, as laid down by Gibbs, C. J. in *Hellings* v. *Shaw*, 7 Taunt. 612, that where a defendant, alleging payment, designates the time and mode so strictly that the Court can say it is impossible that it should have been discharged in any other mode, then the plaintiff is at liberty to disprove that mode, yet, that the principal case did not fall within the rule, as the time and mode were not designated strictly, and the evidence was not sufficient to negative that time and mode. *Beale* v. *Nind*, 4 B. & A. 568.—In the case of *Hellings* v. *Shaw*, 7 Taunt. 608, the defendant, to a demand made for the charges of executing an annuity-deed, answered, "I thought I had paid it *at the time*, but I have been in so much trouble since, that I really don't recollect it;" evidence was adduced to show that the debt had not been paid at the time; but the Court held that the acknowledgment was insufficient, as it did not sufficiently put in issue whether the debt had been paid at the particular time. Gibbs, C. J. in that case, in addition to the case already cited, mentioned others, in which the Courts have held a defendant liable who was discharged by the words of the statute, viz. where he has admitted that the debt is unpaid, but alleges that it has been discharged by lapse of time; a third, where the defendant challenges the plaintiff to produce a particular proof of his liability, which the plaintiff does.—*A.* having by means of misrepresentation obtained money from *B.* and others, to which he was not entitled, on application by *B.* to have the money returned, saying that he and the other tenants had been induced to pay more than was due, replies, if there be any mistake it shall be rectified; this takes the case out of the statute as to all. *Clarke* v. *Hougham*, 2 B. & C. 149. The defendant, upon being applied to for the debt, replied that he had a receipt in full, which he would search for; held, that whether true or false, it was clear he did not intend to pay, and therefore that no promise to pay could be inferred. *Brydges* v. *Plumptree*, 9 D. & Ry. 746. The defendant being applied to for some money on account, said he had not got any; upon a second application, the amount was mentioned, but he made no answer; upon being requested to help the plaintiff to 5 *l.*, he said he was going to *H.* in the course of the week, and that he would help him to 5 *l.* if he could; held, that even if it were to be taken to amount to a promise or acknowledgment, it was merely a *conditional one*, and it was therefore incumbent on the plaintiff to show that the defendant was able to pay that sum. *Gould* v. *Shirley*, 2 Moore & P. 581. Where a letter, relied on to take the case out of the statute, imported no more than offers on the part of the defendant to surrender his property, with a view to an arrangement with his creditors, provided he were allowed time to arrange his affairs; held, that they amounted to no more than a kind of conditional offer to pay, and not a general and unqualified acknowledgment, from which a promise to pay *was to be implied*, and not sufficient to take the case out of the operation of the statute. *Fearn* v. *Lewis*, 6 Bing. 359. A letter of the defendant, stating it to be "without prejudice of his rights, or as to any future right," is only a conditional statement, and cannot be read for the purpose of taking the demand out of the statute. *Cory* v. *Bretton*, 4 C. & P. 462. But where the defendant, after bankruptcy, by letter acknowledged an application for the debt, and added, that in a few days he should have his banker's account, and would remit the sum by draft on them; it was held to be not a conditional promise, but a sufficient answer to a plea of a statute of limitations, and of the general plea of bankruptcy. *Lang* v. *Mackenzie*, 4 C. & P. 463. Where one of

debt (*t*); by the latter an acknowledgment is insufficient, unless a *new promise* to pay the debt be expressly made or can be clearly inferred. Non assumpsit, &c.

the defendants, upon being called on to pay a debt due from him and his late partner, observed that "it was hard he should be called upon to pay when there were so many outstanding debts due to the concern uncollected;" and upon a second application, desired that the account might be handed to *W.* who was to "*settle* the business;" it was held, that it was not a conditional promise, but was properly left to the jury to say whether the whole amounted to a promise or not. *Pierce* v. *Brewster*, 12 Moore, 515. On a replication of a promise within six years to a plea of the statute, fraud is no answer to the plea. Ibid. Where the defendant on being arrested said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it," the acknowledgment was held to be insufficient. *A'Court* v. *Cross*, 3 Bing. 329. In *Tullock* v. *Dunn*, 1 Ry. & M. 416, Abbott, L. C. J. held, that in the case of executors neither a mere acknowledgment by all, nor an express promise by one, was sufficient.

(*t*) The stat. 9 G. 4, c. 14, s. 1, enacts, that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment * or promise by words only † shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing ‡ to be

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* The statute makes no alteration in the form of the acknowledgment, or as to the party to whom it is made. *Haydon* v. *Williams*, 7 Bing. 163; 4 M. & P. 818. But although the acknowledgment be in writing, it must, in order to take the case out of the statute, be such as will raise the implication of a promise to pay. *Brigstocke* v. *Smith*, 1 C. & M. 483. A mere statement of an antecedent debt by *parol* without any new contract or consideration, is not sufficient. *Jones* v. *Ryder*, 4 M. & W. 32. But in the case of *Smith* v. *Forty*, 4 C. & P. 126, Vaughan, B. is reported to have held, where the agents of the plaintiff (an administrator) and the defendant had gone over the accounts within six years, and struck a balance which the defendant promised orally to pay, the plaintiff had a good cause of action on the account stated, and that the statute was not applicable, as the plaintiff proceeded for a *new debt*.

† The stat. excludes oral evidence of an acknowledgment made previous to the day when the stat. began to operate. *Fowler* v. *Chatterton*, 6 Bing. 258. The same point had been previously ruled by Ld. Tenterden and by Hullock, B. at Nisi Prius. See *Ansell* v. *Ansell*, 3 C. & P. 563. An oral acknowledgment by the defendant that he has paid money on account of the debt, is insufficient. *Willis* v. *Newham*, 1 Lloyd & W. 197; 3 Y. & J. 518. But if the fact of payment can be proved by independent evidence, the application of the payment to the particular debt may be proved by the declaration of the debtor. *Waters* v. *Tompkins*, 2 C. M. & W. 723. In an action against *A.* on a note by *A.* and *B.*, the signature of *B.* being attested, a part payment by *B.* cannot be proved in an action against *A.* without calling the attesting witness. *Wild* v. *Porter*, 3 N. & M. 585. Where after the statute a written acknowledgment had been given which had been lost, it was held that secondary evidence of the existence of such writing was admissible. *Haydon* v. *Williams*, 7 Bing. 163. Where, at the time of the sale of the plaintiff's goods, a conversation took place as to the subject of a demand of the defendant's, and which was the subject of his set-off, and otherwise barred by the Statute of Limitations; held that such conversation was improperly rejected at the trial. *Moore* v. *Strong*, 1 Bing. N. C. 441; and 1 Sc. 307. Where, upon the settlement of an old account, a new note was given for the balance and a further sum, but was insufficiently stamped; held that it could not be used as an acknowledgment to take the case out of the statute. *Jones* v. *Ryder*, 4 M. & W. 32. The advertisement by an executor to creditors to send in their claims, is not sufficient to revive a debt already barred by the statute. *Scott* v. *Jones*, 4 Cl. & F. 382.

‡ A promise in writing to pay the balance due, is sufficient to take the case out of the stat.; but without other evidence to show what the balance is, the plaintiff will be entitled to nominal damages only. The defendant, in a letter to the plaintiff, promises to pay the balance due from him to the plaintiff, but does not specify any particular amount, this is sufficient to take the case out of the statute; it seems to be evidence of a new or continuing contract at the time of the date. The Act does not require the amount of the debt to be specified; before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover; a similar promise in writing will have the same effect since, but the plaintiff can recover nominal damages only; the promise is to pay a balance, and there is no evidence to show what that balance is. *Dickinson* v. *Hatfield*, 2 Mo. & M. 141. (Cor. Lord Tenterden.) And see *Dodson* v. *Mackey*, 4 N. & M. 327. Where the defendant wrote, "I beg to say that I cannot comply with your

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From the late decisions on the effect of an acknowledgment under the provisions of the statute 21 J. 1, c. 10, when all the former cases were

signed by the party chargeable thereby §, and that where there shall be two or more contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any *payment* ‖ of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover

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request; the best way for you will be to send another bill, and draw another for the balance of your money, 30*l.*," it was held to be sufficient without showing that another bill had been drawn. *Dubbs* v. *Humphries*, 10 Bing. 496. A promise to pay a proportion of a joint debt is sufficient, though no amount be specified; it may be proved by other evidence. *Lechmere* v. *Fletcher*, 1 C. & M. 623; 3 Tyr. 450. An entry in a bankrupt's examination of a specified sum being due to *A.* is sufficient. *Eicke* v. *Nokes*, 1 M. & R. 359. The drawing a bill of exchange is not an acknowledgment of a debt due in respect of the original demand for which the bill was given. *Gowan* v. *Foster*, 3 B. & Ad. 512. Where the evidence to take the case out of the stat. was a deed of composition in which the defendant stated that he was indebted to the plaintiff in the sum opposite his signature, but the plaintiff had never signed the deed, nor did the amount in any way appear, held that it could not be coupled with a parol admission that there was no other sum due than that on the note on which the action was brought, and that there was no sufficient acknowledgment to take the case out of the statute. *Kennett* v. *Milbank*, 8 Bing. 38.

§ The signature by an agent is not sufficient. *Hyde* v. *Johnson*, 2 Bing. N. C. 776. The acknowledgment, to satisfy the statute, must be signed by the party chargeable *thereby*. Where the party to whom an application was made for payment, replied that "family arrangements have been made to enable him to discharge the debt; that funds have been appointed for the purpose, of which *A.* is trustee; that the defendant has handed the account to *A.*; that some time must elapse before payment, but that the defendant is authorized by *A.* to refer to him for any further information:" it was held that the writing was insufficient to satisfy the statute. *Whippy* v. *Hillary*, 3 B. & Ad. 399.

‖ It should appear that the payment was on account of the debt for which the action was brought, and in part payment of a greater debt. *Tippets* v. *Heane*, 1 C. M. & R. 252. But if evidence be given of a part payment of *some* debt, and it does not appear that any other debt is due from the defendant to the plaintiff, it will be sufficient. *Evans* v. *Davies*, 4 Ad. & Ell. 840. Part payment by one of several joint-contarctors, binds the rest. *Whitcomb* v. *Whiting*, Doug. 652. *Wyatt* v. *Hodgson*, 8 Bing. 309. *Pease* v. *Hurst*, 10 B. & C. 122. *Chippendale* v. *Thurston*, M. & M. 411. And see in general as to the effect of acknowledgments by joint-contractors, *infra*, 669. A note having been given by the defendants as overseers, for money borrowed for the parish, payment of interest by the vestry, the accounts being signed by one of the defendants, was held to be sufficient to take the case out of the statute. *Rew* v. *Pettit*, 1 Ad. & Ell. 196; 3 N. & M. 456. So of a payment to an administrator (on a note) who has neglected to take out administration in a diocese in which the note is within the description of *bonâ notabilia*. *Clarke* v. *Hooper*, 10 Bing. 480; 4 M. & S. 353. So in case of part payment to a legatee of money lent by the trustees of the legatees, as such trustees, to the defendant. *Meggison* v. *Harper*, 4 Tyr. 94; 2 C. & M. 323. Per Parke, B., it has been held by the Exchequer that a yearly settlement of account by which the items on the credit side were taken in diminution of the debt, amounted to a payment. A mere acknowledgment in a written account of payment of a 100*l.* note, does not take the case out of the stat., without specifying that it was part payment of a larger sum. *Garbutt* v. *Wilson*, cor. Parke, B., York Sum. Ass. 1836. Where the testator by letter dated 23 April 1813, requested of the plaintiff, his attorney, to let him have his account that everything might be settled, and shortly after died, having by will charged his real and personal estate in the hands of trustees for sale, with payment of his debts, the last item in the bill when delivered was of the date 19th August 1808, but no bill was filed until 18th November 1820; held that the letter was sufficient to take the debt out of the statute, and that the devise continued it until the filing of the bill. *Rendell* v. *Carpenter*, 2 Y. & J. 484.

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brought under consideration, the result seems to be, that to repel the limiting power of the statute it must either amount to an *express promise*, or to so clear an admission of a still subsisting liability, that a promise must necessarily be implied. And therefore, although from a general acknowledgment (*x*) that a once existing debt still exists unsatisfied, a promise to pay it may be inferred, yet it is otherwise where the party either *denies* his liability or *limits* it. Where the acknowledgment was, "I cannot pay the debt at present, but I will pay it as soon as I can," it was held to be insufficient to take the case out of the statute, without proof of the defendant's ability (*y*).

And notwithstanding an acknowledgment of a debt, yet if it be made in

against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. —Sec. 2. That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear on the trial that they could not, by reason of the said recited Acts or this Act or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same. —Sec. 3. That no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.—Sec. 8. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties on stamps.

(*x*) From a general acknowledgment, such a promise "may and ought to be inferred." Per Bayley, B., in *Brigstock* v. *Smith*, 3 Tyr. 445, citing *Tanner* v. *Smart*, 6 B. & C. 603. The acknowledgment need not state the *amount* of the debt; extrinsic evidence is admissible to prove it. *Lechmere* v. *Fletcher*; 3 Tyr. 450; 1 Cr. & M. 633; S. P. *Linley* v. *Bonsor*, York Spring Ass. 1833, cor. Parke, B. A letter, containing as follows: "I beg leave to say, I cannot accede to your request; the best way will be to send the bill you hold, and draw another for the balance of your money;" held to be sufficient. *Dobbs* v. *Humphries*, 10 Bing. 446.

(*y*) *Tanner* v. *Smart*, 6 B. and C. 603, on a review of all the cases. See also *Scales* v. *Jacob*, 3 Bingh. 638; *Ayton* v. *Bott*, 4 Bingh. 105. Where one of several executors acting in the affairs, said that he believed the debt to be a just one, but that he could not do anything without the consent of the testator's family; it was held that it was neither a promise nor even an acknowledgment to take the case out of the statute. *M'Culloch* v. *Dawes*, 9 D. & R. 40. A memorandum is adduced in the handwriting of the defendant, "I. O. U. 100*l.*," of a date beyond six years; and on the same paper a separate memorandum, "Received 20*l.*," within six years; held that the plaintiff was entitled to the latter sum only. A tender and payment into Court of the principal sum is no implied acknowledgment, so as to revive the claim to interest on the original debt. *Collyer* v. *Willcock*, 4 Bing. 313. Where in an action by the drawers against the acceptor of a bill payable to L. & Co., the defendant admitted that he was indebted to L. & Co. on the bill, but not to the plaintiff, there being no original consideration for the bill; held, that being a denial of liability to the plaintiff, the defendant was within the protection of the statute. *Easterby* v. *Pullen*, 3 Starkie's C. 187. Where the defendant, on application made for payment of an old demand, said, "I will see my attorney and tell him to do what is right," held to be insufficient. *Miller* v. *Caldwell*, 3 D. & R. 206. So where he answered, "I cannot afford to pay my new debts, much less my old ones," the jury being of opinion that there was no acknowledgment of a subsisting debt, the Court refused a new trial. *Knott* v. *Farren*, 4 D. & R. 479. See also *Fearn* v. *Lewis*, 6 Bing. 1; and see Append.

¶ A promissory note improperly stamped is not admissible as a memorandum to take the case out of the stat. under this clause, which applies only to instruments which may be stamped as agreements. *Jones* v. *Ryder*, 4 M. & W. 34. The memorandum, "I acknowledge to owe *M.* 36*l.*, which I agree to pay him as soon as circumstances will permit," is exempt from duty for the purpose of being used as necessary under the Act. *Morris* v. *Dixon*, 4 Ad. & Ell. 745.

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terms which repel the inference of a promise, it is insufficient to take the case out of the statute; and therefore, where defendant said, "I know that I owe the money, but the bill I gave is on a threepenny stamp, and I will never pay it," it was held to be insufficient to revive the debt (*z*).

Two circumstances must be proved:—1st. That a debt *once* existed; 2dly, It must appear from the defendant's acknowledgment that it *continued* to be a debt within the six years. If evidence be given *aliunde* to prove the existence of the debt, then payments (*a*) by the defendant, or statements by him, which now must be in writing, are admissible in evidence to show the *continuance* of the debt. Where the conduct and expressions of the defendant are ambiguous, it is a question of fact for the jury whether they amount to an admission of the continued existence of the debt (*b*). But a mere admission that the sum claimed has not been satisfied, is not sufficient evidence even of the previous existence of a debt (*c*).

Evidence of an acknowledgment.

If a precedent debt be proved, it seems that a general acknowledgment may be sufficient, if it be applicable to that debt; and whether it be so applicable is a question of fact for the jury (*d*). And if no other account between the parties appear, it seems that the onus of showing that other transactions existed, to which the acknowledgment might possibly refer, is thrown on the defendant (*e*); although, in the first instance, it lies on the plaintiff to take the case out of the statute (*f*). But if the defendant wholly deny the debt, although he admit the receipt of the money (*g*), or *deny* the debt, insisting that it has been barred by the statute (*h*), there is no evidence of an acknowledgment to go to a jury. It was not necessary before the late statute that the new promise or acknowledgment should be in writing; although the original promise, as to guarantee the debt of another, was required to be in writing (*i*).

The giving a bill in part payment of a debt, more than six years before the action brought, but which bill has been paid within the six years, does not take the case out of the Statute of Limitations; for the reason why a

(*z*) *A'Court* v. *Cross*, 3 Bing. 329.

(*a*) The payment of interest is sufficient. *Bealy* v. *Greenslade*, 2 C. & J. 61. *Irving* v. *Veitch*, 3 M. & W. 90. A bill of exchange drawn by the debtor, and delivered in payment of a debt, operates as payment from the time of delivery only, and not from the time when the bill is paid. *Irving* v. *Veitch*, 3 M. & W. 90. On an agreement that goods shall be taken in reduction of the demand, the delivery of such goods operates as payment. *Hooper* v. *Stephens*, 4 Ad. & Ell. 71. *Hart* v. *Nash*, 2 C. M. & R. 337.

(*b*) *Lloyd* v. *Maund*, 2 N. R. 760. *Frost* v. *Bengough*, 1 Bing. 266; where it was left to the jury to decide whether a letter written by the defendant had reference to the promissory note on which the action was brought, and was sufficient to take the case out of the statute. In the subsequent case of *Morell* v. *Frith*, 3 M. & W. 402, it was held that the construction of an instrument given in evidence to defeat the Statute of Limitations was for the Court, although, where extrinsic facts were used in explanation, those were for the consideration of the jury. In *Burkett* v. *Church*, 9 C. & P. 209, it is stated to be the practice for the Judge to give his opinion whether a letter written by the defendant be a sufficient acknowledgment to take the case out of the statute, and to leave the case to the jury; and that it must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due.

(*c*) *Rowcroft* v. *Lomas*, 4 M. & S. 457.

(*d*) *Frost* v. *Bengough*, 1 Bing. 266. *Baillie* v. *Lord Inchiquin*, 1 Esp. 435.

(*e*) See the observations of the Court in *Frost* v. *Bengough*, 1 Bing. 266. Per Parke, J.: "A paper is produced, which, though ambiguous, is sufficient to shift on the defendant the *onus*, which at first was on the plaintiff." Burrough, J.: "There is nothing to which the letter appears to relate but the prior demand."

(*f*) Ibid.; and per Bayley, J. in *Beale* v. *Nind*, 4 B. & A. 571.

(*g*) *Owen* v. *Woolley*, B. N. P. 148.

(*h*) *Coltman* v. *Marsh*, 3 Taunt. 380.

(*i*) *Gibbons* v. *M'Casland*, 1 B. & A. 690.

payment takes a case out of the statute is, that it is evidence of a fresh promise; and the promise must be considered to have been made when the bill was given, and not when it was paid (*k*). Evidence of an acknowledgment.

An acknowledgment to take the case out of the statute may be raised from circumstances, without express promise or admission (*l*).

Evidence of an acknowledgment by one of several joint contractors is sufficient to bind the rest, even in separate actions against them; and although the acknowledgment be made not to the plaintiff, but by one of two co-contractors to the other (*m*), or to a third person (*n*); and although it has been made by one of two partners subsequent to the dissolution of partnership (*o*); and although the party to be affected by the acknowledgment, but who has joined in a promissory note, be but a surety for the other (*p*). But since the late statute (*q*), a *new promise*, even in writing, by one joint contractor, or executor or administrator, does not bind any other.

Where one of two makers of a joint and several promissory note became bankrupt, the receiving a dividend under the commission within six years next before bringing the action, was held to be sufficient in an action against the other maker (*r*).

The principle upon which such evidence is admissible, is, as has been already observed (*s*), the community of interest between the party making the admission and the party to be affected by it, and the presumption that the former would not acknowledge that which was adverse to his own interest. And hence it may perhaps be doubted, whether such evidence be sufficient for such a purpose, where the party making it is no longer responsible (*t*).

Where one of two joint drawers of a bill of exchange became bankrupt, and the indorsees proved under the commission a debt exceeding the amount of the bill, and exhibited the bill as a security for the debt, and received a dividend within six years next before the action against the solvent partner, it was held that the action was barred by the statute (*u*). This case was

(*k*) *Gowan* v. *Forster*, 3 B. & Ad. 507.

(*l*) The plaintiffs being sued for money paid under a mistake to defendants, gave notice to the latter that if a verdict passed against the plaintiffs, they should look to the defendants, and they from time to time advised particular proceedings in the defence; held sufficient to warrant the jury in finding an acknowledgment, or to justify the proving under the defendants' commission. *East India Company* v. *Prince*, 1 Ry. & M. 407.

(*m*) In an action against *A.* on the joint and several promissory note of *A.* and *B.*, it was held that a letter written by *A.* to *B.*, desiring him to settle the money, took the case out of the statute. *Halliday* v. *Ward*, 3 Camp. 32. The same evidence seems also to be sufficient on issue taken on the plea *actio non accrevit infra sex annos.*

(*n*) As in a deed between the defendants and a third person. *Mountstephen* v. *Brooke*, 3 B. & A. 141. See *Clarke* v. *Hougham*, 2 B. & C. 149.

(*o*) *Wood* v. *Braddick*, 1 Taunt. 104.

(*p*) *Perham* v. *Raynal*, 2 Bing. 306. So in *Burleigh* v. *Stot*, 8 B. & C. 36, in an action against the administrator of a surety in a note, part payment by the principal within six years was held to be sufficient; and see *Manderton* v. *Robertson*, 4 M. & Ry. 440. Payment of interest by one joint contractor is sufficient to take the case out of the statute, since 9 Geo. 4, c. 14. *Chippendale* v. *Thurston*, 1 M. & M. C. 411. The payment of interest by one of several makers of a note above six years after it had become due, takes the case out of the statute as to all. *Channel* v. *Ditchburn*, 5 M. & W. 494.

(*q*) 9 Geo. 4, c. 14, s. 1; *supra*, 665.

(*r*) *Jackson* v. *Fairbank*, 2 H. Bl. 340. But see the observations on this case in *Brandram* v. *Wharton*, 1 B. & A. 463.

(*s*) *Supra*, tit. ADMISSION.

(*t*) 1 B. & A. 463. See the observations of Bayley and Abbott, Justices.

(*u*) *Brandram* v. *Wharton*, 1 B. & A. 463. Lord Ellenborough, in giving judgment, founded himself on the distinction between express and implied acknowledgments; and see his Lordship's observations in *Holme* v. *Green*, 1 Starkie's C. 488.

distinguished by the Court from that of *Jackson* v. *Fairbank*, for there the claim was made and the dividend received upon the instrument itself (*x*); in the later case the dividend was on a distinct debt, and the instrument was introduced but incidentally, and the introduction or omission of it neither increased nor diminished the claim upon the dividends. And it seems that such evidence is not sufficient to bind a partner, unless it be clear and explicit (*y*).

Subsequent promise.

A subsequent promise, to take the debt out of the statute of limitations, must agree with the original promise stated in the declaration (*z*). A subsequent acknowledgment to an executor will not support a declaration framed on promises to the testator (*a*); and an acknowledgment of negligence made within six years will not support a special action of *assumpsit* founded on negligence, which took place more than six years ago (*b*), although in fact the negligence was first discovered within the six years.

So where the cause of action arises from the doing or not doing some act at a particular time, in breach of a contract, an acknowledgment within six years of the previous breach of contract will not avoid the statute (*c*).

So the principle does not apply to an acknowledgment made by one acting *alieno jure*. *A.* and *B.* made a joint and several promissory note, and ten years after the death of *A.*, *B.* (who was one of *A.*'s executors) made a payment on the note on his own account, and it was held that this was no evidence of a promise by the executors (*d*).

(*x*) See the observations of Abbott and Holroyd, Justices.

(*y*) Per Lord Ellenborough, 1 B. & A. 468; and *Holme* v. *Green*, 1 Starkie's C. 486. In *Munderson* v. *Reeve*, K. B. Easter T. 1829, it appeared on a special case that payments had been made within the six years by Robertson, who had let judgment go by default, upon the joint-note on which the action was brought; and it having been admitted, or at least not disputed at the trial, that an account which Robertson had stated with the plaintiff contained an item for interest on the note, the Court held that the case was not distinguishable from that of *Burleigh* v. *Stott*, 8 B. & C. 36; *supra*, 669, note (*i*). Bayley, J. observed in the course of the argument, that in *Brandram* v. *Wharton*, *supra*, there was in fact no acknowledgment by any one. An acknowledgment by the acceptor that he was indebted on it to the payees but not to the drawer, there being no consideration for the bill, is not a sufficient acknowledgment in an action by the drawer. *Easterby* v. *Pullen*, 3 Starkie, 186. But an acknowledgment, although it be to a stranger, of a debt due to the plaintiff, is sufficient. *Peters* v. *Brown*, 4 Esp. C. 46; and see *Clarke* v. *Hougham*, 2 B. & C. 149. *Halliday* v. *Ward*, 3 Camp. 32. *Mountstephen* v. *Brook*, 3 B. & A. 141.

(*z*) The plaintiff may declare on the original promise, and rely on the subsequent acknowledgment to take the case out of the statute. See *Leaper* v. *Tatton*, 16 East, 420, where the plaintiff declared against the defendant, as the acceptor of a bill of exchange; but note, that there the acknowledgment was held to be evidence on an account stated. See *Bicknell* v. *Keppel*, 1 N. R. 21. *A'Court* v. *Cross*, 1 Bing. 332. The original debt remaining, and the remedy only being gone, it is only necessary to declare specially in the case of executors or administrators. *Upton* v. *Else*, 12 Moore, 303. *Secus*, where the new promise is conditional. *Haydon* v. *Williams*, 7 Bing. 163.

(*a*) *Sarell* v. *Wine*, 3 East, 409, and per Holroyd, J. in *Short* v. *M'Carthy*, 3 B. & A. 632. A declaration by the defendant to the plaintiff (executrix), that the testator always promised never to distress him for it, is no evidence of a promise to the testator. *Ward* v. *Hunter*, 6 Taunt. 210; 1 B. & C. 251.

(*b*) *Short* v. *M'Carthy*, 3 B. & A. 626, and *supra*, 658.

(*c*) *Boydell* v. *Drummond*, 2 Camp. 157.

(*d*) *Atkins* v. *Tredgold*, 2 B. & C. 29; and vide *supra*, 665, and *Slater* v. *Lawson*, 1 B. & Ad. 396. The admission of the executors within six years before the filing of a creditor's bill is not sufficient, as against the heir or devisee of a trader, so as to entitle him to payment out of the real estate in their hands, under the 47 Geo. 3, c. 74. *Putnam* v. *Bates*, 3 Russ. 188. A charge on the personal and real estate by will is a trust against which the statute does not run; a charge on land is a trust to be executed by the heir or devisee. *Hargraves* v. *Michell*, 6 Mad. 326; and see *Burke* v. *Jones*, 2 Ves. & B. 275.

Mutual accounts.

Where there is a mutual account between the parties, every new item and credit in the account given by the one party to the other is an admission of there being some unsettled account between them, the amount of which is to be afterwards ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute (*e*).

Where the items of account are all on one side, as in an account between a tradesman and his customer, and there be some items within the six years, but the rest are beyond it, the modern items will not enable the plaintiff to give evidence of the former (*f*).

Where there is a mutual account, but no item has accrued within the six years, the plaintiff will be precluded from recovering under this issue (*g*), or indeed from recovering at all, unless he can bring his case within the exception of the statute concerning merchants' accounts, which must be done by means of a special replication (*h*).

Where there are cross-demands arising out of the same transaction, and the plaintiff has kept alive his claim by continued process, he cannot avail himself of the statute to defeat the defendant's set-off (*i*).

(*e*) Per Lord Kenyon, C. J. in *Catling* v. *Skoulding*, 6 T. R. 189. In that case the defendants had hired certain premises of the plaintiff's testator for twenty-one years; ten years afterwards the testator died, and rent for nine years and a half was then due; and 20 *l.* was also due for cash lent on account, seven or eight years before the death, and the testator was indebted to the defendants for various articles supplied by them in their trade. The last half-year's arrear of rent, and one or two of the last articles of the defendants' bill for goods supplied, were within six years before the suing out of the writ. The amount of the articles furnished by the defendants within the last six years was more than sufficient to cover the last half-year's rent. There had never been any settlement of account between the defendants and the testator. The balance due to the testator at the time of his death was 171 *l.* Issues were joined on the pleas of *non assumpsit* and set-off, and on the replication of a promise within six years; and the Court, after a consideration of all the former cases, held that the executors were entitled to recover. Where the whole of the items of the plaintiff's bill, as a proctor in a suit terminated by a sentence, were incurred more than six years before the suit, but two items were added within that period for perusing a letter from the adverse proctor as to the costs being paid and threatening proceedings against the bail, and for attending him thereon, held, that as the latter subject was only accidental and not connected with the former duty of the plaintiff, the statute was a bar to the original demand, and he could only recover for the last items. *Rothery* v. *Munnings*, 1 B. & Ad. 15. Where there has been no account in writing, nor any payment on account of a particular debt, it is not an open account within the meaning of the exception of the statute; where a payment has been made without any specific appropriation, the creditor is entitled to apply it in satisfaction of the part of his demand barred by the statute, but it is not such a part payment as to take the earlier portions out of the operation of the statute. *Mills* v. *Fowkes*, 5 Bing. N. C. 455. And see *Tippets* v. *Heane*, 1 C. M. & R. 45; and *Williams* v. *Griffith*, 2 C. M. & R. 45; and *Bosanquet* v. *Wray*, 6 Taunt. 597. The plaintiffs, as joint owners, worked copartnership plantations in *I.*, and kept an account with merchants and agents at *B.*, to whom they became largely indebted; these were held not to be merchants' accounts within the exception in the statute. *Forbes* v. *Skelton*, 8 Sim. 355.

(*f*) Per Denison, J. in *Cotes* v. *Harris*, B. N. P. 149.

(*g*) Per Lord Kenyon, 6 T. R. 192.

(*h*) Ibid. And the clause as to merchants' accounts extends to those cases only where there are mutual accounts and reciprocal demands between two persons. Per Denison, J., *Cotes* v. *Harris*, B. N. P. 149; and only to accounts *current* between merchants, and not to accounts stated between them. *Webber* v. *Tivill*, 2 Saund. 124; and see the cases cited, 2 Will. Saund. 127 (6). The rule is, that if the account be once stated, the plaintiff must bring his action within six years; but if it be adjusted, and a following account be added, the plaintiff is not barred by the statute, for it is a running account. Ibid. and *Farrington* v. *Lee*, 1 Mod. 270; 2 Mod. 311, 312. *Scudamore* v. *White*, 1 Vern. 456. *Welford* v. *Liddel*, 2 Ves. 400. *Cranch* v. *Kirkman*, Peake's C. 121. The clause is not confined to merchants. Ibid. and 2 Will. Saund. 127, b.; although that opinion seems once to have prevailed. Ibid.

(*i*) *Ord* v. *Ruspini*, 2 Esp. C. 270.

Disability. The disability (*k*) of a party must usually be pleaded in reply to a plea of the statute of limitations, but in some instances is matter of evidence, as upon trials of ejectments.

Where it is incumbent on a plaintiff to prove that he laboured under any disability which exempts him from the operation of the statute of limitations, he must show that it was a *continuing* disability from the first; for it seems to be a general rule, that where such a statute has once begun to operate, no subsequent disability will restrain its progress (*l*). If therefore a plaintiff be in England when his right of action or title accrues, and he then depart beyond seas, and the time limited elapses, he and his representatives will be barred (*m*).

So if one of several partners be in England when the cause of action accrues, although the rest be then beyond seas (*n*).

And if an estate descend to parceners, one of whom is under a disability, which continues for more than twenty years, and the other does not enter within the twenty years, the disability of the one does not preserve the title of the other (*o*).

Where an ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son went to sea and was supposed to have died abroad, within age, it was held that the daughter was not entitled to twenty years to make her entry after the death of her brother (*p*), but to ten years only after her coming of age, or to twenty after the death of the ancestor.

It is no answer to a plea of the statute, that the debtor died within the six years; and that by reason of litigation as to the right of probate, an executor was not appointed until after the expiration of the six years (*q*).

MAJORITY.

In the exercise of a public or general power, a majority is to act for the whole (*r*).

(*k*) The exception in the stat. 21 Jac. 1, c. 16, s. 7, was held to apply to the case of absent plaintiffs only. *Hall* v. *Wybourn*, Carth. 136. But the stat. 4 Ann. c. 16, s. 19, enacts, that if any person against whom there is any cause of action for seamen's wages, or of action on the case, the party may bring his action against such person after his return within the time limited by the former statute. See *Williams* v. *Jones*, 13 East, 439.

(*l*) See Lord Kenyon's observations in *Doe* d. *Duroure* v. *Jones*, 4 T. R. 311. *Gray* v. *Mendez*, Str. 556. Ireland is beyond seas, within the meaning of the stat. 21 Jac. 1, c. 16; per Holt, C. J., Show. 91; but Scotland is not. *King* v. *Walker*, Bl. R. 286. Where the statute began to run in the lifetime of the debtor, and after his death, the will being contested, there was for a considerable period no representative who could be sued, held that it did not suspend the operation of the statute. *Rhodes* v. *Smethurst*, 4 M. & W. 42. A direction, in a will of personal estate, for payment of debts, does not prevent the operation of the statute, if once it has begun to run; and it does not cease during the interval between the death and the time of a person being constituted personal representative. *Freake* v. *Cranefeldt*, 3 M. & C. 499. And see *Jones* v. *Scott*, 1 Russ. & M. 255; and *Rhodes* v. *Smethurst*, 4 M. & W. 42.

(*m*) *Smith* v. *Hill*, 1 Wils. 134. Ireland is a place beyond seas within this statute. *Lane* v. *Bennett*, 1 M. & W. 70.

(*n*) *Perry* v. *Jackson*, 4 T. R. 516. *Hall* v. *Wybourn*, Carth. 136; and *Chevely* v. *Bond*, Carth. 226.

(*o*) *Roe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441.

(*p*) *Doe* d. *George* v. *Jesson*, 6 East, 80.

(*q*) *Rhodes* v. *Smethurst*, 1 M. & W. 42.

(*r*) *R.* v. *Justices of Lancashire*, 5 B. & A. 755, upon the question in what cases the act of a majority is binding. See *R.* v. *Beeston*, 5 T. R. 592; Bac. Ab. Corp. E. 7. In all cases a majority of a *meeting capable of deciding* binds. In the absence of any peculiar constitution, it is not essential that a majority of the whole should meet. See the St. 33 H. 8, c. 27, which in effect, and in cases within the

MALICE.

Legal import of the term.

THERE are two classes of cases where the real intention of a man in doing a particular act is immaterial to civil or criminal responsibility. The one, where the act is of such a nature, that even though it be in itself noxious and injurious, yet, for reasons of policy, the law, without regard to the motives of the agent, *excludes* civil or penal liability. Thus a witness or deponent in a cause, however defamatory and however malicious his statement may be, is *not responsible* in an action or in a prosecution for slander or libel.

There is another, and that a large class, where the question of intention is in no way material, so long as the act is *voluntarily* done.

Kinds of malice.

Whenever the law defines a right, or prescribes the performance of a duty, or prohibits a particular act, the *wilful* violation of the right, omission of the duty, or transgression, without legal excuse, is necessarily illegal, without regard to intention; it would be manifestly mischievous, and even inconsistent with the very notion of law, as a general rule of conduct, to allow the crude opinions of individuals to supersede the force of law (*s*). In an intermediate and very extensive class of human actions, the *actual intention* is material; this happens where the act is of such a nature that either unlimited restraint or total prohibition would be inexpedient, and therefore here the law makes the *actual intention* of the agent the test of civil or criminal liability. To permit every man to prefer criminal accusations against others with perfect impunity, or, on the other hand, to subject every one to the payment of damages or to penal visitation who made a charge which turned out to be false, would be highly inconvenient; such prosecutions are therefore neither wholly permitted, nor wholly prohibited; they are allowed to be made with a *bonâ fide* intention, and under circumstances which sup-

statute, makes a majority of the body corporate to bind the rest. See Burn's Ecc. L. by Tyr., vol. 2, p. 113. In the case of dean and chapter, the dean has no casting voice. Ib. *Case of Cathedral Church of Gloucester*, Ib.; of *Carlisle*, Ib.; of *Chester*, Ib.; *Dr. Bland's Case*, Ib; *Howard* v. *Bishop of Chichester*, 1 T. R. 650.

(*s*) A party may be subject even to an indictment for a breach of the law, although he erred not intentionally, but ignorantly. See *R.* v. *Picton*, 30 Howell's St. Tr. 489, and Lord Ellenborough's observations there. Thus magistrates are liable to an indictment for refusing to license a public-house, although they were acting under the advice of able counsel. *R.* v. *Duke of Norfolk*, as cited by Lord Ellenborough in *R.* v. *Picton*, 30 Howell's St. Tr. 489; where his lordship observed, that, "To assert that no man is to be considered as criminal because he has not acted intentionally, but ignorantly, would be leaving it to every man to say, 'I will not inform myself, and in consequence of such negligence I shall not be deemed criminal.' The subject was very much considered when I was at the bar, in the case of some magistrates of Cumberland, and where it was held that they were not entitled to an acquittal, although their mistake originated in the best advice." And see *R.* v. *Sainsbury*, 4 T. R. 451. In the same case (*R.* v. *Picton*, 30 Howell's St. Tr. 489), Lord Ellenborough also observed, "If the act be unlawful, it is a sufficient ground of conviction, although the party may have thought that he had reasonable and probable ground for committing it: being unlawful, he is chargeable for it by indictment. Malice is the essence of an action for a malicious prosecution; here it is an inference of law from the facts." If a Judge in the ordinary exercise of his jurisdiction commit an error, he cannot be prosecuted; but if he commit an error in acting beyond his jurisdiction, he is not protected. Per Lord Ellenborough, Ibid. And one who in the exercise of a public function (as a trustee under a turnpike Act), without emolument, and which he is compellable to execute, acts without malice, according to the best of his skill and diligence, is not liable in respect of consequential damage arising from his act. *Sutton* v. *Clarke*, 6 Taunt. 29; see also *R.* v. *Sainsbury*, 4 T. R. 794; but see *Roberts* v. *Read*, 16 East, 215.

ply a probable cause for the proceeding. Malice, therefore, which in legal and technical language is so frequently used as descriptive of those predicaments which constitute civil or criminal liability, is of two kinds; malice in law, and malice in fact, or *actual* malice.

Malice in law.

Malice in law is a mere inference of law, which results simply from a wilful transgression of the law.

In numerous instances it means simply the evil inclination and disposition of one who wilfully does that which is wrong, without any legal excuse (*t*). In this sense malice has been said to be *un disposition à faire un mal chose* (*u*).

In the same sense, one who being arraigned of felony refuses to plead, is said to stand mute *of malice* (*x*). Again, the statute "*De malefactoribus in parcis* (*y*)," reciting that trespassers did frequently refuse to yield themselves to justice, adds, "*imo malitiam suam prosequendo & continuando*," did flee or stand on their defence.

So where a clerk in orders entered into warranty for hire, and refused to take his trial before lay judges, *propter privilegium clericale*, then, according to Fleta, the warranty will avail nothing, and *clericus gaolæ pro "malitiâ" committetur & redimatur* (*z*).

So where one as a *hired* champion entered fraudulently into warranty, he is said to do so *malitiosè & per fraudem & mercedem* (*a*).

In such cases the term "malicious" imports nothing more than the wicked and perverse disposition of the party who commits the act, and the precise and particular intention with which he did the act; whether he was moved "*irâ vel odio vel causâ lucri*," is immaterial, he acts *maliciously* in wilfully transgressing the law.

The application of the term "malicious" is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offence within the legal denomination of wilful murder, is frequently to be collected by the Court, as a matter of law, from the circumstances of the case, and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever malice consists in the *specific intention* actually existing in the mind of the agent at the time of the act. "Most, if not all the cases of implied malice," says Sir Michael Foster, "will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as plainly carry in them the indications of a heart regardless of social duty and fatally bent upon mischief (*b*)." Malice of this

(*t*) See *Johnstone* v. *Sutton*, 1 T. R. 493. Cro. Car. 271.

(*u*) 2 Roll. R. 461. Fost. 256. Malice in common acceptation means ill will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. Per Bayley, J. in *Bromage* v. *Prosser*, 4 B. & C. 255. See also *Crozer* v. *Pilling*, 4 B. & C. 26; where Abbott, L. C. J. says, "The act of the defendants in detaining the plaintiff in custody after he had tendered the debt, was wrongful, and must be presumed to have been malicious, in the absence of any circumstances to rebut the presumption of malice." Under the st. 6 G. 3, c. 36, s. 48, the word *maliciously* is to be taken in its general signification as denoting an unlawful and bad act; whereas in order to bring the offender within the penalty of death, under the Black Act, the malice must be *personal* against the owner. Per Bayley, J. 4 B. & C. 252.

(*x*) 4 & 5 P. & M. c. 4.

(*y*) 21 Edw. 1, stat. 2.

(*z*) Fleta, lib. i, c. 38, s. 8, 9. Fost. 256. The word malice was used in the same general sense by the best Roman authors, and in the civil law. Fost. 257.

(*a*) Bracton de Corona, c. 32, s. 7.

(*b*) Fost. 257; but even in the case of homicide, malice is frequently a question of fact, depending on the actual intention of the prisoner, and the real state of his mind. Vide *infra*, tit. MURDER.

description is sometimes termed malice *in law*, or *implied* or *constructive malice*; it is nothing more than the evil disposition, which is a necessary inference from the wilful doing of an injurious act without lawful excuse (*c*). Here malice does not depend on the actual intention of the prisoner; he may be guilty of malice prepense in legal consideration, although he entertained no malice whatsoever against the deceased (*d*). Malice in law.

In numerous instances it is unnecessary to use any allegation of malice in the description of the offence, and in others, where the averment of malice is usual, or even necessary, it is not essential to give evidence to *prove* the averment, unless it consist in the existence of some precise and particular intention in the mind of the agent; or in other words, where malice consists in a principle of malevolence to particulars (*e*), for otherwise it is a mere inference of law; and even where special and particular malice is essential, the fact itself is usually *presumptive evidence* to prove it.

In the next place, the term *malice* is frequently used to signify the actual state or disposition of the mind of the agent, with which he did a particular act; as that he did it with a view to prejudice a particular individual, either generally or in some specific manner. In this sense it is usually termed *actual*, *express*, or *positive* malice, and perhaps it may not improperly be termed malice in *fact*, in contradistinction to malice in law, where it is a mere inference of law; for it is obvious that wherever malice depends upon an actual state and disposition of mind, its existence is a question of pure fact, although undoubtedly in ascertaining that existence certain presumptions in fact which are recognized by the law, are to be regarded by juries. This kind of malice seems usually to resolve itself into a question of *intention*, a subject upon which some observations have already been hazarded (*f*). Malice in fact.

A malicious intention in fact is a matter of inference from all the circumstances of the particular case; but nevertheless the terms, malice and malicious, being technical terms of law, involve, as indeed all other technical expressions do, the application of legal judgment and consideration to the facts as found by a jury.

Presumptions of law (*g*) as to malice in particular instances, depend upon considerations of policy and convenience, which greatly affect the nature of the proof, and the effect of malice when proved. In some instances the very existence of malice is wholly immaterial; in other words, the law will decide conclusively in favour of a defendant, notwithstanding his malice or its injurious consequences to the plaintiff. As, where an action is brought for a libel, or words published or spoken by a Judge, juror or witness, in the ordinary course of a judicial proceeding (*h*). In others, the law will not exclude evidence of malice, but will *presume against* its existence, until it has been established by positive proof; as in cases of libel or slander, Presumptions as to malice.

(*c*) Malice implied in case of murder, is where the act is attended with such circumstances as can admit of no excuse. Per Parker, C. J. 10 Mod. 214, 5. So an appeal brought *per malitiam*, was one which was wholly groundless. Per Lord Coke, 2 Ins. 281.

(*d*) See Foster, 256, 7. In cases of appeals of death, it seems formerly to have been held to be unnecessary to use the term malice as descriptive of the offence; it was sufficient to aver that the fact was done *nequiter & in felonia*.

(*e*) Fost. 256.

(*f*) *Supra*, tit. INTENTION.

(*g*) The assignment of a bond by the Lord Chancellor is, it has been held, conclusive evidence of fraud and malice in the suing out the commission. *Smith* v. *Broombed*, 7 T. R. 300, under the statute, 5 G. 2, c. 30.

(*h*) *Supra*, tit. LIBEL.

Presumptions as to malice.

where *the occasion* supports such a presumption (*i*); or where the action is expressly founded upon a malicious proceeding, such as a malicious prosecution by a private person, or a malicious conviction by a magistrate (*k*). In such and similar instances, malice, being the gist of the action, must be established by positive proof, independently of the act itself (*l*).

In other cases, again, where the act of the defendant is unsupported by any presumption of law, supplied in his favour by the occasion and circumstances of the act, which is in itself plainly hurtful and injurious to another, the very act itself supplies evidence of malice, and the *onus* of exculpation is thrown upon the defendant (*m*).

Where a defendant is proved to have done that, the malicious doing of which is prohibited by the law, malice is a *primâ facie* inference from the very act, for he must be presumed to have intended to do that which he did, and an *intentional* violation of the law is a *malicious* violation of it (*n*). The proof of facts in justification, excuse or alleviation, must be, in such cases, incumbent on the defendant. And where the offence consists not merely in the doing a particular act, but in the doing it maliciously, and with *intent* to effect a *specified criminal object*, evidence that the defendant intended to effect that purpose (*o*) is in like manner *primâ facie* evidence of malice.

It seems to be a general rule, that a gross, unfeeling and vicious disregard of consequences, however pernicious they may be to society, or however fatal to the individual in particular, is equivalent to express malice, or perhaps, to speak more correctly, is strong, if not conclusive evidence of a specific intention to injure (*p*).

Such seem to be presumptions of law, in which the Courts in some instances draw the inference; and upon which, in others, juries ought to act, under the direction of the Court.

Where any doubt arises whether the party acted maliciously, or with such a fair and *bonâ fide* intention as would in law protect him, or whether the particular injury resulted from mere accident, seems to be a pure question of fact for the consideration of the jury, who are to decide whether the act was *intentional*, and if so, by what motive the agent was really actuated.

MALICIOUS PROSECUTION.

THE proofs (*q*) in an action for a *malicious prosecution* are, 1st, Of the prosecution; 2dly, Of the want of probable cause, and of the defendant's malice; 3dly, Of damage to the plaintiff.

Proof of the prosecution.

1st. Of a *prosecution* (*r*) by the *defendant*, from which the plaintiff has been *discharged*. If the prosecution was in the King's Bench, at the assizes,

(*i*) See the different instances, *supra*, tit. LIBEL.

(*k*) *Supra*, *Burley* v. *Bethune*, *infra*, tit. MALICIOUS PROSECUTION.

(*l*) See tit. MALICIOUS PROSECUTION.

(*m*) And therefore, when noxious and defamatory words are published without explanation from context or circumstances, the question of malice ought not to be left to the jury. *Bromage* v. *Prosser*, 4 B. & C. 255, and *supra*, 629.

(*n*) If one doth a grievous mischief voluntarily, the law will imply malice. Kel. 126. Holt, 484. Cro. Car. 131. W. Jones, 198. 1 Hale, 454. Palm. 585. Fost. 255. And see *Farrington's Case*, *supra*, 52.

(*o*) *Supra*, tit. INTENTION.

(*p*) *Vide infra*, tit. MURDER.

(*q*) It is, of course, incumbent on the plaintiff to prove so much as is put in issue by the pleadings, under the New Rules. See tit. RULES.

(*r*) An action lies for a malicious prosecution of a charge in the Ecclesiastical Court. Gibs. 216; Burn's Ecc. Law, tit. Churchwardens.

or quarter sessions, the fact of prosecution and acquittal must be proved in the usual way, by the production of the record, or proof of an examined copy of it (*s*). It is no objection to this proof, that no order of court, or fiat of the attorney-general, allowing a copy of it to the party acquitted in a case of felony, is proved (*t*). It must appear that the plaintiff was *acquitted* of the charge (*u*); it is not sufficient to prove that the proceeding was stayed by the *nolle prosequi* of the attorney-general (*x*); otherwise if he had pleaded not guilty, and the attorney-general had confessed it (*y*); and it is sufficient that the party was acquitted upon a defect in the indictment (*z*). Proof of the prosecution.

Some proof ought to be given of the identity of the plaintiff with the party prosecuted. In order to prove that the defendant was the prosecutor, it may be desirable to be prepared with the original bill of indictment; for although the names of the witnesses on the back of the bill are no part of the record, it is evidence that they were sworn to the bill (*a*); but it may be proved that the defendant was a witness, without producing the bill (*b*); and the indorsement of the party's name as a witness on the bill is no evidence that he was the prosecutor (*c*). Where the defendant merely acted as a magistrate, the proof of his name on the back of the indictment as prosecutor, will not render him liable (*d*). The proper evidence to esta-

(*s*) See *Clayton* v. *Nelson*, B. N. P. 13. *Kirk* v. *French*, 1 Esp. C. 81. *Morrison* v. *Kelly*, 1 Bl. R. 385. Where a party, acquitted upon an indictment of felony, obtained upon the *fiat* of the attorney-general a copy of the record of acquittal, upon a representation that the Judge had promised to grant it after the assizes, but which it appeared he had no authority to do, the Court refused to restrain the party from making use of it. *Browne* v. *Cumming*, 10 B. & C. 70.

(*t*) *Legatt* v. *Tollervey*, 14 East, 302. *Jordan* v. *Lewis*, 2 Str. 1122. And Ford's MS. The case of *Legatt* v. *Tollervey*, above cited, overruled that of *Guinn* v. *Phillips*, Monmouth summer assizes, 1763, where Adams, B. held that a copy of the record in felony ought not to be received, unless it had been ordered by the Judge (see Selw. N. P. 1063). But he held that, in all cases of indictments for misdemeanors, a defendant is entitled to a copy of the record. And the same distinction was taken by Lord Mansfield, C. J., in *Morrison* v. *Kelly*, 1 Bl. R. 385, where the prosecution, however, had been for a misdemeanor. Among the orders and directions to be observed by justices of the peace, at the Old Bailey, 26 C. 2, prefixed to Kelyng's Crown Cases, is one which directs "that no copy of any indictment for felony be given without special order, or motion made in the open court, at the general gaol delivery; because the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the king upon just occasions." If *A.* and *B.* be tried on an indictment and acquitted, and a copy of the record be granted to *A.* alone, it is evidence for *A.* in an action against the prosecutor. *Caddy* v. *Barlow*, 1 M. & R. 275. *Jordan* v. *Lewis*, Str. 1122. In *R.* v. *Brangan*, 1 Leach's C. C. L. 32, 3d edit. Willes, C. J. declared, that every prisoner on acquittal had an undoubted right and title to a copy of the record of such acquittal, for any use he might choose to make of it; but this has been denied in other cases. Ib. in the note.

(*u*) *Hunter* v. *French*, Willes, 517.

(*x*) *Goddard* v. *Smith*, 6 Mod. 262; for, notwithstanding the *nolle prosequi*, fresh process may be sued out upon the indictment. Ibid. per Ld. Holt; but it was said that there had been no instance of any further proceeding after a *nolle prosequi*. Ibid. S. C. Salk. 21. Note, that the declaration alleged an *acquittal*, but the Court held that the entry of a *nolle prosequi* did not amount to an *acquittal*.

(*y*) Ibid.

(*z*) *Wicks* v. *Fentham*, 4 T. R. 247. *Pippet* v. *Herne*, 5 B. & A. 634.

(*a*) Per Holt, C. J. in *Johnson & Ux.* v. *Browning*, 6 Mod. 216.

(*b*) Ibid. per Ld. Holt.

(*c*) 1 Vent. 47; B. N. P. 14. It is a question of fact for the jury to determine, who was the prosecutor. See the observations of Lord Ellenborough, C. J., in *R.* v. *Commerell*, 4 M. & S. 207, and *infra*, n. (*d*). See also *R.* v. *Smith*, 1 Burr. 54; *R.* v. *Kettleworth*, 5 T. R. 33; in neither of which was the prosecutor's name in the indictment. Sometimes it is the business of the Court to make the inquiry. Ib. and *R.* v. *Incledon*, 1 M. & S. 268.

(*d*) *Girlington* v. *Pitfield*, 1 Vent. 47. In *R.* v. *Commerell*, 4 M. & S. 203, it was held that the court of quarter sessions

Proof of the prosecution. Variance.

blish this fact is, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution. It has been said that a grand juror may be called to prove that the defendant was the prosecutor (*e*); this, however, appears to be doubtful.

It has been said that the recognizance to prosecute entered into by the defendant is evidence of his being the prosecutor (*f*); this, however, is inconclusive evidence, to say the least, as the magistrate has it in his power to bind over all those who know or can declare anything material, &c., to prosecute or give evidence, so that a witness or party may be bound over without any option on his part.

Where the substance only of the charge contained in the judgment or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different (*g*).

Where the declaration professed to set out the substance of the indictment, and in specifying the goods, and their value, used the word *valoris* for *valentiæ*, it was held that the variance was not material (*h*).

Where the declaration alleged that the defendant charged the plaintiff before the magistrate with assaulting and beating him, and the charge in fact was for assaulting and striking, the Court held, that as the declaration did not profess to describe the warrant, and had stated the charge correctly in substance, the variance was not material (*i*).

So where the declaration for a malicious arrest stated the warrant to be to arrest the plaintiff for an assault with intent to rob *A.* (the informant), and the words of the warrant were "with intent to rob, *as he verily believes*" (*k*).

Where the declaration alleged that the defendant charged the plaintiff with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the *suspicion* of the defendant (*l*).

might make an order on *A.* and *B.* for costs after an acquittal of a parish on a new indictment, although the names of *A.* and *B.* were not indorsed on the indictment. And per Ld. Ellenborough, "We know that in an action for a malicious prosecution, if the prosecutor be kept out of sight, it sometimes becomes a point of very subtle evidence to determine. But *id certum est quod certum reddi potest*; and it is a question to be ascertained by inquiry and evidence. It sometimes is the business of this Court to make that inquiry; as in *R.* v. *Inoledon*, 1 M. & S. 268, one question before the Court was, whether Sir A. Chichester was the prosecutor. So in this case the sessions have found these defendants to be the prosecutors, and the Court will not interfere with that decision unless it appeared that the sessions had improperly or carelessly so found." And per Bayley and Dampier, Js., "it does not follow that he whose name is on the indictment must be the prosecutor;" neither in *R.* v. *Smith*, 1 Burr. 54, nor in *R.* v. *Kettleworth*, 5 T. R. 33, was the prosecutor's name on the indictment.

(*e*) *Sykes* v. *Dunbar*, Selw. N. P. 1066. 7th ed. This evidence is said to have been admitted by Lord Kenyon, on the ground that this was a question of fact, the disclosure of which did not involve a breach of the grand juryman's oath; but yet it seems, that either the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining, upon cross-examination, the grounds from which the witness drew his general inference that the defendant was the prosecutor.

(*f*) *Eager* v. *Dyot*, 5 C. & P. 4.

(*g*) See further, tit. VARIANCE. *Walters* v. *Mace*, Ib. and 2 B. & A. 756. *Phillips* v. *Shaw*, 5 B. & A. 964.

(*h*) *Johnson & Ux.* v. *Browning*, 6 Mod. 216; but it was said, that it would have been otherwise had the indictment been set out in *hæc verba*. Ib. Vide *supra*, tit. LIBEL.

(*i*) *Byne* v. *Moore*, 5 Taunt. 187; Marsh, 12.

(*k*) But note, that Holt, C. J. said he would save the point; a juror was afterwards withdrawn.

(*l*) *Davis* v. *Noak*, 1 Starkie's C. 377;

Proof of the prosecution. Variance.

Evidence that the defendant, upon his application to a magistrate, stated facts which showed the plaintiff to have been guilty of nothing more than a tortious conversion of the defendant's goods, upon which the magistrate issued a warrant to apprehend the plaintiff on suspicion of felony, will not support an averment that the defendant imposed the charge of felony upon him (*m*).

If the plaintiff in his declaration set forth the indictment, which contains several charges, it is sufficient to prove that some of them were maliciously preferred, although there were good grounds for the rest (*n*).

If the declaration allege an acquittal in bank, it is not proved by evidence of an acquittal at *Nisi Prius* (*o*).

But if the day of acquittal be not averred by way of description of the record, a variance from the day of acquittal alleged will not be material. The declaration averred that *afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner, and by due course of law, acquitted. By the record of *Nisi Prius* it appeared that the acquittal took place on Tuesday next after the end of Easter term, and the proof was held to be sufficient (*p*).

Malicious charge before a magistrate.

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum*, to produce the proceedings (*q*). If the information was laid by the defendant, his taking the oath, and hand-writing, should be proved, as also the issuing the warrant to the constable, &c.; the warrant must also be produced and proved, and evidence must be given of the apprehension and deten-

cor. Ld. Ellenborough, C.J. and afterwards by the Court of K. B. Bayley, J. *dissent.*

(*m*) *Leigh* v. *Webb*, 3 Esp. C. 165. 1 Starkie's C. 67. *Cohen* v. *Morgan*, 6 D. & R. 8; *infra*, 680, note (*u*). Where the declaration charged that the defendant maliciously, &c. laid an information against the plaintiff, charging him with having feloniously ridden away with two geldings, and the information, which was of the defendant's servant, merely alleged the riding them away after he was told that he must not, held, that being no more than a trespass, a count stating a malicious charge of felony could not be supported; held also, that a subsequent charge of horse-stealing was evidence as to the motive of the defendant. *Milton* v. *Elmore*, 4 C. & P. 456.

(*n*) *Reed* v. *Taylor*, 4 Taunt. 616.

(*o*) *Woodford* v. *Ashley*, 11 East, 508. The declaration alleged that the plaintiff on Wednesday next after fifteen days of, &c. in the Court of our said Lord the King, before the King himself at Westminster, before the Lord Chief Justice assigned to hold pleas before the King himself, &c. W. & J. being associated with him, &c. was in due manner, and by due course of law, by a jury of the said county of Middlesex, acquitted. In order to prove this, a copy of the original roll was given in evidence, which stated the finding of the bill of indictment in the K. B., the process issued to bring the party into Court, the issue joined, the *venire facias juratores* returnable in Hilary term, the *distringas* returnable in Easter term, the *Nisi Prius* record on the return of the *distringas*, setting out the postea (containing the trial, and verdict and acquittal), and lastly the judgment of the Court in bank.

(*p*) *Purcell* v. *Macnamara*, 9 East, 157, overruling the case of *Pope* v. *Foster*, 4 T. R. 590. And see *R.* v. *Hucks*, 1 Starkie's C. 521; where on an indictment for perjury, alleged to have been committed in the defendant's answer to a bill of discovery filed in the Exchequer, it was alleged that the bill was filed on a day specified, and it was held to be no variance, although the bill was intitled of a preceding term. And see *R.* v. *Payne*, cor. Ld. Kenyon, Westm. after Mich. 29 Geo. 3, where a similar variance was held to be immaterial. See *Phillips* v. *Shaw*, 4 B. & A. 435; 5 B. & A. 984. And though the acquittal be unnecessarily alleged with a *prout patet*, yet if it might have been struck out of the declaration it may be rejected as surplusage. *Stoddart* v. *Palmer*, 3 B. & C. 2, and tit. VARIANCE.

(*q*) Where the declaration alleged an information before a magistrate, and evidence was offered of an admission by the defendant that he had laid an information before a magistrate, and it appeared from the evidence of the magistrate's clerk that the practice was to take such information in writing, but no evidence was given of the information itself, the plaintiff was nonsuited. *Smith* v. *Walker*, cor. Bayley, J. York Sum. Ass. 1821.

Malicious charge before a magistrate.

tion of the plaintiff under the warrant, and his ultimate discharge must also be shown.

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information (*r*).

An allegation that the plaintiff wrongfully and without reasonable cause imposed the crime of felony on the plaintiff, cannot be supported but by evidence that the defendant went before a magistrate and made a charge of felony (*s*).

Where the defendant went merely as a witness to support a charge preferred by another, and the magistrate bound the witness over to appear as a witness on the trial (*t*), Lord Tenterden held that the action was not maintainable against him.

Without probable cause.

2dly. *Malice and the want of probable cause.*—If a party prosecute another on a criminal charge, it is a rule of law, which seems to be founded upon principles of policy and convenience, that the prosecutor shall be protected in so doing, however malicious his private motives may have been, provided he had probable cause (*u*) for preferring the charge.

This protection appears to be not only one of convenience but of justice, or even of necessity, when it is considered how often it happens that the facts upon which a prosecution is properly founded are confined to the knowledge of the prosecutor alone; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such case be left exposed to an action, against which he might have no defence (*x*), if malice were to be inferred from the apparent want of probable cause.

It is incumbent on the plaintiff, in the first place, to prove the absence of probable cause (*y*); slight evidence has been held to be sufficient, the plaintiff being called upon to prove a negative (*z*). What will amount to pro-

(*r*) *Newsam* v. *Carr*, 2 Starkie's C. 70, cor. Wood, B. Note, it did not appear that any information had been taken, and yet it seems that it is to be presumed in a case of felony that one has been taken.

(*s*) *Blizard* v. *Kelly*, 2 B. & C. 283. See *Clark* v. *Postan*, 6 C. & P. 423.

(*t*) *Eager* v. *Harman and others*, West. Sitt. after Trin. 1831.

(*u*) 1 T. R. 520. 1 Salk. 14, 15. 21. 5 Mod. 394. 405. 1 Vent. 86. Carth. 415. Where a party robbed or injured merely states actual facts to a magistrate, on which the latter acts according to his own discretion, the action it seems is not maintainable. The complainant cannot, in propriety, be said to be the prosecutor of the person against whom the magistrate may think fit to issue his warrant; and whether there be or be not probable cause for issuing the warrant, there was, at all events, probable cause for making the statement, and no malice can be inferred from a mere statement of facts according to the truth. Where the defendant went before a magistrate, and stated the fact of his having lost a bill of exchange, and the magistrate's clerk stated the substance, but added that the plaintiff had feloniously stolen the bill; there being no evidence of malice on the part of the defendant, it was held that the plaintiff had been properly nonsuited. *Cohen* v. *Morgan*, 6 D. & R. 8.

(*x*) See Lord Kenyon's observations in *Sykes* v. *Dunbar*, 1 Camp. 202, in note.

(*y*) *Willans* v. *Taylor*, 6 Bing. 183. Action for maliciously suing out a commission of bankruptcy; the plaintiff, after proving the commission and adjudication, and that it was afterwards superseded by the defendant, proved also, that in an action of trespass by him against the defendant for taking goods, under which the defendant justified as assignee, a verdict was given for the plaintiff: he also proved a removal of goods which, under the circumstances, could not amount to an act of bankruptcy, but which, in the absence of any other, was presumed to have been relied on as the act of bankruptcy; held, that it was sufficient evidence on the part of the plaintiff of want of probable cause, to call upon the other party to prove the affirmative. *Cotton* v. *James*, 1 B. & Ad. 128.

(*z*) *Incledon* v. *Berry*, 1 Camp. 203. *Taylor* v. *Willans*, 2 B. & Ad. 857. Per Ld. Tenterden, in *Cotton* v. *James*, 1 B. & Ad. 133, it is said to have been held, that observations of the Judge on the trial of the indictment, tending to censure the mode in which the proceedings have been conducted, are admissible for the plaintiff. *Warne* v. *Terry, cor.* Littledale, J., Winton

bable cause may be either a question of *law*, to be decided by the Court on the particular facts, as found by the jury (*a*), or may, it seems, be a conclusion or inference of fact to be drawn by the jury (*b*). Evidence of the most

Without probable cause.

Summ. Ass. 1836. Roscoe on Evidence, 413.

(*a*) In *Candell* v. *London*, 1 T. R. 520, Buller, J., stated, that what is reasonable or probable cause is matter of law. In *Johnstone* v. *Sutton*, 1 T. R. 543, it is said, that the question of probable cause is a mixed question of law and fact: whether the circumstances alleged to show it probable or not probable existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law; and that upon this distinction the case of *Reynolds* v. *Kennedy*, 1 Wils. 232, was decided. See also B. N. P. 14, which cites *Golding* v. *Crowle*, Mich. 25 G. 2, where a verdict for the plaintiff was set aside, not as a verdict against evidence, but as a verdict against law, the Judge having reported that there was probable cause. See also the judgments of Ld. Mansfield and of Ld. Loughborough, in *Johnstone* v. *Sutton*, 1 T. R. 544; 2 T. R. 231. The rule is one of legal policy, which protects a party to a certain extent, notwithstanding his malicious intention; (for although he may intend ill, yet still good may arise by encouraging the prosecution of offenders): the application of the rule must usually be a question of law, for a jury cannot say how far a mere rule of law is to operate. See tit. LAW & FACT, Vol. I. See also *Hill* v. *Yates*, 2 Moore, 80; *Isaacs* v. *Brand*, 2 Starkie's C. 167. And see *Davis* v. *Hardy*, 6 B. & C. 225. Davis hired a chaise in the name of Hardy, and received from the assignee of Martin, a bankrupt, the amount of the chaise-hire: he did not pay it to the innkeeper or to Hardy, nor did he mention to the latter that he had received the amount. Upon a charge being preferred against Davis, he was examined before one of the magistrates, and admitted most of the facts. On this evidence the learned Judge at the trial was of opinion, that there was sufficient evidence of the want of probable cause for indicting Davis for embezzlement. (The Court of K. B. were afterwards of the same opinion.) In the same case, Staines, the proprietor of the chaise, was afterwards called as a witness for the defendant; and it appeared on his evidence that Staines having applied to Davis for payment, the latter requested Staines not to tell Hardy, for it would do him a great injury. The learned Judge was of opinion that the subsequent facts, coupled with the former, nonsuited the plaintiff, though pressed by the defendant's counsel to leave it to the jury whether they believed Staines's evidence; and the Court of K. B. refused to set aside the nonsuit. See also *Spencer* v. *Jacob*, 1 M. & M. 180. In an action by an attorney, for maliciously and without probable cause indicting him for sending a threatening letter, it appeared that his clients having inquired of the defendant as to the truth of a representation made by a person who had offered to buy goods of them, the defendant replied that he would not be responsible for the debt, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to defendant, demanding payment of the price of the goods obtained from his clients through the defendant's representation; and stating, that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; that he had instructions to adopt proceedings, if the matter were not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendant was then summoned before a magistrate, to answer a charge of obtaining goods under false pretences; the plaintiff served the summons, and attended with his clients, and the complaint was dismissed. The defendant afterwards indicted the plaintiff for sending a threatening letter, contrary to the 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On the trial of this action the Judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment; held that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendant *bonâ fide* believed that he had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendant had such reasonable cause. *Blackford, gent. one, &c.* v. *Dod*, 2 B. & Ad. 179. And see Append. vol. ii. 681.

(*b*) See Vol. I. tit. LAW AND FACT. *Isaacs* v. *Brand*, 2 Starkie's C. 167. *Brookes* v. *Warwick*, 2 Starkie's C. 389. Lord Kenyon's observations, in *Holton* v. *Shepherd*, 6 East, 14, n. *Fry* v. *Hill*, 7 Taunt. 397. Starkie on Libel, &c. vol. 1, p. 279; *infra*, 683, note (*p*). *Beckwith* v. *Phibly*, 6 B. & C. 635. Where a felony has been committed, though not by the plaintiff, a private person may justify not only a prosecution, but even an actual arrest, if he acted on fair and reasonable grounds of suspicion. But in an action of trespass, it would be necessary that the defendant (not being a peace officer) should plead specially the grounds on which he acted. See *Mure* v. *Kaye*, 4 Taunt. 34.

Without probable cause.

express malice will not dispense with proof of the absence of probable cause (*c*).

Under the New Rules, probable cause is put in issue by the general plea of not guilty (*d*).

Where, upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned had been falsely sworn, but that there was no probable cause for some assignments of perjury on some of the transactions contained in the affidavit, it was held that the action was maintainable (*e*); for there being no probable cause for some of the charges in the indictment, it was preferred without probable cause (*f*).

It is invariably necessary, in an action of this nature, to give some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge; for, as was observed in the case of *Purcell* v. *Macnamara* (*g*), the

M'Cloughan v. *Clayton*, 2 Starkie's C. 445. Haw. b. 2, c. 12, s. 15. In such cases, therefore, it may be a question of law for the Court, whether the circumstances were sufficient to justify an arrest. No one who did not himself believe, on facts within his knowledge, that the party was guilty, would be justified in making an arrest. Haw. b. 2, c. 12, s. 15. *Sir Anthony Ashley's Case*, 12 Co. 92. The defendant, a constable acting upon the information of another, corroborated by a supposed intercepted anonymous letter, apprehended the plaintiff at her lodgings at night, without any warrant; it was left to the jury to consider whether, looking at the facts, the defendant had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged, and whether, standing in his place, they would have acted as he had done; and it was held that the direction was not improper. *Davis* v. *Russell*, 5 Bing. 354. In an action for maliciously indicting *A.* for perjury, it appeared that the defendant *B.*, in 1824, preferred the indictment, and gave evidence before the grand jury; that the bill was found, was removed into K. B., and tried in 1827; and that *B.*, who was then in custody, was brought into Court under a *habeas corpus*, obtained by his attorney on the ground that he was a material witness; but he did not give evidence, and *A.* was acquitted. The Judge in his direction told the jury, that if the defendant did not appear at the trial as a witness, from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff; but if his non-appearance did not proceed on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The defendant offered no evidence, and the jury found for the plaintiff. Upon error on a bill of exceptions, wherein the objection stated to the summing up was, that the Judge himself ought to have determined upon the facts whether there was probable cause, without leaving any question to the jury, it was held, that under the circumstances, the motive which induced the defendant not to appear as a witness was a question of fact for the jury, and that they might be directed to conclude there was or was not probable cause, and to find for or against the defendant, according to their opinion of the motive. *Taylor* v. *Willans* (in error), 2 B. & Ad. 845. In the case of *Macdonald* v. *Rook*, 2 Bing. N. C. 217, it was held that the Judge was warranted, under the particular circumstances of the case, in leaving the question of want of probable cause to the jury; and Tindal, C. J. observed, "There are some cases, no doubt, in which a Judge may be expected to tell the jury whether or not a defendant had probable cause for proceeding against the plaintiff, as in the case of a threatening letter, or the like; but where the probable cause consists partly of facts and partly of matter of law, a Judge would be warranted in leaving the question to a jury." But see Appendix.

(*c*) *Turner* v. *Turner*, 1 Gow. 50. *Johnson* v. *Sutton*, 1 T. R. 545.

(*d*) *Cotton* v. *Brown*, 3 Ad. & Ell. 362; 4 N. & M. 836, S. C. In an action for maliciously outlawing the plaintiff, the plea of not guilty puts in issue the existence of reasonable and probable cause, but not the reversal of the outlawry. *Drummond* v. *Pigou*, 2 Bing. N. C. 114.

(*e*) *Reed* v. *Taylor*, 4 Taunt. 616.

(*f*) Per Gibbs, C. J., *Reed* v. *Taylor*, 4 Taunt. 616.

(*g*) 9 East, 361. *Sykes* v. *Dunbar*, cited 9 East, 363, in the note, where Lord Kenyon ruled, that it was not sufficient for the plaintiff to show his acquittal, without going farther, and giving evidence of malice in the defendant. And see *Incledon*

prosecution may have been commenced and abandoned from the purest and most laudable motives. Without probable cause.

Thus it is not enough to show, that on an indictment of the plaintiff by the defendant for perjury, the former was acquitted upon the trial, on failure of the prosecutor's appearance when called (*h*); even although the facts lay within the defendant's knowledge, who, had there been the least foundation for the prosecution, might have proved it (*i*).

Or to prove that the bill was thrown out by the grand jury (*k*), or that the defendant, after charging the plaintiff on oath with an assault, omitted to prefer an indictment (*l*).

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by *malicious motives* in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient (*m*).

Where the defendant had preferred three bills of indictment against the plaintiff on the same charge, one of which had been found on his own testimony, and he abandoned the last indictment at the time of trial, after it had been pending three years, it was held to be sufficient *primâ facie* evidence of the want of probable cause (*n*).

In an action against a magistrate for a malicious conviction, the question is not whether there was probable cause in fact for convicting, but whether *he* had any probable cause for convicting; and for this purpose, what passed before him upon the hearing is not only proper, but essential evidence with a view to the question of malice (*o*). It is also incumbent on the plaintiff to prove the existence of malice, as well as the want of probable cause.

The existence of malice is *usually* (*p*) a question of fact for the jury. Malice.

v. *Berry*, 1 Camp. 203. *Wallis* v. *Alpine*, 1 Camp. 204, (n.) *Williams* v. *Taylor*, 6 Bing. 188. *Willans* v. *Taylor*, 6 Bing. 187; 2 B. & Ad. 845.

(*h*) 9 East, 363.

(*i*) The circumstance, that in the particular case the facts are peculiarly within the knowledge of the prosecutor, and the proof of them within his reach, would clearly be an insufficient reason for departing from the general rule, which seems to be founded partly on the difficulty under which a defendant must often labour, in proving by other witnesses the cause which he had for instituting the prosecution. In Buller's Nisi Prius, 14, it is laid down, that where the facts are in the knowledge of the defendant himself, he must show a probable cause, though the indictment has been found by a grand jury, or the plaintiff shall recover, without proof of express malice: for this position, the case of *Parrott* v. *Fishwick*, Lond. Sitt. after Trin. T. 1772, is referred to; but from the note of this case, given 9 East, 362, it appears that where a defendant had been acquitted by verdict, Lord Mansfield, in summing up, said, "that it was not necessary to prove express malice; for if it *appeared* that there was no probable cause, that was sufficient to prove implied malice, which was all that was necessary to be proved to support this action. For in that case all the facts lay within the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it." Verdict for the plaintiff, damages 50*l*. It is observed by Mr. East, in the note referred to, that it was perfectly consistent with the summing up, that the plaintiff had given *primâ facie* evidence to negative any probable cause.

(*k*) *Byne* v. *Moore*, Marsh, 12. In *Nicholson* v. *Coghill*, 4 B. & C. 23, Holroyd, J., said, that in actions for malicious prosecutions it had been held that evidence of the bill having been thrown out by the grand jury, was sufficient to warrant an inference of the absence of probable cause.

(*l*) *Wallis* v. *Alpine*, 1 Camp. 204.

(*m*) Per Le Blanc, J., *Incledon* v. *Berry*, 1 Camp. 203, in the note.

(*n*) *Willans* v. *Taylor*, 6 Bing. 183.

(*o*) *Burley* v. *Bethune*, 5 Taunt. 580.

(*p*) See *Johnstone* v. *Sutton*. 1 T. R. 513. Yet there may be cases so circumstanced, that though the Courts might not go so far as to infer malice in point of law, without the aid of a jury, yet they would leave it to the jury to imply malice. *Brookes* v. *Warwick*, 2 Starkie's C. 389. See also *Isaacs* v. *Brand*, 2 Starkie's C. 167. *Supra*, Vol. I. tit. LAW AND FACT. The defendant had held the plaintiff to bail, as administratrix, for a debt due from the estate; and upon the trial of the

Malice.

The proof of malice in this action (as has already been observed) usually results from the want of probable cause, which when once established affords a strong presumption of malice (*q*). Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of the proceedings, is properly adduced to prove malice (*r*). It seems also, that the plaintiff may give in evidence the proof adduced by the defendant on the trial of the charge (*s*). So he may give in evidence publications by the defendant on the subject of the charge (*t*).

Where the prosecution was against the plaintiff and another, the plaintiff may, as part of the *res gesta* and to show the *animus* of the defendant, give in evidence misconduct in the transaction against the other party indicted (*u*).

Where the defendant, a Bank inspector, had procured the plaintiff, a tradesman, to be taken into custody on a charge of having in his possession a forged bank-note, without legal excuse, because he had refused, after paying the amount to the person to whom he had paid it away, to deliver it up to the inspector, Lord Ellenborough held that the pressing a commitment, under such circumstances, was such *crassa ignorantia* that it amounted to malice (*v*).

action for maliciously holding to bail, the plaintiff relied wholly on the mere fact of her having been held to bail when she was not liable to arrest, and gave no extrinsic evidence of malice. The jury having found a verdict for the plaintiff, with five shillings damages, the Court, upon a motion for a new trial, doubted whether the very fact of holding the party to bail, under such circumstances, was not evidence from which malice was to be *implied*, and refused to disturb the verdict. *Fletcher* v. *Webb*, 11 Price, 381.

(*q*) No evidence of malice can be more cogent than that the defendant *knew* that the plaintiff was innocent. *Purcell* v. *Macnamara*, 9 East, 361; *Burley* v. *Bethune*, 5 Taunt. 583; *Turner* v. *Gow*, 20. The want of probable cause is not conclusive as to malice. *Mitchell* v. *Jenkins*, 5 B. & Ad. 558; 2 N. & M. 301.

(*r*) Str. 691. So it has been held that evidence of malevolent misconduct by the defendant towards the plaintiff, tending to show evil motives after the prosecution, is admissible. *Caddy* v. *Barlow*, 1 M. & Reg. 275. The plaintiff having been taken into custody on a criminal charge, offers bail before the magistrate, to which the prosecutor objects; a letter purporting to have been written by a Judge, on reading which the magistrate was induced to admit the plaintiff to bail, is evidence merely to show that the magistrate refused bail till so induced, without proof that the letter was written by the Judge. *Taylor* v. *Willans*, 10 B. & C. 845. And in order to show that the prosecutor took steps to prevent a person from becoming bail, an affidavit made by the attorney's clerk was put in, as showing that those who conducted the prosecution had taken means to prevent a person becoming bail for *A*. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. *Taylor* v. *Willans* (in error), 2 B. & Ad. 845. It has been held that in order to support the averment of malice, it must be shown that the charge is wilfully false. *Cohen* v. *Morgan*, 6 D. & R. 9, cor. Abbott, C. J.; this doctrine does not seem to be warranted by the authorities.

(*s*) B. N. P. 13, 14.

(*t*) *Chambers* v. *Robinson*, Str. 691, where the plaintiff gave in evidence an advertisement published by the defendant pending the prosecution of an indictment for perjury, though an information had been granted; but the Chief Justice informed the jury that they were not to consider it in damages, but only as a circumstance of malice.

(*u*) *Caddy* v. *Barlom*, 1 M. & Ry. 275.

(*v*) *Brookes* v. *Warwick*, 2 Starkie's C. 389. The plaintiff had taken the note in the usual course of business, and paid it in the usual course to *B*. The note being stopped at the Bank, was stamped as a forgery, and brought by an inspector to the plaintiff. The plaintiff paid the amount to *B*., and refused to give it up to the inspector, insisting on his right to retain it. The inspector, without any ground for suspicion, charged the plaintiff with feloniously having the note in his possession, without lawful excuse. The case was very pertinaciously pressed on the part of the plaintiff, although Lord Ellenborough had, early in the cause, expressed a strong opinion on the subject, and left it to the

Proof of probable cause.

The defendant may give in evidence any facts which show that he had *probable cause* for prosecuting, and that he acted *bonâ fide* upon that ground of suspicion. It is no answer to the action that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted (*x*).

If it appear that the jury, upon the trial of the plaintiff, entertained doubts upon the evidence, and deliberated as to his guilt after the case was concluded, the fact is, it seems, evidence of a probable cause (*y*).

It is obviously of importance to prove that a felony has been committed (*z*), and to be prepared with proof of such circumstances as tend to throw suspicion on the plaintiff (*a*). This, however, would probably be deemed to be insufficient in case of express proof that the defendant knew that the prosecution was without foundation.

In the case of *Johnson* v. *Browning* (*b*), where it appeared that no one was present at the time of the supposed robbery but the wife of the defendant in the action, Lord Holt admitted evidence of what she swore at the trial of the indictment; but it is obvious that this was done under the impression that it was incumbent on the defendant to establish the fact of probable cause, although no evidence were given to establish the negative.

Where the plaintiff has been arrested on a charge of larciny, it has been doubted whether the defendant, after having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character (*c*); but it seems that although such evidence affords no presumption of probable cause in the particular instance (*d*), yet that it is matter admissible in mitigation of damages.

Damage.

3dly. *The damage sustained.*—The plaintiff may prove, in aggravation of damages, the length of imprisonment, his expenses, situation, and circumstances. The peril and jeopardy in which a man's life and liberty are placed by a malicious prosecution, or the prejudice to his fame and reputation, constitute a sufficient ground of action (*e*); so although neither his

jury upon the ground of malice. The jury found for the plaintiff, damages 50 *l.*

(*x*) *Hewlett* v. *Crutchley*, 5 Taunt. 277.

(*y*) In *Smith* v. *Macdonald*, 3 Esp. C. 7, Lord Kenyon held, that if the jury paused before they acquitted the plaintiff upon his trial for the offence, he should hold that there was probable cause for the prosecution. It does not appear whether in that case the evidence rested upon the testimony of the prosecutor, the defendant in the action. It is also to be observed, that there was no evidence to negative probable cause, a circumstance in itself sufficient to warrant a nonsuit. See also *Liliwal* v. *Smallman*, Selw. N. P. 946. *Golding* v. *Crowle*, B. N. P. 14.

(*z*) In *Johnson* v. *Browning*, 6 Mod. 216, Lord Holt seems to have considered this proof to be essential to the defence; but it seems to be a good defence to prove reasonable grounds for suspecting the guilt of the plaintiff, although no felony was committed. See *Samuel* v. *Payne*, Dougl. 345. *Ledwith* v. *Catchpole*, Cald. 291. *Supra*, 601.

(*a*) See *Knight* v. *Germain*, Cro. Eliz. 134. *Pain* v. *Rochester*, Cro. Eliz. 871.

(*b*) 6 Mod. 216. In B. N. P. 14, citing *Cobb* v. *Carr*, it is said, that the defendant's evidence of what he swore upon the trial of the indictment is evidence: this, however, does not seem to be warranted; for if the principle of *necessity* operated in such a case, the effect would be to admit the testimony of the defendant himself, by which means the plaintiff would have the benefit of a cross-examination.

(*c*) In the case of *Rodriguez* v. *Tadmire* 2 Esp. C. 721, Lord Kenyon admitted general evidence to that effect. In *Newsam* v. *Carr*, 2 Starkie's C. 69, cor. Wood, B., where a witness was asked whether the plaintiff's house had not been searched on former occasions, and whether he was not a man of suspicious character, Wood, B. overruled the question, observing, that in actions of slander such evidence would be admissible to mitigate the damages, but that in the present case it would afford no evidence of probable cause.

(*d*) Ibid.

(*e*) *Savill* v. *Roberts*, B. N. P. 13.

Damage.

fame nor liberty be affected, if he has been put to needless expense to defend himself (*f*). In the assessment of damagés, the costs incurred by the plaintiff are to be estimated as between attorney and client (*g*).

If a man be falsely and maliciously indicted of a crime which is a scandal to him, and hurts his fame, an action lies, although the indictment be insufficient, or an ignoramus be found (*h*); for although no expense may have been incurred, the mischief of the slander has been effected (*i*).

Upon the execution of a writ of inquiry, where the defendant in an action for slander has allowed judgment to go by default, it is not incumbent on the plaintiff to give any evidence. The jury, in the absence of evidence of damage, are not confined to nominal damàges (*k*).

In a joint action against several, the jury cannot assess several damages (*l*).

In an action for a malicious arrest the plaintiff must prove the arrest, the determination of the suit, the want of probable cause, and the defendant's malice, and the damages sustained (*m*).

Malicious arrest. Proof of the arrest.

In an action for a *malicious arrest*, the plaintiff must be prepared to prove the affidavit made by the defendant, either by means of the affidavit itself, or proof of an examined copy; the former, it is said, is the better course (*n*). He must also prove an examined copy of the writ and return, and produce and prove the warrant of the sheriff made by virtue of the writ (*o*), and the arrest and detention under it. The official return made by the sheriff is evidence of the fact for either party (*p*).

Where the plaintiff alleged that he was arrested under and by virtue of a plaint for debt, in the Sheriff's Court, it was held to be proved by evidence that the plaint was entered, and that the officer in consequence arrested the plaintiff, having first received a paper, in the nature of a warrant, containing the parol directions of the sheriff, which were good by custom, although the stat. 12 Geo. 1. requires an affidavit of debt, which had been made (*q*).

The arrest may be proved by the sheriff's officer (*r*).

(*f*) B. N. P. 14. This was formerly doubted. Ibid. But it has been decided, that such an action lies by the husband for the expense of defending his wife. B. N. P. 13. *Jones* v. *Gwynn*, 10 Mod. 214; 1 Salk. 15; Gilb. 185.

(*g*) *Sandback* v. *Thomas*, 1 Starkie's C. 306. But see *Sinclair* v. *Eldred*, 4 Taunt. 7.

(*h*) *Savill* v. *Roberts*, B. N. P. 13. *Chambers* v. *Robinson*, Stra. 691.

(*i*) Ibid.

(*k*) *Tripp* v. *Thomas*, 3 B. & C. 427.

(*l*) *Lowfield* v. *Banckcroft*, Str. 910; B. N. P. 15. 93. *Contra*, *Lane* v. *Santeloe*, B. N. P. 15; Stra. 79.

(*m*) Or so much as is put in issue by the pleadings, under the new rules.

(*n*) Peake's Ev. 330. See *Webb* v. *Herne*, 1 B. & P. 280, where the plaintiff, having in an action against the sheriff alleged that *I. S.* was arrested under a writ indorsed for bail, by virtue of an affidavit filed of record, it was held that the allegation must be proved. See *Casburn* v. *Reid*, 2 B. Moore, 60; B. N. P. 14. *Crook* v. *Dowling*, 3 Doug. 75. *Rees* v. *Bowen*, 1 M'Clelland & Y. 392. *R.* v. *James*, 1 Show. 397. Buller, J. held that the writ indorsed was sufficient evidence of the holding to bail. *Rogers* v. *Ilscomb*, 2 Esp. C. 38.

(*o*) As to this proof, see tit. SHERIFF. In an action for maliciously holding to bail, the bare production of the writ by a person who received it in a letter, will not entitle the plaintiff to have it read. *Jackson* v. *Burleigh*, 3 Esp. C. 34. *Secus*, after proof of the affidavit to hold to bail, and of the warrant founded upon the writ. Ibid.

(*p*) *Gyfford* v. *Woodgate*, 11 East, 297; *supra*, Vol. I. *Contra*, *Lloyd* v. *Harris*, Peake's C. 174. It is not sufficient to prove the arrest, and return of *cepi corpus*, without proof of the warrant. *Lloyd* v. *Harris*, Peake's C. 174. See *Drake* v. *Sykes*, 7 T. R. 113.

(*q*) *Arundel* v. *White*, 14 East, 216.

(*r*) If a bailiff, having process against one who is on horseback, or in a coach, say, "you are my prisoner, I have a writ against you;" on which he submits, turns back, or goes with him; though the bailiff never touch him, it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him. *Herner* v.

Malicious arrest. Proof of the arrest.

Where the declaration alleged a malicious arrest, and the imprisonment of the plaintiff until he was forced to give bail; and it appeared in evidence that, on a message sent by the officer, informing the plaintiff that he had a warrant against him, he went to the officer's house and executed a bail-bond; it was held that there was no evidence of arrest, and that as the allegations were not divisible, the variance was fatal (*s*). But to support an allegation that the defendant held the plaintiff to bail, it is sufficient to show that the plaintiff, on being informed of the writ, went to the officer's house and gave bail (*t*).

Determination of the action.

The determination of the action (*u*) must also be proved by means of an examined copy of the entry on the record. Proof of the rule of court to discontinue, and of the taxation and payment of costs, is sufficient evidence of the determination of the action (*x*). But it is said that proof of an order made by a Judge to stay proceedings is insufficient, although the costs have been taxed and paid (*y*).

The not declaring for a year after the return of the writ, is evidence of the determination of the suit, under an averment that the plaintiff did not declare, but permitted the suit to be discontinued (*z*).

A *stet processus* by consent is not such a determination as will support the action (*a*).

Where it appeared to be the practice in the Sheriff's Court in London, upon the abandonment of a suit by the plaintiff, to make an entry in the

Batty, (n.) B. N. P. 62. See below, tit. TRESPASS; and *Berry* v. *Adamson*, 6 B. & C. 528. *Gaye* v. *Radford*, 3 C. & P. 464. *Grainger* v. *Hill*, 4 Bing. N. C. 412.

(*s*) *Berry* v. *Adamson*, 2 C. & P. 503. Where the officer told the plaintiff that he had a warrant against him at the suit of the defendant, and did not touch him, but took his word that he would put in bail; and the plaintiff, giving him a small gratuity, asked him to go to his attorney and desire him to put in bail, which he did, and bail was put in; L. C. J. Tenterden said, that it was the strong inclination of his opinion that it was not a sufficient arrest to sustain the action for a malicious arrest. *George* v. *Radford*, 1 Mood. & M. C. 244.

(*t*) *Small* v. *Grey*, 2 C. & P. 605.

(*u*) When the action is put an end to by a *stet processus* by consent of the parties, no action for a malicious arrest can be supported. *Wilkinson* v. *Howell*, 1 Mood. & M. C. 493. In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action; and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. *Whitworth* v. *Hall*, 2 B & Ad. 695. Proof that no declaration was filed or delivered within one year after the return of the writ is sufficient. *Pierce* v. *Street*, 3 B. & Ad. 396.

(*x*) *Bristow* v. *Haywood*, 1 Starkie's C. 48. *Brandt* v. *Peacock*, 1 B. & C. 649. *Gadd* v. *Bennett*, 5 Price, 540. So if the proceedings be stayed by rule of court, though the rule has been obtained on the affidavit of the party. *Brooke* v. *Carpenter*, 3 Bing. 297. The Court held it to be receivable on the ground of necessity. An averment that the defendants did not prosecute their suit, but therein made default, and their pledges were in mercy, &c. is not proved by the production of a will to discontinue. *Webb* v. *Hill*, M. & M. 253.

(*y*) *Kirk* v. *French*, 1 Esp. C. 80, on the ground that the evidence is not the best which the case admits of; but note, that a juror was withdrawn in that case, and Lord Kenyon seems to have entertained doubts. See *Austin* v. *Debnam*, 3 B. & C. 140. An order from the Lord Chancellor for superseding a commission is not evidence, in an action for maliciously suing it out, to show that it has been superseded; a *supersedeas* under the great seal must be produced. *Poynton* v. *Forster*, 3 Camp. 58. See *Barton* v. *Mills*, Cas. temp. Hardw. 125, 6.

(*z*) *Pierce* v. *Street*, 3 B. & Ad. 397.

(*a*) *Wilkinson* v. *Howell*, M. & M. 295. For such a termination does not afford *primâ facie* evidence of the essential to the action, that the former suit was without foundation.

minute-book of "withdrawn by the plaintiff's order," opposite to the entry of the plaint, it was held that proof of such an entry was sufficient to prove the determination of the suit (*b*).

Variance.

Where the declaration, in stating a judgment by default, stated "and thereupon it was considered by the said Court of K. B. that the plaintiffs should take nothing by their said writ, but that *they and their pledges to prosecute should be in mercy*, &c., as by the record and proceedings thereof, &c., now fully appear, and the said action was and is thereby wholly ended and determined," it was held to be no variance, although the record produced wanted the words "and their pledges to prosecute," but only an *&c.*, and that as the substance of the allegation was the discontinuance of the former suit, those words might be rejected as surplusage (*c*).

Where the declaration alleged a plaint against the defendant at the Sheriffs' Court in London, it was held to be supported by proof of a plaint before *one* of the sheriffs (*d*).

An allegation of an arrest is satisfied by evidence of a detainer (*e*).

It lies on the plaintiff to prove that the arrest was malicious, and without reasonable or probable cause (*f*). And it seems that if the defendant act merely through mistake, and without actual malice, the action is not main-

(*b*) *Arundel* v. *White*, 14 East, 318. In an action for maliciously suing out a commission of bankruptcy, it must be averred that before the commencement of the action the commission was superseded. *Whitworth* v. *Hall*, 2 B. & Ad. 695. The *supersedeas* alone is not sufficient evidence of the want of probable cause. *Hay* v. *Wenly*, 5 C. & P. 361. An allegation of a nonsuit is not proved by showing a rule to discontinue. *Webb* v. *Hill*, M. & M. 253; *Supra*. The mere acceptance of debt and costs, as awarded by the prothonotary on reference to him, under a rule, without the intervention of the Court, does not show a determination of the suit. Per Pattison, J., *Combe* v. *Capron*, 1 Mo. & R. 398.

(*c*) *Judge* v. *Morgan*, 13 East, 547.

(*d*) *Arundel* v. *White*, 14 East, 216. So the assize Courts may be stated indifferently to be held, either before both the Judges of Assize, or before the one who in fact sat at the time; per Lord Ellenborough, Ibid.; and *R.* v. *Alford*, Leach's C. C. L. 179.

(*e*) *Whalley* v. *Pepper*, 7 C. & P. 506.

(*f*) Reasonable or probable cause may, it seems, be either a question of law or of fact; *supra*, 680. But see the Appendix, 680. 688. Where the defendant, being the indorser of a bill of exchange, arrested the plaintiff as the acceptor of the bill, when in fact he was not the acceptor, but was of the same name and address, and upon being applied to denied that it was his acceptance, but it did not appear that the defendant was informed that he so disclaimed the bill, Lord Tenterden, on an action for a malicious arrest, nonsuited the plaintiff, observing, "the defendants may have been careless, they certainly were mistaken, but I can see no appearance of *malice* in their conduct. How can I say that they were without reasonable cause for what they did? It does not even appear that they were informed that the plaintiff, on presentment, disclaimed the acceptance." *Spencer* v. *Jacob*, 1 M. & M. 280. In an action for maliciously holding the plaintiff to bail on a bill, held, that whatever was admissible in the action on the bill, was also admissible in that action; the judgment in the original action would not be sufficient; the plaintiff was therefore entitled to show that the defendant at the time of the action brought, was the holder of the bill as indorsee after it was once due, and that the bill was a mere accommodation bill, and that the defendant therefore had no right of action against the plaintiff on it. *Haddon* v. *Mills*, 4 C. & P. 487. Where the defendant was arrested for 327 *l.*, after a tender of 250 *l.* and upon a reference, the arbitrator awarded the latter sum only, held that the defendant himself, not trusting to the sufficiency of his tender, but having paid it into Court, it was not to be deemed a vexatious arrest, within the 43 Geo. 3, c. 46, to entitle him to costs. *Sherwood* v. *Taylor*, 6 Bing. 280. Upon the 43 Geo. 3, c. 46, s. 3, it is sufficient to entitle the defendant to costs, that the plaintiff had no reasonable or probable cause for arresting the defendant for the amount; it is not necessary that the arrest should have been malicious. *Doulan* v. *Brett*, 10 B. & C. 117. So where there could be no debt until the period of audit had expired, held that till then there could be no reasonable cause for arresting the defendant to that amount. *Day* v. *Picton*, 10 B. & C. 120.

tainable (*g*). It is not sufficient to show that the action was *non-prossed* (*h*), or that the defendant in the former action took a less sum out of Court (*i*); or that an action on a bill, in respect of which the present plaintiff had been discharged by the laches of the present defendant, had been discontinued (*j*). Variance.

But where the defendant arrested the plaintiff for money paid to his use, but did not declare till he was ruled to do so, and soon discontinued his action, and paid the costs, it was held to be evidence to go to a jury of malice and the want of probable cause (*k*).

It is evidence of malice that the defendant sued out the writ after a release of the debt (*l*); but it is not sufficient to show that the writ was sued out after payment of the debt to the defendant's agent, upon an affidavit made before the payment, without proof of malice (*m*).

The action lies for maliciously arresting an attorney in practice, knowing him to be an attorney, although he owes a large sum to the defendant (*n*).

It seems that if the plaintiff allege that the defendant had *no cause* of action against him, upon which by law he could be held to bail, proof of a cause of action, to a bailable amount, would be an answer to the action, and that the plaintiff ought to have declared specially (*o*). But where the declaration was in that form, and it appeared that the defendant's affidavit was for money had and received, and money paid, and that he had a claim to the amount of 100 *l.* for commission on the sale of timber, and that on the general balance of account he was indebted in a large sum to the plaintiff, the action was held to be maintainable (*p*). Malice.

In an action for maliciously refusing to sign an authority to the sheriff to discharge a defendant out of custody, on tender of the debt and costs, the refusal to sign the discharge is *primâ facie* evidence of malice, in the absence of any circumstances to rebut the presumption (*q*.)

(*g*) *Bicton* v. *Burridge*, 3 Camp. 140. But in that case, on the plaintiff's informing the officer who had the writ to execute, that he did not owe the debt, the officer did not actually arrest the plaintiff, who afterwards needlessly incurred expense by putting in bail. The same was held where the defendant, through mistake, and without malice, caused another to be arrested as the indorsee of a bill of exchange. *Spencer* v. *Jacob*, M. & M. 180.

(*h*) *Sinclair* v. *Eldred*, 4 Taunt. 7. But in a previous case of *Hamilton* v. *Beddell*, cor. Pratt, C. J., 4 July 1756, Bearcroft's MSS. 22, Roscoe on Ev. 406, it was held that the defendant's suffering the former action to be *non-prossed* was sufficient *primâ facie* evidence of malice; and Pratt, C. J., is reported to have said, "Here the defendant's never proceeding and suffering a *non-pros*, is, in my opinion, *primâ facie* evidence of malice. I hold most clearly that the affidavit, bail, and *non-pros*, make up sufficient *primâ facie* evidence to call for a defence."

(*i*) *Jackson* v. *Burleigh*, 3 Esp. C. 311, cor. Lord Kenyon.

(*j*) *Bristow* v. *Haywood*, 1 Starkie's C. 48.

(*k*) *Nicholson* v. *Coghill*, 4 B & C. 21. *Webb* v. *Hill*, M. & M. 254.

(*l*) *Waterer* v. *Freeman*, Hob. 207.

(*m*) *Gibson* v. *Chater*, 2 B. & P. 129. Note, in that case the Court were of opinion that the circumstances excluded the inference of malice. Vide *infra*, 499, note (*c*).

(*n*) *Whally* v. *Pepper*, 7 C. & P. 506. And the defendant's attorney is liable to be joined in the action, if, besides acting, as an attorney, he co-operated in the arrest. Ib.

(*o*) *Wilkinson* v. *Mawbey*, cited 1 Camp. 297; *Wetherden* v. *Embden*, 1 Camp. 295; *Savil* v. *Roberts*, 1 Salk. 14.

(*p*) *Wetherden* v. *Embden*, 1 Camp. 295; cor. Sir J. Mansfield.

(*q*) *Crozer* v. *Pilling*, 4 B. & C. 26. Payment of the debt and costs to the landlord or sheriff, does not discharge the defendant. Ib.; and *Taylor* v. *Baker*, 2 Lev. 203. *Slackford* v. *Austen*, 14 East, 468. A defendant is not bound to pay money to the sheriff, but to the party. *Norton's Case*, 2 Show. 139. But see *Whally* v. *Pepper*, 7 C. & P. 506; where it was held, that the question was, whether the former plaintiff had a probable cause of action for the amount for which he held the party to bail, not whether he had a probable cause of action in the particular form of action brought; and that where *A.* having a good

Malice.

If one of two parties, between whom there are transactions of mutual account, arrest the other for the whole amount due on one side, without deducting what is due on the other, the arrest is malicious (*r*).

If a party having laid his case fairly before counsel, acts *bonâ fide* upon the opinion given, he is not liable to an action for acting *bonâ fide* on that opinion, however erroneous it may be. But it is otherwise where he does not act *bonâ fide* on the opinion, but arrests though he believes that he has no cause of action (*s*); whether he did so or not, is a question of fact for the jury (*t*).

Where the defendant, after arresting the plaintiff, did not declare until he was urged by the plaintiff, and shortly after that discontinued, it was held to be sufficient evidence of malice for the consideration of the jury (*u*). Where the defendant held the plaintiff to bail, when she was liable as administratrix only, it was held to be such evidence of malice that the Court refused to disturb a verdict with 5*s*. damages (*v*).

The taking a less sum than that arrested for out of Court is not enough to maintain the action (*x*).

If the defendant, though advised by a competent person that he has a good cause of action, believes that he must fail, and yet arrests the plaintiff from indirect motives, there is no probable cause.

Although a jury *may* they are not *bound* to infer malice from the want of probable cause (*y*).

It has been held at *Nisi Prius*, that one, who as arbitrator in an action between the parties has seen their books of accounts, and awarded that nothing was due, is not a competent witness for the plaintiff in an action for a malicious arrest, on the ground that he has had access, by consent, to documents which the present defendant, the plaintiff in the former action, could not have been compelled to produce (*z*).

Expressions showing malice on the part of the defendant cannot be taken into consideration as shewing the want of probable cause (*a*).

Damages.

The plaintiff must prove the arrest, and the expenses to which he was put (*b*). Where a bailable writ was sued out against the plaintiff by mis-

cause of action on a covenant against *B.* & *C.* separately, but not jointly, sued *B.* & *C. jointly*, and arrested *B.* in that action, he was not liable as for a malicious arrest.

(*r*) *Austin* v. *Debenham*, 3 B. & C. 139. Note, that the question of malice was left by Abbott, C. J. to the jury. See also *Dr. Turlington's Case*, 4 Burr. 1996; and *Drovefield* v. *Archer*, 5 B. & A. 513. *Barclay* v. *Hunt*, 4 Burr. 1906. *Contra*, *Brown* v. *Pigeon*, 2 Camp. C. 594.

(*s*) *Ravenga* v. *Mackintosh*, 2 B. & C. 693. Where the affidavit of debt was made by the defendant, and it was to be inferred from circumstances that he knew of the plaintiff's having been discharged under the Insolvent Act; held that he was to be deemed responsible for the acts of his attorney, although it was sworn by the latter that the arrest was by his mistake, and without the interference or knowledge of the defendant. *Jones* v. *Nicholls*, 3 M. & P. 12.

(*t*) Ibid.

(*u*) *Nicholson* v. *Coghill*, 4 B. & C. 21.

(*v*) *Fletcher* v. *Webb*, 11 Price, 382.

(*x*) *Jackson* v. *Burleigh*, 3 Esp. C. 34.

(*y*) *Mitchell* v. *Jenkins*, 5 B. & A. 588. The defendant arrested the plaintiff for 35*l*. knowing that 25*l*. only was due. The Judge told the jury that the law implied malice. After a verdict for plaintiff, the Court of K. B. granted a new trial. K. B. Mich. 1833.

(*z*) *Habershon* v. *Troby*, 3 Esp. C. 38. *Qu. tamen.*

(*a*) *Whally* v. *Pepper*, 7 C. & P. 506.

(*b*) He cannot, it is said, recover any damage for extra costs. *Sinclair* v. *Eldred*, 4 Taunt. 7. In *Webber* v. *Nicholas*, 1 Ry. & M. 419, Best, C. J. said, that though he should have thought that Lord Ellenborough's opinion in *Sandback* v. *Thomas* (1 Starkie's C. 306) was the more correct one, yet that he was bound by the decision in the Common Pleas. But see *Grove* v. *Morgan*, 2 Bing. N. C. 534, where it was held that a plaintiff in replevin who had received the taxed costs of

take, and the bailiff to whom the warrant was delivered to be executed merely requested payment of the money, informing him that he had a writ out against him, and on the mistake being discovered, the plaintiff was told that he need give himself no further trouble, but the plaintiff afterwards incurred expense by putting in bail above, it was held that the action was not maintainable (*c*). Damage.

It is competent to the defendant, for the purpose of rebutting the inference of malice, to show that he acted under professional advice, although it was unfounded in law: the defendant, after taking the present plaintiff's bail in execution, arrested the plaintiff on a *testatum ca. sa.* after notice from the plaintiff's attorney that the proceeding was irregular; the defendant proved that he had acted upon *Higgins's* case (*d*), and on the opinion of a special pleader, and the plaintiff was nonsuited (*e*). Defence.

It has been held that the arbitrator in the former suit, who had inspected the defendant's books and decided that he had no cause of action, was not competent to prove the defendant's malice (*f*).

MALICIOUS INJURIES, INDICTMENTS FOR.

Upon an indictment for shooting at or cutting another, with intent to murder or maim him, or to do him some grievous bodily harm (*g*), whether For maliciously cutting, &c.

his replevin, could not in an action for an excessive distress recover the extra costs of the replevin as damages; and see *Hodges* v. *Earl of Lichfield*, 1 Bing. N. C. 500.

(*c*) *Bicten* v. *Burridge and others*, 3 Camp. 139. See *Arrowsmith* v. *Le Mesurier*, 2 N. R. 211. In general, an action does not lie for bringing an action without good ground, unless it be done maliciously with intent to imprison the party for want of bail, or to do some special prejudice. *Per Cur. Savil* v. *Roberts*, B. N. P. 13. *Purton* v. *Honnor*, 1 B. & P. 205. And an action will not lie against a party for neglecting to countermand a writ, after payment of debt and costs, unless it be alleged to have been done maliciously. *Page* v. *Wiple*, 3 East, 313. *Scheibel* v. *Fairbain*, 1 B. & P. 388; and if in such a case it be incumbent on the party suing out the writ, to countermand it, what shall be a reasonable time for so doing is a question of law. 1 B. & P. 388.

(*d*) Cro. J. 320; 2 Buls. 68; 10 Vin. Ab. 578.

(*e*) *Snow* v. *Allen*, 1 Starkie's C. 502; and see *Ravenga* v. *Mackintosh*, *supra*, 690. *Secus* where a full case has not been stated to counsel. *Hewlett* v. *Cruchley*, 5 Taunt. 281.

(*f*) *Habershon* v. *Troby*, 3 Esp. C. 38, cor. Ld. Kenyon. This was on the ground that the parties themselves could not have been examined in the former cause, and the plaintiff in that cause could not have been compelled to produce his books. *qu.*

(*g*) See the St. 9 G. 4, c. 31, sec. 12, 13, &c. A striking on the face with a sharp claw of a hammer, by which the face was cut, has been held to be within the Act 43 G. 3, c. 58, s. 1. *Atkinson's Case*, York Spring Ass. 1806, Russ. & Ry. C. C. L. 104. So the cutting off part of the skull by means of an instrument adapted to the purpose of prizing open doors, was held to be within the statute; a piece of the skull, according to the evidence, having been taken out as if sawed out, not *broken* out, but *cut* out. *R.* v. *Hayward*, O. B. Jan. 1805; and afterwards before the Judges. Russ. & Ry. C. C. L. 78. The intent there was to resist the lawful apprehension of the prisoner; and the jury found that the intent was not to *cut* but to *break or lacerate* the head. The Judges held that the conviction was right, and the prisoner was executed. In *Adams's Case*, O. B. Sess. 1808, and afterwards before the Judges, 1 Burn's J. 296, 23d edition, it was held that the striking with a square iron bar was not within the statute; but there the wound was not an *incised wound*, but contused and lacerated. It has been said, that in a case before Dallas, C. J. and Burton, J. at Chester, 5 Ev. St. part V. c. 4, p. 334, note (*z*), it was held that a blow with the handle of a windlass was not within the Act, although it made an *incised* wound; but in *Atkinson's Case*, above referred to, the *nature of the wound*, and not of the *instrument*, seems to have been considered to be the proper test of decision. The shooting at another with a pistol loaded with powder and wadding only, was held to be within the Act, if it be fired so near the person that it would probably kill or do some grievous bodily harm. *R.* v. *Kitchen*, Bridg. Sum. Ass. 1705; and afterwards by the Judges, 1 Burn's J. 293,

Proof of intention.

the act was done by the prisoner with the particular intention wherewith it is charged to have been done, is, as in other cases of *specific* malice and intention, a question for the jury. Their inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and above all, on the *nature* and *extent* of the violence and injurious means he has employed to effect his object.

In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted; according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses and the acts which he does (*g*). If with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention was to destroy.

It is not, however, essential to the drawing such an inference that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal (*h*), provided the criminal intention can be clearly inferred from other circumstances.

In the case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible.

Where the question was, whether the shooting was by accident or design, proof is admissible that the prisoner at another time maliciously shot at the same person (*i*).

Where the cutting was laid with intent to do some grievous bodily harm, and the jury found that the act was done with intent to resist a lawful apprehension of the prisoner, and with *no other intent*, it was held by the Judges that the conviction could not be supported (*j*).

Where the act is charged to have been done with intent to resist a lawful

23d edit. Russ. & Ry. C. C. L. 95. But in order to constitute the offence of attempting to discharge loaded fire-arms, it must appear that they are so loaded as to be capable of effecting the mischief. *R.* v. *Carr*, Russ. & Ry. C. C. L. 377. A blow with a hammer (*R.* v. *Withers*), or with a stick or club (*R.* v. *Lancaster*), is within the Act, if it occasion a *wound*. S. P. ruled at York, cor. Park, J. But the inflicting blows with a hammer or iron instrument, so as to break the collar-bone and violently bruise, but without breaking the skin, is not a wounding within the statute. *R.* v. *Wood*, 4 C. & P. 381. Striking on the head with a bludgeon, whereby the skin was broken and blood flowed, was held to be a wounding within the stat. 9 Geo. 4, c. 31, ss. 11, 12. *R.* v. *Payne*, 4 C. & P. 558.

(*g*) See tit. INTENTION—MALICE—MURDER.

(*h*) *R.* v. *Case*, York Summer Ass. 1820, cor. Park, J., who said that it had been so held by the Judges. See *R.* v. *Akenhead*, Holt's C. 469). It is obvious that a case may fall within both the letter and the spirit of the statute, although from *accident* or from *ignorance* the prisoner has not succeeded in reaching a vital part. *Supra*, tit. INTENTION—MALICE.

(*i*) *R.* v. *Voke*, Russ. & Ry. C. C. L. 531.

(*j*) *R.* v. *Marshall & others*, Surrey Spring Assizes, 1818. Cor. Wood, B. and afterwards by the Judges. The jury in this case negatived any *other intent*; and therefore the case differs most essentially from that of *R.* v. *Fox*, above cited, p. 783; where, although it seems that the primary intention of the prisoner probably was to commit a rape, yet the jury found that he did by cutting intend to do some grievous bodily harm.

apprehension, the right of the prosecutor to arrest must be proved by the production and proof of the warrant or other authority (*k*).

A variance from the particular instrument, or poison, alleged to have been used, does not appear to be material (*l*). Variance.

An indictment for striking and cutting is not supported by evidence of stabbing (*m*).

Upon an indictment for administering (*n*) a noxious substance to a woman

(*k*) *R.* v. *Dyson*, 1 Starkie's C. 246, cor. Le Blanc, J. York Spring Ass. 1816; there the prisoner having cut *A. B.* on the cheek, the prosecutor and several others who were *not present* at the transaction, went *without any warrant* to the prisoner's house to apprehend him, and he then wounded the prosecutor; and Le Blanc, J., held, that to enable a private person to apprehend in such a case, he must either have been present when the offence was committed, or must be armed with a warrant, this branch of the statute being intended to protect officers and others armed with authority in the apprehension of persons guilty of robberies or other felonies.—Note, that it did not appear in the above case that the first cutting amounted to a felony, or that the wound was likely to be mortal. Vide *supra*, 441. Where a private person arrests for felony, a notification of his purpose must be given before he can legally arrest. *Infra*, tit. MURDER. Where the prosecutor, whose property had been stolen, found it concealed in an adjoining field, and waited at night to detect the thief, and when he came and had lifted up the bag containing the property, seized him without any previous notification, whereupon the prisoner cut the prosecutor, it was held that for want of previous notification the case was not within the statute. (*Rickett's Case*, cor. Lawrence, J., 3 Camp. 68). But where, in a case somewhat similar, the goods had been concealed by the thief in an out-house, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night and *removed* the goods from the place where they were deposited, and upon an attempt to apprehend them, the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice, *stop thief*, and on being overtaken, the prisoner drew a knife with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed. *R.* v. *Robinson*, cor. Wood, B. Lancaster. Under the 7 & 8 Geo. 4, c. 29, the servant of the owner, finding a party in the act of committing the offence of stealing vegetables, and taking him before a justice, was held to be entitled to all the protection of a constable, and that the cutting him with intent, &c. would be a capital felony; but where the party was only found with the stolen property in the adjoining close, and was taken by the servant, not to a justice, but to the owner's house, it was held that the party stabbing the servant was not guilty of a capital offence; if he had killed him it would not have amounted to murder. *R.* v. *Curran*, 3 C. & P. 397. But where the prisoner was discovered at night in the act of felony, and being pursued escaped over into an adjoining garden, where he was found secreted, and upon being apprehended resisted and stabbed the prosecutor; held that the arrest was lawful, and that no previous notice of the cause of apprehension was necessary. *Howarth's Case*, 1 Ry. & M. 207. A party was wrongfully arrested and detained by a constable on a charge of assault, which did not take place in his presence, and whilst in such custody, struck a party assisting the constable having him in charge, for which the constable also said he should take him before a magistrate; whilst proceeding thither, the prisoner in resisting struck the party with a knife, for which he was indicted under the 43 Geo. 3, c. 58; held that as he might be considered to be still acting under the provocation of the original wrongful arrest, he was entitled to an acquittal. *Curran's Case*, 1 Ry. & M. 132. Where two parties were seen by watchmen with two carts containing stolen apples, and upon one watchman going up and walking by one, was wounded by him whilst his colleague was near the other, held that the latter could not be convicted of the wounding, unless the jury found not merely that they went together with the common intent of stealing apples, but also of resisting with extreme violence any attempt to apprehend them. *R.* v. *Collinson*, 4 C. & P. 565.

(*l*) Vide tit. MURDER — VARIANCE. Starkie's Crim. Pleadings, *R.* v. *Goldsmith*, 3 Camp. 75; where, on an indictment for administering a decoction of savin to a woman with child, but not quick with child, with intent to procure a miscarriage, it was held by Lawrence, J., to be unnecessary to prove that the substance administered was savin; for if the prisoner believed at the time that the substance which he administered would procure a miscarriage, and administered it with that intent, the case was within the statute.

(*m*) *R.* v. *Macdermot*, Nott. Lent. 1818, cor. Garrow, B.

(*n*) Where the prisoner merely gave the poisoned article to the party intended to

Variance.

quick with child, with intent to procure abortion, it is essential to prove that she was quick with child at the time (*o*). But where the indictment charged the prisoner with administering a decoction of savin (describing it to be a noxious substance) to a woman with child, but not quick with child, it was held to be unnecessary to prove that the substance so administered was savin, or that it was capable of procuring a miscarriage, or that the woman was with child; these being unnecessary averments (*p*).

Indictment for maiming cattle.

Under indictments framed upon the stat. 9 Geo. 1, c. 22 (*q*), for maiming (*r*) or wounding cattle, it has been held that if it *appear* that the malice was against the *animal*, and not against the *owner*, the case is not within the statute (*s*). But it was not essential on the part of the prosecution to prove previously existing malice against the owner (*t*). The brutality of the act indicates a malignant mind, and the jury are to judge of the real motives and intention of the prisoner. Under the late stat. 7 & 8 G. 4, c. 30, s. 25, it is immaterial whether the offence be committed from malice against the owner or otherwise.

Where the prisoner broke into a stable at night, and cut the sinews of the fore-leg of a racer, in order to prevent his running, he was capitally convicted (*u*).

Where persons riotously assembled, had obtained money from the prosecutor, under the pretence of advice; held, that other demands of the same kind on the same day, when the prisoners were present, were admissible (*x*).

On an indictment for destroying machines (*y*), against the stat. 7 & 8

be destroyed, but the latter never took or applied it, it was held to be insufficient to sustain a charge for administering, &c. under 43 Geo. 3, c. 58, s. 1; but that if any part were taken, it was not necessary that it should be swallowed, *Cadman's Case*, 1 Ry. & M. 114. Where the prisoner, a servant, placed the coffee-pot, in which she had mixed arsenic, by the fire, and told her mistress it was for her, and the latter took and drank of it, it was held to be a sufficient "causing the poison to be taken," and to be an "administering," within the 9 Geo. 4, c. 31, s. 11; manual delivery not being necessary. *R.* v. *Harley*, 4 C. & P. 369.

(*o*) *Goldsmith's Case*, 3 Camp. 73; cor. Lawrence, J. The medical men differed as to the time when the fœtus may be stated to be quick, and to have a distinct existence; but they all agreed that, in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens usually about the fifteenth or sixteenth week after conception. Lawrence, J., said, that this was the construction to be put on the words of the statute; and as the woman had not felt the child move within her before she took the medicine, he directed an acquittal. On an indictment for administering drugs to *A. B.* in order to procure miscarriage, alleging her "being with child;" held that it appearing negatively that she was not with child, a conviction on 43 Geo. 3, c. 58, was wrong. *Scudder's Case*, 1 Ry. & M. 210. See *R.* v. *Phillips*, 3 Camp. C. 76.

(*p*) *Goldsmith's Case*, 3 Camp. 73; per Lawrence, J.

(*q*) The word cattle in this statute includes horses, mares, and colts. *Paty's Case*, 2 East's P. C. 1074; 2 Bl. R. 721. The statute applies although the wound be not mortal, and does not occasion any permanent injury. *Haywood's Case*, East's P. C. 1076.

(*r*) Injuring a mare by pouring nitrous acid into the ear and eye, so that it became necessary to destroy her, was held to be a maiming within the 7 & 8 Geo. 4, c. 30, s. 16. *Owen's Case*, 1 Ry. & M. 205.

(*s*) *Shepherd's Case*, cor. Hotham, B. and Heath, J., O. B. 1790, East's P. C. 1073; where it was left to the jury to say whether a brutal injury to a horse resulted from sudden passion against the animal itself, or from motives of personal revenge against the master; and the prisoner was acquitted. S. P. in *R.* v. *Austin*, cited by Bayley, J., 3 B. & C. 248. See also *Pearce's Case*, East's P. C. 1072; 1 Leach, 527. *Kean's Case*, O. B. 1789, 1 Leach, 527.

(*t*) So held by the Judges in *Ranger's Case*, Surrey Summer Ass. 1798, East's P. C. 1074.

(*u*) *R.* v. *Dobbs*, 2 East's P. C. 513. So in *Dawson's Case*, Russel, 1688, who was executed for poisoning a mare in order to prevent her from running a race, he having betted against her.

(*x*) *R.* v. *Winkworth*, 4 C. & P. 444.

(*y*) Where the prisoners broke only the

Geo. 4, c. 30, s. 4, the prisoner was allowed to ask in cross-examination if persons had not been compelled to join the mob, and to call a witness to prove they had agreed to run away from the mob the first opportunity, and did so shortly afterwards (*z*).

MANDAMUS.

As to a mandamus to Justices to set out facts in a conviction, see *R.* v. *Wilson*, 1 Ad. & Ell. 627. As to a traverse of a return, see 1 Ad. & Ell. 297.

MANOR.

Evidence essential to proof of manor.

Every manor consists of demesnes and services (*a*), and it is essential to the existence of a manor, not only that there should be two freeholders within the manor, but two freeholders holding of the manor, and subject to escheats (*b*); and in default of freehold tenants, the manor ceases to be a legal manor (*c*). But that which has been once a legal manor may still be a manor by reputation, and exist for the purpose of many prescriptive rights attached to it, although the right of holding courts, for want of freehold tenants, may have been severed from it (*d*).

Where the plaintiff alleged that he was seised of the manor of Froome Selwood, by virtue of which he claimed a prescriptive right to appoint a sexton, and it appeared in evidence that Froome Selwood had once been a legal manor, but had for some time ceased to be so for want of any freehold tenants, it was held that it might still be a manor by reputation, for the special purpose to satisfy the allegation (*e*).

The question, whether a certain manor be of ancient demesne or not, is proved, as all such tenures are, by an inspection of Domesday by the Court (*f*).

Proof of the existence of a manor.

The existence of a manor is proved by the production of the ancient muniments of the manor, the court-rolls, the exercise of manorial rights (*g*), and by reputation (*h*). Reputation is also admissible evidence to prove the boundaries of a manor. And it seems that the description of the manor as

detached parts of a machine which had been taken to pieces, it was held to be within the 7 & 8 Geo. 4, c. 30, s. 4. *R.* v. *Mackerel*, 4 Carr. & P. C. 448. So where they broke the water-wheel, the moving power of a threshing machine. *R.* v. *Fidler*, 4 Carr. & P. C. 450.

(*z*) *R.* v. *Crutchley*, 5 C. & P. 133.

(*a*) Com. Dig. *Copyhold*, (Q. 1.) A manor commenced where the king granted lands with jurisdiction to another, who before the statute of *Quia Emptores* granted parcel of them to others, to hold of him by certain services. Co. Litt. 58. A grant of tithes within a manor, includes the tithes of the freehold as well as of the demesne lands. *Best* v. *Heightman*, Cro. Eliz. 683. But a grant of free manor, rentcharge, &c. extends to the demesne lands only, for otherwise it would be a charge upon other men. Ibid.

(*b*) Per Lord Kenyon, *Glover* v. *Lake*, 3 T. R. 447. *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*c*) *Soane* v. *Ireland & others*, 10 East, 259. *Finch's Case*, 6 Co. 63.

(*d*) Ibid. A manor by reputation is sufficient to entitle the lord to manorial wastes. *Curzon* v. *Lomax*, 5 Esp. C. 60. See *R.* v. *Bishop of Chester*, Skinn. 661; Ld. Raym. 291. *Thinne* v. *Thinne*, 1 Lev. 87; Cary, 33, 4; 2 Brownl. 223. *Lenox* v. *Blackwell*, Skinn. 191.

(*e*) *Soane* v. *Ireland*, 10 East, 259. See also 2 Brownl. 223, Hill. 7, J. B. R. citing *Finch* v. *Durham*, where it was said to have been held, on issue joined on the plea of *non dimisit manerium* in ejectment, that upon a finding by the jury that there were not any freeholders, but divers copyholders, and that it was known by the name of a manor, that it should pass to him who pleaded the demise of the manor. See also 12 Vin. Ab. T. b. 67.

(*f*) Hob. 188; B. N. P. 248. *Supra*, Vol. I.

(*g*) *Supra*, tit. Copyhold.

(*h*) Ib.

such, in ancient deeds (*i*), or even mere oral reputation, without proof (*k*) of the actual exercise of any manorial rights, is evidence of a manor by reputation.

Proof of manorial rights.

In actions by or against the lord of a manor, the right usually depends on proof of the particular custom (*l*) of the manor, and of the actual enjoyment of that which is claimed by or against the lord (*m*).

Where a tenant has made an inclosure of part of the waste, it is to be presumed to have been made for the benefit of the landlord (*n*). An inclosure from the waste made without objection, and seen from time to time by the lord and his steward, may be presumed to have been made with the desire of the lord, and the tenant cannot be treated as a trespasser without notice to give it up (*o*).

Upon a question, whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it was held that he might give parol evidence to show that there was a known distinction within the manor between *old* and *new* land, and to show by evidence of reputation,

(*i*) *Curzon* v. *Lomax*, 5 Esp. C. 60.

(*k*) *Steele* v. *Prickett*, 2 Starkie's C. 466.

(*l*) Independently of custom, the lord of a manor, as such, has no right to enter on copyholds within the manor, to bore and work for coals. *Bourne* v. *Tayler*, 10 East, 189. Nor to enter on a copyhold of inheritance to cut timber for his own use, leaving sufficient for botes and estovers. *Whitechurch* v. *Holworthy*, 4 M. & S. 340. It is a good custom that the inhabitants of a manor shall grind all their corn, grain and malt, which by them, or any of them, shall be used, spent or ground within the manor, at certain mills. *Cort* v. *Birkbeck*, Dougl. 218. That the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. *Rex* v. *Rigge*, 2 B. & A. 550. Where there is a custom in a manor for the payment of a separate set of fees to the steward upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; two sets of fees become due, and continue payable, although the land is afterwards conveyed to one person, as in the case of indivisible services. *Attree* v. *Scott*, 2 Smith, 449; 6 East, 476. Where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, in the absence of a special custom, to the full fees on each admission separately, and must therefore stand on his *quantum meruit*. *Everest* v. *Glynn*, 2 Marsh, 84; Holt's C. 1. *Semble*, that coparceners are entitled to admission as one heir. *R.* v. *Bonsall*, 3 B. & C. 173. Where the custom of a manor is silent, the common law must regulate the course of descent. *Denn* d. *Goodwin* v. *Spring*, 1 T. R. 466. An agreement between the lord and tenants of a manor, that the tenants may cut down, use and dispose of wood for the repairing, upholding or maintaining of their houses, hedges and fences, "or for any other their necessary uses," does not empower them to fell wood for sale; for which, if they do, the lord may support trover. The words "or for any other their necessary uses," mean, uses in their characters of *tenants*. *Blackett*, bart. v. *Lowes*, 2 M. & S. 494. If a manor be granted, reserving the waste, these are thereby severed from the manor, subject, however, to the rights of common, &c. as before. *Revell* v. *Jodrell*, 2 T. R. 415. A fine by tenant for life of parcel of a manor, the residue being in possession of the tenant in fee, severs it from the manor. *Goodright* ex. dem. *Fowler* v. *Forrester*, 8 East, 552.

(*m*) Where the lord claimed the exclusive privilege of cutting sea-weed (braic) from rocks covered at ordinary tides by the sea, held that, in the absence of any grant from the Crown, he could only sustain such right by evidence of long continued and undisturbed enjoyment, as well by the common law of England as by the civil law of Normandy. Where the evidence was of continued adverse claim without resistance, followed up by suit, the Court of Appeal (Privy Council) set aside the judgment in favour of the lord. *Benest* v. *Pipon*, 1 Knapp, 60.

(*n*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; 1 Esp. C. 461; and by Park, B. in *Doe* v. *Rees*, 6 C. & P. 610. Ld. Kenyon was of opinion that if a tenant inclose part of a waste, and remain in possession for a length of time sufficient for giving a possessory right, the inclosure does not belong to the landlord, unless, perhaps, where he acknowledged such part to belong to his landlord. *Doe* v. *Mulliner*, 1 Esp. C. 140. See *Attorney-gen.* v. *Fullarton*, 2 V. & B. 263.

(*o*) *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

as well as by acts of taking coal under the lands of other freeholders within the *new* land, that the lord was entitled to the coal within that boundary (*p*). And it was held that it was not necessary in such a case to prove the exercise of the lord's right in getting coal in the particular land then in question; it was sufficient to prove the exercise of the right with respect to lands similarly circumstanced, and then reputation was evidence to show the generality and extent of the right (*q*). It was observed that the nature of the right rendered it probable that the exercise of it would be confined to the same spot until the subject-matter was exhausted; and therefore that proof could not be expected of the exercise of the right in all places to which it might extend, for that would be proving a right to a thing which had ceased to be of any value (*r*). So, in general, what old people, deceased, have said concerning the boundaries of manors, is evidence, although what they have said as to particular facts and transactions is not admissible (*s*). Proof of manorial rights.

Usual reputation for sixty years past as to the *contents* of a manor, was held by Lord Chancellor Egerton to be evidence to be left to a jury, notwithstanding the production of ancient deeds, which showed that part of the lands claimed as parcel of the manor belonged to another manor (*t*). The evidence to prove the existence of a custom within a manor has already been considered (*u*).

The lord is not entitled to salvage for taking and preserving parts of a ship against the consent of the owner, whose servants were there to take care of them for him (*x*).

Where the plaintiff in ejectment claimed the manor of Artam as ancient demesne, and upon inspection of Domesday it appeared that the manor of *Nettam* was of ancient demesne, the plaintiff was not allowed to prove that Nettam was the ancient name of the manor claimed, for the variance ought to have been averred on the record (*y*). If the lord convey a customary estate to the tenant, he cannot reserve the ancient services (*z*); for the Variance.

(*p*) *Barnes* v. *Mawson*, 1 M. & S. 77. Evidence of rights exercised by the lord over conventionary tenants in one of several manors forming one district under the same lord, may be received to show what rights he had reserved or parted with to a class of tenants called conventionary tenants throughout the district. *Rowe* v. *Brenton*, 8 B. & C. 702. Where the largest interest ever claimed by the conventionary tenants was from seven years to seven years, renewable for ever, it was held that it would not give them a right to the minerals; and though a positive usage to take them might be valid in law, it must be proved, otherwise the right would remain in the lord. *Rowe* v. *Brenton*, 8 B. & C. 706. Where the question was whether a slip of land between an old inclosure and the highway belonged to the lord of the manor or to the owner of the adjoining land, it was held that acts of ownership by the lord, as inclosure of other slips in open places in the same manor, were properly admitted in evidence, and that such evidence of right ought not to be confined to the part in dispute, the circumstance of all being in the same manor, giving a general unity of character to the whole. *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 732, and 5 M. & P. 173.

(*q*) Ibid. And see Lord Ellenborough's observations in that case.

(*r*) Per Ld. Ellenborough, C. J. *Barnes* v. *Mawson*, 1 M. & S. 77.

(*s*) *Nicholls* v. *Parker*, Exeter Summer Ass. 1805, cor. Le Blanc, J., 14 East, 331. *Supra*, Vol. I. tit. WITNESS.—HEARSAY.

(*t*) 12 Vin. Ab. T. b. 67.

(*u*) *Supra*, tit. COPYHOLD.

(*x*) *Sutton* v. *Buck*, 2 Camp. 302.

(*y*) B. N. R. 248, cites *Gregory* v. *Withers*, Hil. 28 Car. 2. *Qu.* as to the description in the declaration in this case.

(*z*) And a confirmation to a customary tenant, of his customary and tenant-right estate, discharged from all customs, services and demands, except, &c., is tantamount to a release of the rents and services not specifically excepted; and the customary tenement becomes frank-free, or held in free and common socage. *Doe* d. *Reay* v. *Huntington*, 4 East, 271.

tenant, under the statute of *Quia Emptores*, must then hold of the superior lord.

MARRIAGE.

Jurisdiction on questions of marriage.

THE Spiritual Court has the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding, incidentally, either upon the fact or legality of marriage: when such questions lie in the way to the decision of the proper objects of their jurisdiction, they do not want or require the aid of the Spiritual Courts (*a*); nor has the law provided any legal means of sending to them for their opinion, except where an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, general bastardy. In those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; and his certificate, when received, returned, and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point (*b*).

The proof of a marriage is either, 1st, of a marriage in fact; or 2dly, of a marriage by evidence of repute, cohabitation, &c.; or 3dly, by evidence of a sentence or decree in the Spiritual Courts.

Proof of a marriage in fact.

1st. The usual proof of a marriage in fact, before a jury, is by means of a witness who was present at the celebration.

Where it has been celebrated in a parish church it does not appear to be necessary, in the *first instance*, to prove that the church was one in which marriages may lawfully be celebrated (*c*); so in general it is not essential to prove, in the first instance, that the officiating minister was a clerk in holy orders (*d*), or that the banns have been duly published (*e*), or that a licence has been granted, nor is proof of registration necessary (*f*).

(*a*) The answer to the claim of the Spiritual Courts to decide exclusively in such matters, in the reign of Edward 2, was, *Quando eadem causa diversis rationibus eorum judicibus ecclesiasticis et secularibus ventilatur, dicunt quod non obstante ecclesiastico judicio curia Regis ipsum tractet negotium ut sibi expedire videtur.* 2 Inst. 22; 11 St. Tr. 261.

(*b*) Per De Grey, C. J., in giving judgment in the *Duchess of Kingston's Case*. As the certificate of the ordinary is peremptory, the stat. 9 Henry 6 requires public proclamation to be made, in order that parties who are interested may come in and be parties to the proceeding. Vide *supra*, tit. BASTARDY; and Vol. I.

(*c*) Previous to the Marriage Act, it was not essential that the marriage should be performed in a church or chapel; it might be celebrated in a private room. *R.* v. *Fielding*, 5 St. Tr. 614. *Jesson* v. *Collins*, Salk. 487; 6 Mod. 155. Marriages solemnized in chapels, &c. whilst the parish church is under repair, and in chapels wherein banns cannot be legally published, or of which the due consecration may be doubtful, were declared valid, 6 Geo. 4, c. 18.

(*d*) Before the Marriage Act, 26 Geo. 2, c. 33, s. 18, it was essential to the validity of a marriage that it should have been solemnized by a person in holy orders; (*Haydon* v. *Gould*, Salk. 119; 1 Bl. Comm. 439. *R.* v. *Luffington*, 1 Burr. S. C. 232). But this was much questioned in a late case. But a marriage celebrated by a Roman-catholic priest was binding. Evidence of the ceremony being celebrated in

(*e*) But it is competent to the adverse party to prove that the banns have not been regularly published. *Standen* v. *Standen*, Peake's C. 32. See Ld. Mansfield's observations, *St. Devereux* v. *Much Dewchurch*, Bl. R. 367; 4 Burn's J. 280, 22d edit.

(*f*) *R.* v. *Allison*, Russ. & Ry. C. C. 109. Even upon an indictment for bigamy. Ibid. See below, 700, note (*p*).

A marriage may also be proved by the production of the register, or proof of an examined copy of it (*g*), with some evidence of the identity of the parties (*h*). Proof of a marriage in fact.

It has been seen that although the entry be first made in a day-book, the day-book is not evidence, if the entry has been afterwards made in the register (*i*). It is not necessary to call one of the subscribing witnesses to the entry in the register (*k*).

The identity of the parties may be proved (*l*) by evidence of their handwriting, payment of money to the bell-ringers, the giving a wedding-dinner, or any other circumstances which satisfy the jury (*m*).

Where the marriage has been solemnized in a chapel, evidence should be given that banns have been usually published there previous to the Marriage Act (*n*); as by old registers of marriages solemnized in such chapels ante- Chapel.

England between the prisoner and a Roman-catholic woman, by a Romish priest, in a language which the witnesses did not understand, and which they cannot swear to, as the ceremony of marriage according to the church of Rome, was held to be insufficient. *Lyon's Case*, O. B. Dec. 1748, cor. Willes, L. C. J. East's P. C. 469. And see the observations of Lord Ellenborough, *R.* v. *Brampton*, 10 East, 287. In *Haydon* v. *Gould*, Salk. 119, the parties were Sabbatarians, and the ceremony had been performed according to the rites of their sect, and they lived together for seven years, till the death of the wife; yet the officiating minister being a layman, the Ecclesiastical Court repealed the letters of administration granted to the husband, and the Court of Delegates, on appeal, confirmed the sentence. In *R.* v. *Fielding*, 5 St. Tr. 610, the marriage here by a Roman-catholic priest was held to be good, on evidence of the words of *present contract*, the rest being read in the Latin tongue, which the witness did not understand. And see *R.* v. *Brampton*, 10 East, 287, and *infra*, 704. And see the observations of Willes, L. C. J. in *Lyon's Case*, East's P. C. 469.

(*g*) *Supra*, Vol. I. Ind. tit. MARRIAGE.

(*h*) *Hemings* v. *Smith*, 4 Doug. 29.

(*i*) Vol. I. p. 243. *May* v. *May*, Str. 1073. *Lee* v. *Meecock*, 5 Esp. C. 177.

(*k*) *Birt* v. *Barlow*, Doug. 170; *supra*, 352. See further provisions as to registers, 52 G. 3, c. 146.

(*l*) *Supra*, 353.

(*m*) B. N. P. 27.

(*n*) 26 G. 2, c. 33. By sect. 1, all banns shall be published in the parish church, or in a public chapel in which banns have been usually published.—By sect. 8, all marriages solemnized in any other place than a church or chapel, unless by special licence, or without publication of banns, or licence of marriage, from a person having authority to grant the same, shall be void. It has been held, that the words "*have usually been published*," refer to the time of the Act, and consequently that marriages in a public chapel erected since the passing of the Act are illegal. *R.* v. *Northfield*, Doug. 658. By different statutes, marriages celebrated in such subsequently erected churches, which have been duly consecrated, are rendered valid. See 21 G. 3, c. 53; 44 G. 3, c. 77; and the stat. 48 G. 3, c. 127, as to marriages solemnized before August 23d, 1808, and 6 G. 4, c. 92. Provisions are also made by those statutes for the reception of the registers of those marriages in evidence, subject to the same exceptions as in the case of other marriage registers. By the stat. 48 G. 3, c. 127, such registers are to be removed within thirty days next after August 23d, 1808, to the parish church; or if the situation of the chapel be extra-parochial, to the parish church of the next adjoining parish, to be there kept with the marriage registers of the parish; copies are also to be transmitted to the bishop of the diocese, or his chancellor. A publication of banns in an adjoining parish church, where the publication in the proper parish church was impossible from the state of the church, which was under repair, was held to be sufficient. *Stallwood* v. *Tredgar*, 2 Phillim. 287. By the stat. 4 G. 4, c. 76, s. 2, banns are to be published in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, in, of, or belonging to such parish or chapelry, &c.—By sect. 3, the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals, may authorize the publication of banns and the solemnization of marriages in such chapel, for persons residing in such chapelry or extra-parochial place.—By sect. 9, where a marriage shall not be had within three months after the complete publication of banns, it shall not be solemnized without re-publication, or licence granted. By the 6 G. 4, c. 92, s. 2, it shall be lawful for marriages to be in *future* solemnized in all churches and chapels erected since

Proof of a marriage in fact.

cedently to the Act, and registers of banns published there since; and to prove as far as can be done by living testimony, that marriages have been usually celebrated there (*o*). Such evidence furnishes a reasonable presumption that the chapel is one in which marriages may legally be solemnized.

Although the Marriage Act requires an entry to be made in the register immediately after the celebration, in which it shall be expressed that the marriage was by banns or by licence; and that, if both or either of the parties be under age, that it was with the consent of the parents or guardians; and that it shall be signed by the minister and parties, and attested by two witnesses; yet the registration of a marriage is but evidence of it, and is not essential to its validity (*p*).

Publication of banns.

The banns ought to be published in the true names of the parties (*q*). But if they have been published in the names by which alone the parties *are known*, and *without fraud*, the marriage is within the meaning of the statute. Abraham Langley resided for three years in Lamberhurst, and during that time was known by the name of George Smith only, and the banns of his marriage were published and he was married under that name, and the Court of King's Bench held that the marriage was valid (*r*). And where a deserter assumed another name, and after residing for sixteen weeks at L., where he was known by that name only, and then married there, the Court held that the marriage was valid, the name having been assumed for the purpose of concealment, and not in order to impose upon the woman whom he married (*s*). But where there has been a change of the name for the purpose of fraud, or (*t*) even a deliberate omission of part of a real name (*u*) with a view to mislead, it seems that the marriage will be void.

the passing of 26 G. 2, and consecrated, in which churches and chapels it has been customary and usual, before the passing of the 6 G. 4 to solemnize marriages; and the registers of such marriages, or copies thereof, are declared to be evidence.—By sect. 3, power is given to the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel, with a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, to authorize under his hand and seal, the publication of banns and the solemnization of marriages in such chapels, for persons residing in such chapelry or extra-parochial place. And see 6 & 7 W. 4, c. 85, s. 26.

(*o*) See *Taunton* v. *Wybourne*, 2 Camp. 297. There a register of marriages, going back to the year 1758, and a register of the publication of banns from the year 1754 (when the Marriage Act was passed), were produced from the chapel in the Tower. Lord Ellenborough held that it might be presumed that banns had usually been published there before the Marriage Act.

(*p*) *R.* v. *St. Devereux*, 1 Bl. R. 367. *Read* v. *Passer*, Peake's C. 231; 1 Esp. C. 213.

(*q*) For although the Marriage Act does not specify in what manner the banns shall be published, yet it was the clear intention of the Legislature to require it; and the statute requires that notice in writing shall be delivered to the minister, of the true christian and surnames of the parties, seven days before the publication.

(*r*) *R.* v. *Inhabitants of Billinghurst*, 3 M. & S. 250; and see *Frankland* v. *Nicholson*, there cited, where Sir W. Scott says, there may be cases where names acquired by general use and habit may be taken by repute as the true christian and surnames of the parties.

(*s*) *R.* v. *Inhabitants of Burton-upon-Trent*, 3 M. & S. 537. So where a widow assumed her maiden name, and many years afterwards was married by that name with the addition of widow. *R.* v. *St. Faith's, Newton*, 3 D. & R. 348.

(*t*) See *Frankland* v. *Frankland*, cited 3 M. & S. 259; where Ann Nicholson, with a view to fraud, described herself to be Mrs. Ross, and was known by that name at the house where she lived; but it did not appear that she ever went by that name down to the time of the marriage, for before that time she cohabited with the producent, under the name of Frankland, Sir W. Scott pronounced the marriage to be null and void. Vide *etiam*, *Fellowes* v. *Stewart*, 2 Phillim. 257. *Meddowcroft* v. *Gregory*, Ib. 365. *Bayard* v. *Morphew*, 2 Phill. 321.

(*u*) *Pougett* v. *Tomkyns*, cited 3 M. & S. 262, where William Peter Pougett, who was a minor, of the age of sixteen, and

So if the banns be published in a wrong name, although without any fraudulent motive (*x*). Proof of a marriage in fact.

The law was held to be as above stated under the st. 26 G. 2; the statute now in force does not annul the marriage except where *both parties* knew of the undue publication (*y*).

Where the marriage was by licence, and either of the parties, not being a widower or widow, was a minor, it is essential to prove the consent of the father of that party, if he was then living, or if he was dead, then of the guardians of the minor, or of one of them, or if there was no guardian, then of the mother, if living and unmarried, and if there was no mother living and unmarried, then of a guardian of the person appointed by the Court of Chancery (*z*). Minor.

generally known and addressed by the name of *Peter* only, few people knowing that he had likewise the christian name of William, was married by banns to Letitia Tomkyns, his father's maid-servant, in a parish where the parties had never resided, the banns were published in the names of *William Pougett* and Letitia Tomkyns, and the marriage was pronounced to be null and void. See Lord Tenterden's observations in *R.* v. *Tibshelf*, 1 B. & Ad. 195.

(*x*) *Mather* v. *Ney*, Consistory Court, 1807, where the real name of the woman was *Ney*, and the banns were published under the name of Wright, and the marriage was held to be void. And see Lord Tenterden's observations in *R.* v. *Tibshelf*, 1 B. & Ad. 195. But where Anna Colley was married upon a publication of banns in the name of Anna *Sophia* Colley, it was said by Sir W. Scott, that in the absence of fraud the Court would be very unwilling to question the validity of the marriage, after a long cohabitation by the parties. And see *Tree* v. *Quin*, cited 3 M. & S. 266; and *Mayhew* v. *Mayhew*, Ibid. A publication in the name of Edward Stanhope, the real name being Augustus Henry Edward Stanhope, was held to be bad. *Stanhope* v. *Baldwin*, Add. 93; see also *Green* v. *Dalton*, Ib. 289. So where a false name is fraudulently assumed for the purpose of marriage. *Frankland* v. *Nicholson*, cited 3 M. & S. 259; and see *Fellowes* v. *Stewart*, 2 Phill. 257. *Bayard* v. *Morphew*, Ib. 321. *Meddowcroft* v. *Gregory*, Ib. 365. But where the banns were published, the woman being a natural daughter, in the name of the mother, as well as of the putative father, it was held to be sufficient. *Sullivan* v. *Sullivan*, Ib. 45. A marriage of sixteen years' standing was refused to be set aside on the ground of a false name used in the banns, it not appearing which was the true name, and no intention of fraud. *Diddear* v. *Faucit*, 3 Phill. 580.

(*y*) And therefore where the proposed husband procured the banns to be published in a christian and surname which the woman had not borne, and she was ignorant of the fact till after the solemnization of the marriage, it was held to be good. *R.* v. *Wroxton*, 4 B. & Ad. 640.

(*z*) 26 G. 2, c. 33, s. 11. An illegitimate child has been held to be within this clause; *R* v. *Hodnett*, 1 T. R. 96; although it seems once to have been held that the consent of the putative father was sufficient. *R.* v. *Edmonton*, East, 24 G 3; 2 Bott. 70, pl. 114, cited 1 T. R. 97. And the consent of the putative father or natural mother in such a case has been held to be insufficient. *Horner* v. *Liddiard*, *Daniel* v. *Cooke*, cor. Sir W. Scott; and *Priestly* v. *Hughes*, 11 East, 3, Grose, J. being of opinion that illegitimate children were not within the contemplation of the Legislature in framing this clause. Where the parties have long cohabited, the Court (ecclesiastical) will require the evidence of minority and want of consent to be full and conclusive. *Johnston* v. *Parkes*, 3 Phillim. 49. *Hayes* v. *Watts*, Ibid. Where a testamentary appointment of a guardian was not attested by two witnesses, the marriage of a minor, with the consent of such guardian, held to be void. *Reddall* v. *Liddiard*, 3 Phillim. 256. Consent is necessary, although the minor be a Jewess, married according to Christian rites. *Jones* v. *Robinson*, 2 Phillim. 285. But the Ecclesiastical Court will not dissolve the marriage without satisfactory proof of minority, especially where the father's consent is rendered probable by circumstantial evidence. *Agg* v. *Davies*, 2 Phill. 341. By the stat. 3 G. 4, c. 75, s. 2, marriages by licence before the passing of the Act, without such consent as is required by the Marriage Act, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of this Act, or shall only have discontinued their cohabitation for the purpose or during the pendency of any proceedings touching the validity of such marriage, shall be deemed good and valid. Where an infant was married by licence without consent of parents between the repeal of 26 Geo. 2, c. 33, by 3 Geo. 4, c. 75, and the time when the latter Act came into operation, held that such marriage was valid. *Waudly's Case*, 1 Ry. & M. 163. A marriage

Proof of marriage in fact.

In a prosecution for bigamy, where it appeared that the first wife was a minor at the time of the marriage, which was by licence, the prisoner was acquitted for want of proof of the consent of a parent or guardian (*a*).

Residence.

Whether the marriage has been solemnized upon a licence granted, or the publication of banns, it is unnecessary after solemnization to give any evidence in support of the marriage that the parties resided within the limits and for the times specified by the Act, and evidence to the contrary is inadmissible (*b*).

which would have been void by the 26 Geo. 2, c. 33, and had once been rendered valid by the second section of the 3 Geo. 4, c. 75, cannot subsequently be rendered invalid by the marriage of either of the parties, during the life of the other, with a third person. *R.* v. *The Inhabitants of St. John Delpike*, 2 B. & Ad. 226. The stat. 4 G. 4, c. 76, repeals the stat. 3 G. 4, c. 75, except as to things done under its provisions, and except so far as it repealed any former Act, or any clause, matter or thing therein contained. The retrospective clause (sect. 1) in the 3 Geo. 4, c. 75, operated, with respect to the marriages to which it was applicable, as a repeal of the clauses in the former Marriage Act which rendered them invalid; it therefore was not repealed by the subsequent statute. And, therefore, where one of the parties was married by licence, under age and illegitimate, before the passing of the 3 G. 4, c. 75, and at the time of the passing of that Act they were living together as husband and wife, and were of full age, the marriage was held to be good. *Rose* v. *Blakemore*, 1 Ry. & M. 372. But where the marriage was void, under 26 G. 2, by reason of undue publication of banns (in a false name), held that the statute was still unrepealed as to that ground of nullity, and the marriage void, notwithstanding the later Acts. *Farquharson* v. *Farquharson*, 3 Add. 282. *Bridgewater* v. *Crutchley*, Add. 473. The stat. 4 G. 4, c. 76, s. 16, provides that such consent as was required under the 26 G. 2, shall be necessary, unless there be no person authorized to give such consent.—This clause is directory only, sec. 23 inflicting a penalty on parties disobeying the directions of sec. 16; a marriage, therefore, by a minor by licence, without consent of his father then living, was held to be valid. It is no objection to its validity that the marriage was obtained by the fraudulent practice of the parish officers. *R.* v. *Birmingham*, 8 B. & C. 29, and 2 M. & Ry. 230. By sect. 17, where a father is *non compos*, or the mother or guardian is *non compos*, or beyond the seas, the Lord Chancellor shall have power to consent on petition made. Where the marriage of a minor by licence was void, under the 26 G. 2, c. 33, but the parties at the passing of 3 G. 4, c. 75, were living separate, under a mere voluntary agreement, without any legal sanction; held that they were to be deemed to have "continued to live together as man and wife," within the meaning of the retrospective effect of the latter Act, and in a state of matrimonial cohabitation, how *locally* soever situate, and upon what terms soever of matrimonial intercourse. *King* v. *Sansom*, 3 Add. 277. A conviction for bigamy will not preclude the party from setting up the nullity of the first marriage, in a cause of divorce. *Bruce* v. *Buck*, 2 Add. 471.

(*a*) Cor. Le Blanc, J. York Assizes. *R.* v. *Butler*, 1 Russ. & Ry. 61. *Qu.* Whether the licence reciting the consent of the father or guardian would be *primâ facie* evidence of the fact? See tit. POLYGAMY.

(*b*) See the stat. 26 G. 2, c. 33, s. 11, and 4 G. 4, c. 76, s. 26, which provides, that after the solemnization of any marriage under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage.—But by sec. 22, if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may lawfully be published, or without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes. See also *Drovey* v. *Archer*, 2 Phill. 347. *Clarke* v. *Hawkins*, Ib. in the note. *Wiltshire* v. *Wiltshire*, 3 Hag. 333. But the stat. avoids the marriage only where the parties knowingly and wilfully intermarry without due publication; and to avoid the marriage under this clause, *both* must *know*. *R.* v. *Wroxton, Inhabitants of*, 4 B. & Ad. 640. Where the pauper and her husband were married by banns in the surname of her baptismal register, which appeared by mistake to have been that of the grandfather, and she

Proof of marriage in fact.

It is provided by the st. 6 & 7 W. 4, c. 85, that superintendant registrars may grant licences to be married in a building registered under the Act, or in his office (*c*); provision is made for the registration of chapels (*d*).

It is further provided, that if any persons shall knowingly and wilfully intermarry in any other place than the church, chapel, registered building, or other place specified in the notice and certificate (to be given according to the Act), or without due notice to the superintendant registrar, or without certificate of notice duly issued, or without licence where a licence by the Act is necessary, or in the absence of a registrar or superintendant where their presence is necessary, the marriage shall be void (*e*).

The Marriage Act does not extend to any of the marriages of any of the royal family (*f*), or to Scotland, or to marriages among Quakers or Jews (*g*), &c., or to marriages beyond seas (*h*).

A marriage of English minors in Scotland is valid (*i*), although the marriage be contracted in direct contravention of the law of England, between parties repairing to Scotland for the purpose.

A marriage by a dissenting minister in Ireland, in a private room, is valid (*k*).

A marriage may be avoided by evidence of the incapacity of either of the parties to the contract, either by reason of consanguinity or affinity (*l*), or

had never been called or known by it, held, that under 26 Geo. 2, c. 33, the marriage was void. *R.* v. *Tibshelf*, 1 B. & Ad. 190.

(*c*) Sec. 61.

(*d*) See secs. 18, 19, 34, &c.

(*e*) Sec. 42. But it is provided that nothing therein contained shall annul any marriage solemnized under the st. 4 G. 4.

(*f*) Sec. 17.

(*g*) In the case of a Jewish marriage, it has been held at *Nisi Prius* to be insufficient to give evidence of the solemnization at the synagogue, without also proving the previous written contract of marriage. *Horn* v. *Noel*, 1 Camp. 61. In the case of *Ganer* v. *Lady Lanesborough*, a Jewess was allowed to give parol evidence of her own divorce in a foreign country. As to the form of a Jewish contract of marriage, see *Lindo* v. *Belisario*, 1 Hagg. Con. 225. 247. *Goldsmid* v. *Bromer*, 1 Hag. Con. 324. In the case of *Woolston* v. *Scott*, Norfolk Lent Assizes, 1753, Denison, J. in an action for crim. con., admitted the plaintiff, who was an Anabaptist, to prove that the marriage was celebrated according to the Anabaptists' form of religion. B. N. P. 28. In the case of a Quaker, the marriage must be proved according to the ceremonies of that sect. In the case of other dissenters, no provision was made previous to the 6 & 7 W. 4, c. 85.

(*h*) Sec. 18.

(*i*) *Crompton* v. *Bearcroft*, Bull. N. P. 113. *Phillips* v. *Hunter*, 2 H. B. 412; 2 Burr. 1080; Co. Litt. by Harg. & Butler, note 79, b.; Huberus, 33.

(*k*) *R.* v. ——, Old Bailey, Jan. 1815, *cor.* Sir J. Silvester. Although no evidence be given of any licence obtained. *Smith* v. *Maxwell*, 1 R. & M. 80. Upon a charge of bigamy, the first marriage was proved to have been in Ireland by licence, the party being a minor, and without consent of parents; it was held a valid marriage, the 9 Geo. 2, c. 11 (Irish Marriage Act), making it voidable only. *Jacob's Case*, 1 Ry. & M. 140. Upon a question as to the settlement of Elizabeth the wife of *C.*, the respondents proved by the testimony of *C.* his marriage with the pauper in 1820. The appellants, in order to prove that that marriage was void, on the ground that he had been married in 1826 to *M. B.*, called the latter, who stated that she, in 1826, went with *C.* before *W.*, a reputed clergyman of the Established Church in Ireland, who in his private house there read to them the marriage ceremony. A document was also produced, purporting to be *W.*'s letter of orders, signed in 1799 by the then Archbishop of Tuam, which was proved to have been among *W.*'s papers at the time of his death, in July 1820. Held, first, that *M. B.* was a competent witness to prove the first marriage, although her husband had been before examined and proved the second marriage; secondly, that the certificate of the ordination of *W.* was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that the certificate not being the act of any Court, and not having any relation to the corporate character of the Archbishop, the seal was to be considered the seal of the natural person, and not of the corporation; had it been of the latter character, *quære* whether it would have been admissible without evidence that it was the proper seal. *The King* v. *The Inhabitants of Bathwick*, 2 B. & Ad. 639.

(*l*) By the 5 & 6 W. 4, c. 54, marriages within the prohibited degrees of consangui-

Proof of marriage in fact.

of a previous and still-subsisting marriage with another; from want of reason, for consent is absolutely requisite to matrimony (*m*), although formerly a lunatic was supposed to be able to contract matrimony (*n*).

By 15 Geo. 2, c. 30, all persons found lunatics under a commission of lunacy, or committed to the care of trustees, are declared incapable of marrying before they have been declared of sound mind by the Chancellor, or by the majority of the trustees.

Beyond the seas.

Marriages beyond the seas are excepted out of the prohibition in the Marriage Act. To be valid, however, they must be celebrated either as marriages were in England before that Act (*o*), or according to the law of the country where the marriage takes place (*p*). And therefore it seems, that if the ceremony be not performed according to the laws of the country where such marriage is had, it must be solemnized by a person in holy orders (*q*), and not by a mere layman (*r*), and *per verba de presenti* (*s*).

nity or affinity, thereafter celebrated, are to be void.

(*m*) 1 Bl. Com. 438. *Morrison's Case, cor.* Deleg. cited ibid. *Semble*, it is unnecessary to prove a decree of nullity in such a case. See Nolan, 200.

(*n*) By three Judges, *Manby* v. *Scott*, 1 Lev. 4, 5; 1 Sid. 109; Bac. Abr. *Baron and Feme*, H.; 1 Roll. Ab. 357.

(*o*) A marriage between two British subjects, solemnized by a Catholic priest at Madras, and followed by cohabitation, but without the licence of the governor (although it had been the uniform practice to obtain such licence), is valid. *Lautour* v. *Teesdale*, 8 Taunt. 830; and see *R.* v. *Brampton*, 10 East, 286.

(*p*) 1 Hale's P. C. 692, 3; 1 Haw. c. 43, s. 7; Roll. 79, 80; 1 Sid. 71; East's P. C. 465. 469; 3 Inst. 88. A marriage between Protestant British subjects, celebrated at Madras by a Catholic priest, according to the rites of the Romish church, is valid, although no licence be obtained from the governor, according to the local usage there. *Lautour* v. *Teesdale*, 8 Taunt. 830. Such a marriage would have been valid in England before the Marriage Act. Ibid. The canon law is the general law of marriage, unless it be altered by the municipal law of the particular place. Ibid. And therefore a marriage between British subjects, celebrated at Versailles by a Protestant English clergyman there, but which is invalid according to the law of France, is invalid here. *Lacon* v. *Higgins*, 3 Starkie's C. 178. So a marriage by contract in Scotland, valid according to the law of Scotland, is valid here. *Dalrymple* v. *Dalrymple*, 2 Haggard's R. 54. *Harford* v. *Morris*, Ib. 430. So a marriage in Ireland, celebrated in a private house by a person who had been curate of the parish for eighteen years, was held to be valid, without any proof of licence granted. *Smith* v. *Maxwell*, 1 Ry. & M. 80; and see 1 Russ. C. L. 205. By the stat. 4 G. 4, c. 91, marriages celebrated by a minister of the Church of England, in the chapel or house of any British ambassador residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing within such factory, and those solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be deemed to be good and valid. A marriage between English subjects in a foreign country, not celebrated according to the laws of that country, nor according to the law of this country before the marriage, nor according to the stat. 4 G. 4, c. 91, seems to be void. See *Middleton* v. *Javerin*, 2 Hag. Con. 437. *Lacon* v. *Higgins*, 2 Starkie's C. 183. *Scrimshire* v. *Scrimshire*, 2 Hag. Con. 437. In the case of a foreign marriage, some evidence should be given of the law of the country; the Ecclesiastical Courts receive such evidence from professors of the law of the foreign state. *Lindo* v. *Belisario*, 1 Hag. Con. 248. *Middleton* v. *Javerin*, 2 Hag. Con. 441; and see *Dalrymple* v. *Dalrymple*, 2 Hag. Con. 81, and *Harford* v. *Morris*, 2 Hag. Con. 431.

(*q*) See the cases referred to in *R.* v. *Brampton*, 10 East, 287. It appeared that a soldier in the British army in St. Domingo, in 1796, went with the widow of another soldier to a chapel in the town, where they were to be married; the ceremony was performed there by a person

(*r*) *Haydon* v. *Gould*, Salk. 119. *Smith* v. *Maxwell*, *supra*, note (*p*).

(*s*) Lord C. J. Holt said, that a contract, *per verba de presenti*, was a marriage, viz. "I marry you—you and I are man and wife;" and that such a contract amounts to actual marriage, as if it had been in *facie ecclesiæ*. 6 Mod. 155; and see Dyer, 309, a. S. P.

Where the marriage is celebrated between English subjects in a foreign country, occupied by the troops of the King of England, it is to be presumed that the law of England, ecclesiastical and civil, was recognized and observed there (*t*). Proof of marriage in fact. Beyond seas.

In general, if it be insisted that the marriage has been solemnized in conformity with the law of the country where the marriage took place, it is necessary to prove what the law of that country was (*u*).

Where the marriage appeared to have been solemnized by one who publicly assumed the office of a priest, and appeared to be such, and was performed openly in a public chapel, and was followed by a long cohabitation of the parties, it was held, in a settlement case, that a valid marriage was to be presumed (*x*).

Evidence of the law of the country, with respect to marriages, must be derived from a person of competent knowledge on the subject (*y*). The Lord Chief Baron of the Exchequer refused to receive evidence of the law of Scotland, in regard to the validity of a marriage contracted there, from a tobacconist.

2dly. Cohabitation and repute, including the declarations of deceased members of a family, are, it has been seen, evidence not only as to the fact of marriage, but also as to the state and condition of the family, and the relationship of its various members (*z*). It seems to be a general rule, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage (*a*). Cohabitation and repute.

3dly. The effect of judgments in ecclesiastical courts, upon the question of marriage, has been already adverted to (*b*). Sentence of Ecclesiastical Court.

In the case of civil proceedings, a direct sentence of nullity, or sentence in affirmance of a marriage, are, it has been held, conclusive evidence upon a question of legitimacy, arising incidentally upon a claim to a real estate (*c*).

appearing to be a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk, which the woman understood by means of an interpreter, at the time, to be the marriage service of the Church of England. After this they cohabited as man and wife for eleven years, till the death of the husband. Upon a question as to the validity of this marriage in a settlement case, the Court held that the facts warranted a presumption that the marriage had been legally contracted, since it appeared to have been contracted *per verba de presenti*; to have been celebrated by one who publicly assumed the habit of a priest, and appeared to be such, in a public chapel; and had been followed by cohabitation for eleven years.

(*t*) Per Ld. Ellenborough, *R.* v. *Brampton*, 10 East, 288.

(*u*) See tit. FOREIGN LAW, and *supra*, p. 704, note (*p*).

(*x*) *R.* v. *Brampton*, 10 East, 289, and *supra*, p. 704, note (*p*).

(*y*) Ibid. Vide *supra*, tit. FOREIGN LAWS. In *Ganer* v. *Lady Lancsborough*, Peake's C. 17, a Jewess was allowed by Lord Kenyon to prove that she had been divorced in a foreign country, according to the custom and ceremonies of the Jews there.

(*z*) *Supra*, Vol. I. Ind. tit. REPUTATION, &c. Vol. II. tit. BASTARDY; and *infra*, tit. PEDIGREE, where this subject, and also that of the competency of witnesses in such cases, is further considered.

(*a*) Ibid.; and *Leader* v. *Barry*, 1 Esp. C. 353. *Read* v. *Passer*, Peake's C. 231. *May* v. *May*, B. N. P. 112. *Hervey* v. *Hervey*, 2 W. Bl. 877; 2 Roll. Ab. 551. *Kay* v. *Duchess de Pienne*, 3 Camp. 123. Vide *Standen* v. *Standen*, cited 4 T. R. 460, and *infra*, tit. PRESUMPTION. Where a marriage in Ireland was inferred from circumstances of avowal and reputation, the Ecclesiastical Court held that it was not invalidated by evidence of belief on the part of the husband that it was invalid, having been celebrated by a Popish priest. *Stedman* v. *Powell*, 1 Add. 58. In *Doe* d. *Fleming* v. *Fleming*, 4 Bing. 266, it was held that reputation was good evidence of a marriage, although the plaintiff adducing it claimed as heir at law, and his parents are still living.

(*b*) *Supra*, Vol. I. Ind. tit. JUDGMENT.

(*c*) 11 St. Tr. 261. *Supra*, Vol. I. tit. JUDGMENT.

Sentence of Ecclesiastical Court.

A sentence in a jactitation suit, it has been held, is evidence as to a marriage, upon a question of title in ejectment, and in personal actions, founded upon a supposed marriage between the *same parties* or their privies (*d*).

So a direct sentence in a suit upon a promise of marriage against the contract, is evidence to disprove the contract in an action brought upon the same contract for damages (*e*). But in these cases it is to be observed, that the suits in which the evidence is so receivable must be between the same parties or their privies (*f*).

Bigamy.

It seems that a sentence concerning marriage in a spiritual court is not evidence in a criminal proceeding, unless it be a direct proceeding in *rem*, and final and conclusive in its nature; and that even there it is liable to be impeached for fraud (*g*).

It has been solemnly determined, in the case of the Duchess of Kingston, that a sentence in a jactitation suit is not conclusive evidence upon a prosecution for bigamy (*h*), and that at all events it is liable to be impeached on the part of the Crown by evidence of collusion (*i*).

In the case of *Martin Lolly* (*k*), the prisoner being indicted for bigamy, his defence was, that previous to his second marriage he had been divorced from his first wife, whom he had married in England, by virtue of a sentence of the Consistorial Court in Scotland, in a suit instituted by the first wife, on the ground of adultery committed by the prisoner in Scotland; it appeared that although the proceedings had been instituted *bonâ fide* by the wife, the whole had resulted from the artful practices and contrivance of the husband: the prisoner was convicted, and sentenced to transportation. The case was afterwards argued before the Judges, who are stated to have been unanimously of opinion that a marriage solemnized in England could not be dissolved but by an act of the Legislature (*l*).

Action for breach of promise of marriage.

In an action for breach of promise of marriage, evidence of the promise is either, 1st, *express*, or 2d, is from the nature of the case frequently *presumptive* (*m*). It has been seen that the promise need not be in writing (*n*); where it is in writing it need not be stamped (*o*).

(*d*) 11 St. Tr. 261. *Supra*, Vol. I.

(*e*) Per De Grey, C. J., 11 St. Tr. 231. *Da Costa* v. *Villa Real*, Stra. 691; *supra*, Vol. I. tit. JUDGMENT.

(*f*) *Supra*, Vol. I. tit. JUDGMENT; 11 St. Tr. 261. It is there said by Chief Justice De Grey, that in such cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and had acquiesced. *Qu.* whether such a sentence would be evidence for a stranger against a party, there being no mutuality. Vide *supra*, Vol. I. tit. JUDGMENT.

(*g*) Vide *Supra*, tit. FRAUD.

(*h*) 11 St. Tr. 262. *Supra*, tit. FRAUD. It seems upon principle that such a sentence is not evidence at all. Vide Vol. I, tit. JUDGMENT.

(*i*) Ibid.

(*k*) Cor. Wood, B. Lancaster Sum. Ass. 1812.

(*l*) Russel, 287. See *Tovey* v. *Lindsay*, 1 Dow, 117; where this case is referred to by the Lord Chancellor.

(*m*) If there be an express promise by the man, and it appear that the woman countenanced it by her actions at the time, and behaved as if she agreed to the matter, although there be no actual promise, yet it shall be sufficient evidence of a promise on her part; per Holt, C. J. in *Hatton* v. *Mansel*, 3 Ann. A promise on the woman's

(*n*) *Supra*, 479. The contrary has been held. *Phillip* v. *Walcot*, 3 Lev. 65; Skin. 24; Com. Dig. *Action on the Case*, F. 3. The position in the text seems however to be now established in practice. B. N. P. 210. *Orford* v. *Cole*, 2 Starkie's, C. 351; and see *Cock* v. *Baker*, 1 Str. 34. *Harrison* v. *Cage*, 1 Ld. Ray. 386.

(*o*) *Orford* v. *Cole*, 2 Starkie's, C. 351. *Infra*, tit. STAMP.

Action for breach of promise of marriage.

A promise to marry generally is in point of law a promise to marry within a reasonable time (*p*). Where the defendant, having called upon the plaintiff, to whom he paid his addresses, at her father's house, said to the father upon going away, "I have pledged my honour to marry her in six months, or in a month after Christmas;" and this varied from the counts, which alleged a promise to marry within a specified time; it was left to the jury to presume from the circumstances a general promise to marry (*q*).

Proof of refusal.

The refusal to marry should also be proved, either by proof of an actual refusal (*r*), or of conduct and declarations equivalent to an absolute refusal: and where it is alleged that the plaintiff has married another woman, the fact must be proved (*s*).

Proof in defence.

A defence (*t*) to an action of this kind frequently results from the very peculiar nature of the contract. It would be going much too far to say, that a party who is morally excused in breaking off an engagement to marry, is also in all cases legally absolved.

Nevertheless, the practising of fraud and deception in matters likely to influence the conduct of the other contracting party, would in this case, as well as in any other matter of contract, render the agreement void. It seems, also, that where it is discovered that one party has been guilty of fraudulent or dishonest conduct in collateral transactions, the other party is not bound to fulfil a promise made previously to the discovery (*u*). But it would be incumbent on the defendant in such a case to substantiate the grounds of refusal by evidence. It would be insufficient to prove merely that a suspicion of the kind existed; and that upon being called upon to repel the charge, the plaintiff omitted to do so. But although the omission on the part of the plaintiff to exculpate himself would be no bar to the action, it may nevertheless, under the circumstances, materially affect the damages (*x*). It seems that in general where one party has improvidently made a promise to marry another, the gross misconduct and general bad character of the plaintiff is a good defence to the action (*y*).

If, however, a man promise to marry a loose and immodest woman, knowing her to be such, he is bound by his promise (*z*).

part may be inferred from such circumstances of apparent acquiescence as usually attend such an engagement; from her being present and not objecting when the consent of a parent was asked; the making preparation as for the wedding; the receiving her suitor's visits, and demeanour towards him. Ib. and *Daniel* v. *Bowles*, 2 C. & P. 554. The promise on the part of the man is more frequently capable of proof by means of explicit declarations, but it is also frequently matter of presumption from his conduct.

(*p*) *Potter* v. *Deboos*, 1 Starkie's C. 82. *Phillips* v. *Crutchley*, 3 C. & P. 178; 1 M. & P. 239.

(*q*) *Potter* v. *Deboos*, 1 Starkie's C. 82; cor. Lord Ellenborough.

(*r*) As where, in answer to a question by the father of an infant child, whether the defendant meant to marry her, he replied, "Certainly not." *Gough* v. *Farr*, 2 C. & P. 631.

(*s*) As to the proof, vide *supra*, 699.

(*t*) See the new rules of Hil. T. 4 W. 4.

(*u*) See *Baddely* v. *Mortlock & Ux.* Holt's C. 151. And in general, as to the principles on which a justification of this nature rests, see Pothier's Traité du Contrat de Marriage, part 2, c. 1, art. 7. *Qu.* whether a discovery of the woman's want of chastity be not a legal bar to an action by her. *Semble*, it is; per Abbott, C. J. in *Foote* v. *Hayne*, West. Sitt. after Mich. T. 1824.

(*x*) Ibid.

(*y*) *Foulkes* v. *Sellway*, 3 Esp. C. 236. In that case the defendant had a verdict; but note, that he proved not only that the plaintiff was a woman of general bad character, but also one instance of gross misconduct. In the same case Lord Kenyon held, that a witness might give evidence as to the character which he had heard of the woman upon inquiry in the neighbourhood, although it was objected that those who knew her character in the neighbourhood ought to be called and give evidence, since otherwise the party would be precluded from cross-examining as to the means of knowledge. *Tam. qu.*

(*z*) Per Lord Tenterden, in *Irving* v. *Greenwood*, 1 C. & P. 350.

Proof in defence.

So if a man, after a promise of marriage has been made by the woman, conduct himself in a brutal or violent manner, and threaten to use her ill, she is not bound to commit her happiness to his keeping, and this would be a legal defence to the action (*a*). And even in cases where the misconduct of the plaintiff does not afford a legal bar to the action, yet if he has betrayed gross habits or want of feeling, such circumstances ought it seems to be considered by a jury in their estimate of damages (*b*).

So it is a good defence to show that the defendant was induced to enter into the engagement by any fraudulent misrepresentation or suppression of the circumstances of the family, or conduct of the plaintiff (*c*). In proof of such misrepresentations, letters written by the father of a female plaintiff to the defendant, with her knowledge, and containing representations concerning her, are admissible to show deceit on her part (*d*).

Where the plaintiff's counsel was apprized by the course of cross-examination of the plaintiff's intention to impute deceit to the plaintiff, it was held that the plaintiff's counsel ought, upon such notice, to offer evidence for the purpose of rebutting the charge, before he closes his case.

Any circumstances which enable the jury to appreciate the loss sustained by the plaintiff are admissible in evidence, in order to mitigate the damages. It is competent to the defendant for this purpose to show that his parents disapproved of the match (*e*).

MERGER OF CIVIL ACTION.

See ASSUMPSIT.

OF a civil action in a felony, see tit. RECORD (*f*).

MISNOMER.

A MISNOMER of the plaintiff's or defendant's name was formerly pleadable in abatement, but could not be taken advantage of under a plea in bar (*g*). But it was otherwise, if the misnomer constituted a misdescription of a contract (*h*).

(*a*) Per Lord Ellenborough, in *Leeds* v. *Cook & Ux.* 4 Esp. C. 256.

(*b*) Ibid.

(*c*) *Wharton* v. *Lewis*, 1 C. & P. 531. And see *Foote* v. *Hayne*, 1 C. & P. 547.

(*d*) *Foote* v. *Hayne*, 1 C. & P. 547. But she will not be responsible for particular expressions. Ib. And a representation made by the father orally to a third person, though communicated to the defendant, is not admissible against her. Ib.

(*e*) *Irving* v. *Greenwood*, 4 C. & P. 350. And where the father was incompetent, having employed the attorney, a relation was admitted to prove such disapprobation. Ib.

(*f*) See also *Crosby* v. *Levy*, 12 East, 412. *M.* has an annuity for the life of *W.*; *J.* kills *W.* in order to determine the annuity; no action lies; Freem. 382. *Qu.* whether maintainable after *J.* had been acquitted of the murder.

(*g*) *Jowett* v. *Charnock*, 6 M. & S. 45. *Mayor of Stafford* v. *Bolton*, 1 B. & P. 40. *Boughton* v. *Frere*, 3 Camp. 20. The Court will not set aside process on the ground of a misnomer of the plaintiff. *Morley* v. *Law*, 2 B. & B. 34. *Secus*, in the case of a defendant. Ib. *Wilks* v. *Lorck*, 2 Taunt. 399; and see *Clerk of Trustees of Taunton Market* v. *Kinleedey*, 2 Blk. 1120. *Gardner* v. *Walker*, 3 Ans. 935. A plaintiff may sue by his name of baptism or confirmation, or both. Per Holt, C. J. in *Walden* v. *Holman*, 6 Mod. 115. See 2 Ld. Ray. 1015. The transposing two christian names, *e. g.* James Richard, for Richard James, is a misnomer. *Jones* v. *Macquillin*, 5 T. R. 195. It is a good plea in abatement for the defendant to say, that he was known and called by such a name, though he was never baptized. Per Holt, C. J. 6 Mod. 166.

(*h*) *Gordon* v. *Austin*, 4 T. R. 614. Note, that the party whose name was misdescribed as a maker of the note had been outlawed. See the observations of Buller, J. Ib. Where the name is *idem sonans*, it is no ground for a plea in abatement; but

The plea of misnomer in abatement is now abolished, by the st. 3 & 4 W. 4, c. 42, s. 11. *See* tit. ABATEMENT (*i*).

MORTGAGE.

As to proof in an action of ejectment by a mortgagor, *see* tit. EJECTMENT.

In the case of lands let for years and then mortgaged, the mortgagee is entitled to rent accruing after the mortgage, and after notice to the tenant, before any possession taken (*j*).

A mortgagor is not properly tenant-at-will to a mortgagee, for he does not pay rent; he receives the rent by tacit agreement with the mortgagee, who may put an end to it when he pleases. The mortgagor cannot be considered tenant-at-will where there is an under-tenant, for there can be no under-tenant to a tenant-at-will; in such case the mortgagor is only a receiver of the rent for the mortgagee, who may at any time countermand the implied authority by notice (*k*).

MONEY (*l*).

See ASSUMPSIT.—PAYMENT.

MURDER.

THE offence consists in the killing any person under the King's peace, with malice aforethought, either express or implied (*m*).

This definition includes, 1st, The killing of another; 2dly, Of malice: and the evidence is either direct or indirect.

1. The proof of killing another involves the proof of the death of the person, and that it was occasioned by some act done by another.

First, Of the death of the person specified in the indictment. It has been laid down by Lord Hale, as a rule of prudence in cases of murder, that to

Proof of the death.

Shakpear and Shakspeare are materially different. 10 East, 83. Some names may be used the one for the other indifferently. 2 Rol. Ab. 135; 1 Leon. 147; as Jean for John, Jane for Joan. A peer must sue by his christian name as well as name of dignity. See Com. Dig. Abatement, F. 19; E. 18, 19, 20. *R.* v. *Cooke*, 2 B. & C. 871. If judgment be obtained againt a person in a wrong name, and the plaintiff sue him again for the same cause of action in the right name, he may plead the judgment recovered, and prove that he is the same person. 2 Str. 1218. In some instances a defendant may, on being arrested in a wrong name, procure his discharge in a bailable action, on putting in common bail. 1 Ch. R. 282. But if he put in bail in the wrong name without notice, or execute a deed in the wrong name, he will be estopped from disputing it. 3 Taunt. 504; Dyer, 279; 1 Ray. 249.

(*i*) *Irving* v. *Greenwood*, 1 C. & P. 350.

(*j*) *Moss* v. *Gallimore*, Doug. 266. See *Chinnery* v. *Blackburn*, 1 H. B. 118.

(*k*) Ibid. A mortgagor is not properly tenant-at-will to the mortgagee, for he is not to pay rent; he is only so *quodam modo*. There is nothing more apt to confound than a simile. Per Lord Mansfield, in *Moss* v. *Gallimore*, Doug. 269.

(*l*) In what cases money may be followed and recovered, see *Scott* v. *Sumner*, Willes, 400. *Whitcombe* v. *Jacob*, 1 Salk. 161. If a factor sell the goods of his principal before the bankruptcy, the money cannot be followed unless he purchase a specific thing with the same money. Ib. See *Taylor* v. *Plumer*, 3 M. & S. 563; and *supra*, 176.

(*m*) Fost. 256; 4 Bl. Comm. 198; 3 Inst. 47; 1 Hale, 424. See the fourth report of the Criminal Law Commissioners. The killing is of malice aforethought whensoever it is voluntary, and is not justified, excused, or extenuated by circumstances. Ib. And it is *voluntary* whensoever death results from any act or unlawful omission done or omitted, with intent to kill or do great bodily harm to any other person; or whensoever any one wilfully endangers the life of another, by any act or omission likely to kill, and which does kill any other person. Ib.

Proof of the death.

warrant a conviction, proof should be given of the death, by evidence of the fact or the actual finding of the body (*n*). But, although it be certain that no conviction ought to take place unless there be most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential. And it is evident that to lay down a strict rule to that extent might be productive of the most horrible consequences.

In *Hindmarsh's Case* (*o*), the prisoner, a mariner, was indicted for the murder of his captain at sea; a witness saw the prisoner throw the captain overboard, and he was not seen or heard of afterwards; and it was left to the jury, under the circumstances, to say whether the deceased had not been killed by the prisoner before he was thrown into the sea; and the jury being of that opinion, the prisoner was convicted and executed (*p*).

A variance in the proof in the name of the deceased, as alleged in the indictment, will be fatal (*q*).

Proof of the cause of the death.

Next, the act (*r*) of the prisoner which occasioned the death, is to be proved. The proof must agree in substance with the allegations on the record. But if the act of the prisoner, and the means of death proved, agree in substance with those which are alleged, the nature of the violence, and the kind of death occasioned by it being the same, a mere variance as

(*n*) 2 Hale, 290; where Lord Hale said, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases; one mentioned in my Lord Coke's P. C. 104, p. 232, a Warwickshire case (vide *supra*, Vol. I. tit. CIRCUMSTANTIAL EVIDENCE): another, that happened within my remembrance in Staffordshire, where *A.* was long missing, and upon strong presumptions *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted of murder, and convicted and executed; and within one year after *A.* returned, being indeed sent beyond sea by *B.* against his will; and so, though *B.* justly deserved death, he was really not guilty of that offence for which he suffered." The published account of the case of Ambrose Gwynnett, is a very remarkable one; after being convicted of murder, he was suspended for a considerable time in the usual course of execution, and afterwards gibbeted; and yet, in consequence of a series of singular circumstances, he survived his supposed execution, and having escaped to a foreign country, actually met and conversed with the person for the supposed murder of whom he had been condemned to die.

(*o*) 2 Leach, 571.

(*p*) The conviction was unanimously approved of by the Judges. The objection, that the body had not been found, was urged by Mr. Garrow at the trial. See a case cited Russel, 683; where Gould, J. directed the acquittal of two prisoners who had been seen to strip an infant, the bastard child of one of them, and throw it into a dock at Liverpool, on account of the possibility that the tide might have carried out the living infant from the dock.

(*q*) See Starkie's Criminal Pleadings, 184, 2d edit.; and *infra*, tit. VARIANCE. An indictment for the murder of a child is bad, which neither states the name, nor alleges that the child had none. *R.* v. *Biss*, 2 Moody's C. C. 93.

(*r*) It is necessary that the death should have been occasioned by some bodily injury done to the party by force, or by poison, or by some other *mechanical means* which occasion death; for although a person may in *foro conscientiæ* be as guilty of murder by working on the passions or fears of another, and as certainly occasion death by such means as if he had used a sword or pistol for the purpose, he is not the object of temporal punishment. 1 Hale, 427. 429; East's P. C. 225. But it is not essential that the hand of the party should immediately occasion the death; it is sufficient if he be proved to have used any mechanical means likely to occasion death, and which do ultimately occasion it; as, if a man lay poison for another, with intent that he should take it by mistake for medicine, or expose another, against his will, in a severe season, by means of which he dies. 1 Haw. c. 31, s. 5; 1 Hale, 431, 2. So where a harlot left her newly-born child in an orchard, covered only with leaves, where it was killed by a kite. 1 Hale, 431; East's P. C. 226. So where a pauper is wilfully removed from parish to parish till he die for want of care and sustenance. Palm. 545. Or an apprentice dies from negligence and harsh usage. *Self's Case*, East's P. C. 226, 7.

to the name or kind of instrument used will not be material (*s*). Neither will the variance be material, though it should appear that the party charged as a principal in the second degree was a principal in the first degree; or although it should turn out that a party, indicted as a principal in the first degree, was but a principal in the second degree (*t*). Proof of the cause of the death.

Unless the death be so immediately and obviously occasioned by the violence inflicted by the prisoner, as to exclude all doubt upon the subject, the connexion between the act of the prisoner and the death of the deceased must be proved by means of the judgment of persons of professional skill and experience, who have had an opportunity of forming an opinion upon the subject, or who are enabled to form an opinion from the circumstances of the case, as detailed by others (*u*). Connexion between the act and the death.

Where there is any doubt whether the death was occasioned by the act of the prisoner, or by some other cause, it is of course a question of fact for the jury (*v*).

Where the husband and wife were charged with the murder of an apprentice to the husband, by using him in a barbarous manner, and not providing sufficient nourishment, and the opinion of the surgeon who opened the body, was, that the boy died from debility, occasioned by the want of proper nourishment, and not from the wounds, &c., it was held that the wife was entitled to be acquitted, as it was the duty of the husband and not of the wife to provide sufficient food and nourishment for the apprentice (*x*).

It is sufficient in law to prove that the death of the party was *accelerated* by the malicious act of the prisoner (*y*), although the former laboured under a mortal disease at the time of the act. And it is sufficient to constitute murder that the party dies *of the wound* given by the prisoner, although the wound was not *originally mortal*, but become so in consequence of negligence or unskilful treatment (*z*); but it is otherwise where the death arises, *not from the wound*, but from unskilful applications or operations used for the purpose of curing it (*a*).

II. Malice is either positive and *express*, or it is *implied* malice, or malice in construction of law. Malice of the former kind consists in an actual and deliberate intention unlawfully to take away the life of another, or do him great bodily harm (*b*); and the actual existence of such an intention is a Proof of malice.

(*s*) See the cases, Crim. Pl. 91, 2d edit. It seems that proof of any one of the means of death stated is sufficient. Ib.; and *R.* v. *Clark*, 1 B. & B. 473; Bulst. 87. *Weston's Case*, 3 Inst. 49. *Watkin's Case*, 4 Rep. 41. But where the indictment stated the death to have been by striking with a piece of brick, &c., the fact being that the prisoner struck him with his fist down upon a brick floor, and that the fall upon the brick was the cause of death; it was held, that the means were not truly stated. *Kelly's Case*, 1 Ry. & M. 113. S. P. *Thompson's Case*, Ib. 139.

(*t*) See Crim. Pleadings; and *supra*, tit. ACCESSORY.

(*u*) Vide Vol. I. tit. WITNESS, OPINION, and *Squire's Case*, Stafford Lent Assiz. 1799, *cor.* Lawrence, J., Russel, 621.

(*v*) *Self's Case*, East's P. C. 226, 7; where an apprentice having returned from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered state, and was afterwards ill-treated by his master, and medical evidence was given that if he had been properly treated after his return home he might have recovered, it was left to the jury to say whether the death had been occasioned by ill-treatment which the apprentice received from his master after returning from Bridewell.

(*x*) *R.* v. *Squire & Ux.*, Russel, 621. *R.* v. *Webb*, York Assizes.

(*y*) 1 Hale, 428.

(*z*) Ibid.

(*a*) Ibid.

(*b*) 1 Hale's P. C. 451, and 4th report of the Crim. L. Commiss., p. xxxiii, art. 14. Malice being essential to the offence, it follows that no person can incur the penalties of homicide who is of so imbecile or unsound a mind as to be incapable of malice, according to the rule of civil law, *ut nec infans nec furiosus nec qui casu for-*

Proof of malice.

question of fact to be found and ascertained by the jury. Implied or constructive malice is not a fact for the jury, but is an inference or conclusion founded upon the particular facts and circumstances ascertained by them; in which case the real intention and object of the prisoner is frequently a very material ingredient, although he did not deliberately meditate and intend actual destruction.

It is a general rule, that the law infers malice from the very fact of killing (*c*); and that all the circumstances of necessity, accident, or infirmity, which justify, excuse, or extenuate the act, are to be proved by the prisoner, unless they arise out of the evidence produced against him. It is for the jury to pronounce upon the truth of such facts; and it is for the Court to decide whether in point of law the fact of killing is justified, excused, or extenuated by those facts (*d*).

Actual intention to destroy.

Upon an indictment for murder, whenever the question turns upon the *actual* and *specific* intention of the prisoner at the time of the act which occasioned the death, the existence of that intention or disposition is a question of fact for the decision of the jury under all the circumstances of the case. And it seems that in general, notwithstanding any facts which tend to excuse or alleviate the act of the prisoner, if it be proved that he was in fact actuated by prepense and deliberate malice, and that the particular occasion and circumstances upon which he relies were sought for and taken advantage of, merely with a view to gratify actual malice, in pursuance of a preconceived scheme of destruction, the offence will amount to murder (*e*).

Where, however, *fresh provocation* intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice.

If *A.* and *B.* quarrel, and they are reconciled, and afterwards fall out again, and *A.* kill *B.*, it will not be presumed that they fought upon the old grudge (*f*). But if proof be given that the reconciliation was but counterfeit, and that the prisoner was actuated by the previously conceived malice, it will be murder (*g*).

The materials from which the jury are to draw their conclusion as to such an intention, are obviously the previous situation of the parties, the connection and transactions between them, the conduct and expressions of the prisoner towards the deceased, the motives by which he was probably influenced, and, above all, the facts and circumstances immediately connected with the transaction, particularly the means of destruction used, the mode in which they were procured, and the subsequent conduct and demeanour of the prisoner.

tuito occidit hac lege teneatur. L. 12, L. 3, § 4. Heinec. E. J. C. p. 7, sec. 201. Vide *supra*, tit. INFANT, 728; *infra*, tit. WILL.

(*c*) Fost. 255. That is, where, so far as appears, the act was wilful, and is not extenuated by circumstances. The general rule in the text has, in one instance at least, been misapprehended. A watchman employed to guard some premises and property in the night-time, being suddenly alarmed by the approach of one whom he suspected of having come for the purpose of robbing the premises, instantly fired at and killed him; and the jury, being told that they ought to infer malice from the act of killing, found the prisoner guilty, but the prisoner was not executed.

(*d*) Ibid.; Ld. Raym. 1493; Str. 733. Where the motive to commit murder was to prevent the party discovering the previous murder of another, it was held that the circumstances of that case were admissible in evidence upon the trial of parties charged with the second murder. *R.* v. *Clewes and others*, 4 C. & P. 221.

(*e*) East's P. C. 224; 1 Hale, 451.

(*f*) 1 Hale, 451; *infra*, 721. *Mason's Case*, note (*f*).

(*g*) Ibid.; and see *Mawre's Case*, Fost. 132; East's P. C. 239.

Intention to injure, &c.

Where malice is an inference of law from the facts, that is, as it seems, in all cases where the act does not result from actual and preconceived malice, the question still frequently depends upon the actual *intention* of the prisoner, which is to be found as a fact by the jury. They are to find the nature, extent and origin of the intention; as, whether the prisoner really intended not to destroy the deceased, but to do him some bodily injury, and to what extent, and whether this intention was preconceived, or arose upon the occasion of some sudden provocation given (*h*).

Negligence.

Where there was no intention either to kill or injure, it seems also to be a question of fact for the jury, whether the prisoner conducted himself carelessly and negligently, and whether he might not, by using proper precaution, have prevented the death. According to the opinion of Sir Michael Foster, the law does not require the *utmost* caution to be used; it is sufficient that a *reasonable* precaution, what is usual and ordinary in like cases, be taken (*i*), and this appears to be a question of fact for the jury (*k*).

Constructive malice.

By *constructive* malice, or malice in law, it is meant that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit (*l*), and carry with them the plain indications of a heart regardless of social duty, and fatally bent upon mischief (*m*). Here the law itself infers malice from the circumstances found by the jury, without their special finding of an actual intention to destroy or do great bodily harm to the deceased.

It would be manifestly inconsistent with the design of this work to enter into a discussion of those circumstances and particulars which constitute constructive malice, or malice in law. In point of practice, it is usual and proper to be prepared with evidence of all the circumstances connected with the transaction which tend to explain its real nature. In particular, it is essential to show what the real intention and object of the prisoner was, although it fell short of a deliberate design to take away the life of the deceased; that his intention was to commit some other felony, or a trespass, or some other unlawful act, or that the death resulted from carelessness and culpable want of caution; the nature and circumstances of the quarrel and provocation, where such have existed; the nature of the weapon used, and the mode of procuring it.

Malice in case of killing by accident.

Where the defence is that the death was occasioned by *accident*, the nature

(*h*) If *A.* intendeth to beat *B.* in anger, or from preconceived malice, and death ensueth, it will doubtless be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for the consequences of doing it. Fost. 259.

(*i*) Fost. 264, 5.

(*k*) Ibid.; and the case there cited; where it was left by Mr. J. Foster as a question for the jury, to say whether the prisoner, on a charge of manslaughter, had not reasonable grounds for believing that a gun which went off accidentally in his hands, was not loaded.

(*l*) Fost. 256.

(*m*) Ibid. 257. This is the general inference of that most able and learned Judge, upon a consideration of the authorities and decisions on this subject. It is plain, however, that the terms of such a description are of too indefinite a nature to supply any certain rule or test for mere legal decision; and it may probably appear on inquiry that these cases turn upon the question, whether the defendant did not wilfully place the life of another in danger and jeopardy by an act or unlawful omission likely to kill, and which did kill another person. This is a question of fact rather than of law. If he did so, then the case properly falls within the description of one regardless of social duty, and fatally bent upon mischief. If, on the other hand, he were guilty of no such act or unlawful omission as was likely to produce such a consequence, it would be difficult to suppose any case which would fall under this branch of the law against murder. See the observations made on this subject in the 4th report of the Crim. Law Commissioners.

Construction. Malice in case of killing by accident.

of the act itself which occasioned the death, and the real motive and intention of the prisoner, are the proper subjects of evidence; but the conclusion as to the quality of the offence, as founded upon such facts, is usually a question of law. If the act was done in the prosecution of a felonious intention, it will amount to murder (*n*). But it is not murder, but manslaughter, if the prisoner intended to commit a mere trespass when he accidentally killed the deceased (*o*).

So malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief or great bodily harm to those on whom it may chance to light, and death is occasioned by it (*p*). And although such an original intention should not appear, but such unlawful act be done heedlessly and incautiously, the offence will amount to manslaughter (*q*).

If *A.* intend to beat *B.* in anger, or from preconceived malice, and death ensues, he is guilty of murder, or of manslaughter at the least, although he did not *intend* the death (*r*); for what he did was *malum in se*, and he is answerable for the circumstances; but the nature of the offence in such cases must depend upon the particular circumstances.

If there was an *actual intention* to kill or do great bodily harm, the offence would undoubtedly be murder, without regard to the *means* used; but if there was a mere intention, as evidenced by the act itself, to do some bodily injury, the complexion of the defence will depend upon the nature of the instrument, and the manner and circumstances of using it, and the offence will be murder or manslaughter accordingly as these facts do or do not indicate that brutal or malignant intention which constitutes malice in law (*s*).

The inference of malice frequently arises from the means used by the prisoner; as where he has used such an instrument as was likely to produce fatal consequences, and where if he had used one of a different nature, and *not likely to occasion death*, the offence, on account of the provocation previously given, or other circumstances, would have amounted to manslaughter only. Thus if a master or parent, in the correction of a child, exceed the bounds of moderation, either in the *measure* of it or in the *instrument* made use of, it will be murder or manslaughter, according to the circumstances of the case (*t*).

(*n*) Fost. 258. If *A.* shoot at the poultry of *B.*, and accidentally kill a man, if he intended to steal them, it is murder; but if he intended merely to kill them, it is but manslaughter; and it is not even manslaughter if the wrongful act be merely *malum prohibitum*; as, where an unqualified person uses a gun to kill game. Fost. 259. See the next note.

(*o*) Foster, 258. Ld. Coke seems to have doubted whether, even in the latter case, the offence would not amount to murder; but Mr. J. Foster was of opinion that it would amount to no more than manslaughter; and even in the former case the rule of law is exceedingly ambiguous and unsatisfactory, as every rule must be which is not founded upon the degree of moral guilt, or upon grounds of public convenience or necessity. Upon what ground can it be reasonably contended that a man ought to suffer death because he has from pure accident killed another, whilst he was committing an act for which he probably would not have been imprisoned for six months? The immorality of his act is not increased by a circumstance wholly unforeseen and unexpected; and the mere possibility that death may be occasioned in the course of committing a larciny, and that the punishment, when such an accident does happen, may be capital, is not likely to operate in the least degree to diminish the number of offenders.

(*p*) Fost. 261.

(*q*) Ibid.

(*r*) Ibid. 259; 1 Hale, 440, 1; Kel. 127.

(*s*) See East's P. C. 257; Kel. 127. If one throw a large stone at another with a deliberate *intention to hurt*, but not to kill, it will be murder. 1 Hale, 440, 1.

(*t*) Fost. 262; Hale, 474.

Negligence in a lawful occupation.

And even in the case of homicide by a person following his lawful occupation, any degree of carelessness and negligence, through which the death was occasioned, will constitute him guilty of manslaughter, and he must show in defence that he used all due caution (*u*). If the driver of a cart had notice of the mischief likely to ensue, and yet drove on, he is guilty of murder; if he might have seen the danger but did not look before him, he is guilty of manslaughter, for there was a want of due circumspection; if the accident happened in such a way that *no want of due care* can be imputed to the driver, it will be but accidental death (*x*). And in general it is not sufficient that the act from which death resulted was lawful or innocent; it must be done in a proper manner, and with due caution (*y*) to prevent mischief (*z*).

If a person not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, or he may have a good one, but he has no right to hazard the consequences in a case where medical attendance may be obtained (*a*).

(*u*) Fost. 262; see the 4th Report of the Crim. Law Commissioners. The crime of manslaughter includes all cases of voluntary and merely extenuated homicide, and also all involuntary homicide, which is not by misadventure; and homicide is by misadventure when a person doing an act without intention of bodily harm to any other person, and using proper caution to prevent danger, happens to kill another, provided the act done be either a lawful act, or be not attended with risk of hurt to the person of another. 1 East's P. C. 260. The crime of manslaughter includes all cases, 1st. Where death results from any act or unlawful omission done or omitted with intent to hurt the person of any other. 2d. Where death results from any wrong wilfully occasioned to the person of any other. 3d. Where death results from any unlawful act or unlawful omission, attended with risk of hurt to the person of any other. 4th. Where death results from the want of due caution in doing an act, or neglecting to prevent mischief, which the offender is bound in law to prevent.

(*x*) Kel. 40.

(*y*) The law does not require the utmost caution that can be used, but only such a reasonable degree of caution as is appropriate to the nature of the act and the probability of danger in the particular case. See 4th Report of the Crim. Law Commiss. p. 42; and 1 East's P. C. 265; Fost. 264.

(*z*) Fost. 262. *R.* v. *Higgins*, Dyer, 128; 9 St. Tr. 112. *R.* v. *Rampton*, O. B. 1664. See the case, Kel. 41, and Fost. 263. A man found a pistol in the street, which he had reason to believe was not loaded, he having tried it with the rammer; he carried it home and showed it to his wife, and she standing before him, he pulled up the cock and touched the trigger; the pistol went off, and killed the woman. This was ruled to be manslaughter. Mr. J. Foster, with great reason, as it seems, expressed his disapprobation of this case; and adds, that admitting the judgment to be strictly legal, it was, to say no better of it, *summum jus*.

(*a*) *R.* v. *Simpson*, cor. Bayley, J. at Lancaster, 4 C. & P. 398, in the note. A mariner on board a vessel, whose wife had used opium, recommended a labourer on board the vessel, who complained of pains in his head, to take opium, and he sent for one pennyworth and gave it to the labourer, who took the whole; and it was left by Alderson to the jury, to say, whether he was not guilty of gross negligence. York Spr. Ass. 1834.

A publican administered large quantities of Morison's pills to a young man labouring under small-pox. He attended him for ten days, administering the pills (composed of gamboge, aloes, colocynth, and cream of tartar) in large quantities, which, according to the testimony of medical men, were highly diuretic and violent purgatives, and improper in reference to the disorder. Lord Lyndhurst, C. B. left it to the jury to say whether the prisoner had not, by the administration of severe medicines in a dangerous complaint, of the nature of which he was ignorant, occasioned the death of the deceased. If the opinion of the jury was, that the death was accelerated by the medicines, and that the prisoner had administered them in gross ignorance, the jury ought to find him guilty. He was convicted, and suffered six months' imprisonment.

If a person *bonâ fide* and honestly exercising his best skill to cure a patient, perform an operation, which causes the patient's death, he is not guilty of manslaughter, and it is immaterial whether the party be a regular or irregular practi-

Proof where the inference of malice results from legal situation of parties.

Although it is, as has been seen, a general rule, that circumstances in justification, excuse or alleviation, are to be proved by the prisoner, yet where the inference or implication of law as to malice results from the legal authority and situation of the deceased, that authority must be proved, or in default of proof the offence will in general amount to no more than manslaughter.

In general, ministers of justice are specially protected by the law whilst they act in the execution of their duty, and the killing of officers so employed is deemed to be murder, because it is an outrage wilfully committed in defiance of the justice of the kingdom (*b*); such an officer is protected *eundo morando et redeundo* (*c*); and so is every man who acts in his aid, whether he be commanded to assist or not (*d*). In general, if one having *lawful authority* to arrest in either a civil or criminal proceeding, and using *lawful means*, be resisted and killed, it will be murder in all who made or aided in the resistance (*e*).

Those who have *lawful authority* are either, 1st, public officers; or 2dly, private persons.

A public officer acts either, 1st, under a warrant; or 2dly, without one.

Warrant.

By legal process, whether by writ or warrant, is meant a process which is not defective in the framing of it; for if the writ or warrant be legal, although the previous proceedings were irregular, it will be murder to kill the officer, for he was bound to obey it; and therefore it is sufficient in evidence to prove the writ or warrant, without showing the decree or judgment upon which it is founded (*f*). But it is not sufficient to prove the sheriff's warrant to the officer, without producing the writ of *capias*, &c. on which it is founded (*g*).

But if the process be defective in the frame of it, or if there be any mistake

tioner. *R.* v. *Van Butchell*, 3 C. & P. 629; contrary to the dictum in Coke, 4 Inst. 251. And see 1 Hale's P. C. 429; 4 Bl. Com. C. 14. The question is whether he has been guilty of criminal misconduct, arising either from gross ignorance or criminal inattention. *R.* v. *Long*, 4 C. & P. 398. 423. The death having been occasioned by the application of a powerful lotion to the skin, it was held that the prisoner might show that the same lotion had been applied to other patients, and that they had been treated in the same manner. *Ib.* & 1 Hale's P. C. 429 (*a*). Where an irregular practitioner in midwifery mistaking an unusual appearance, attempted to remove it by force, and occasioned the death of the patient, it appearing that he had had considerable experience and that there had been no want of attention, held that he could only be found guilty of manslaughter upon proof of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. *R.* v. *Williamson*, 3 C. & P. 635.

(*b*) Fost. 308. 370; 1 Hale, 457. It seems that in general the killing is deemed to be of malice aforethought, whensoever one unlawfully and forcibly resists any officer or other person lawfully executing, in a lawful manner, any civil or criminal process or other authority for the advancement of the law, or lawfully interposing in a lawful manner for the prevention or suppression of any breach of the peace or other offence, and in so resisting happens to kill such officer or other person. See 4th report of the Criminal Law Commissioners, p. 40; and see East's P. C. 295, where the authorities on the subject are collected.

(*c*) Fost. 309.

(*d*) Ibid.; 1 Hale, 463. If a man be lawfully arrested, and he and his party resist, and a stranger to the facts interposes, the question seems to turn principally on his *intention*; for if he interposes with intent to aid the one party against the other, he does it at his peril, and is guilty of implied malice if he lend aid to the party lawfully arrested, and the officer be killed. *Sir C. Stanley's Case*, Kel. 87. But if he merely interpose, being ignorant of the facts, with intent to preserve the peace, he certainly would not be guilty of murder. East's P. C. 296; 1 Sid. 160. See the *Sissinghurst-house Case*, 1 Hale, 461, 2, 3.

(*e*) Fost. 270. 308.

(*f*) Fost. 311, 312. *R.* v. *Rogers*, East's P. C. 310. As to proof of a writ, see Vol. 1.

(*g*) 2 Starkie's *C.* 205.

in the name or addition of the person upon whom it is to be executed, or if the name of the person or officer by whom it is to be executed be inserted without authority, and after the issuing of the process (*h*), or it be otherwise altered after it has been issued, or if the officer exceed the limits of his authority, and be killed, it is no more than manslaughter in the person whose liberty is so invaded (*i*). So it is if the court from which the process issued wanted jurisdiction (*k*). Warrant.

Without a warrant.—A peace-officer may justify an arrest on a charge of felony, on reasonable suspicion, without a warrant, although it turn out that no felony has in fact been committed; for all that a constable can do is to inform himself of the circumstances, and it is the duty of all persons to submit to the known officers of the law (*l*). Arrest without warrant.

A private person, it seems, is a trespasser (*m*), unless a felony has in fact been committed; and where a felony has been committed, and *A.* suspecting *B.* to be guilty, who is in fact innocent, attempts to arrest him, *A.* is not within the protection of the law, and the killing would amount to manslaughter only (*n*); but if a felony has been committed, or a dangerous wound has been inflicted, and the party flies, it is the duty of every one to prevent an escape (*o*). By a private person.

Either a constable or private person may lawfully interpose, on his own view, to prevent a breach of the peace, or quiet an affray (*p*); but in the case of the constable, a notification of the character in which he interposes may, it seems, be implied from his office (*q*); but a private person must give express notice (*r*). Notice.

And it seems that a peace-officer has no authority to arrest after the fray is over, and peace has been restored (*s*), except for the purpose of taking an offender before a magistrate to find sureties (*t*).

No private person can justify an arrest in a civil suit (*u*).

The fact that the party killed was an officer of justice, such as a constable or other peace-officer, may be proved generally by evidence that he acted in that capacity, without strict evidence of his appointment (*x*). Although a special authority to arrest under a precept be alleged in the in- Proof of authority.

(*h*) An arrest upon a warrant in which the officer's name is inserted after it has been signed and sealed by the sheriff, is illegal. *Housin* v. *Barrow*, 6 T. R. 122. *R.* v. *Stokley*, East's P. C. 310. But where a magistrate keeps a number of blank warrants ready signed, and on being applied to, fills them up, the officer may legally execute the warrant, and consequently it will be murder to kill him. *R.* v. *Inhab. of Winwick*, cited 8 T. R. 455.

(*i*) Fost. 312.

(*k*) East's P. C. 309; MS. Summ. 163.

(*l*) *Samuel* v. *Payne*, Dougl. 359; and vide *supra*, 601; and *R.* v. *Ford*, *supra*.

(*m*) 2 Hale, 83. 92; East's P. C. 301. *Qu.* whether the finding of a bill by a grand jury be such *primâ facie* evidence of a felony as to warrant the apprehension of the party by a private person. East's P. C. 301.

(*n*) Fost. 318; where Mr. J. Foster says, "This suspicion, though probably well founded, will not bring the party attempting to arrest or imprison within the protection of the law so far as to excuse him from the guilt of manslaughter if he killeth; or, on the other hand, to make the killing amount to murder. I think it would be felonious homicide, but not murder, in either case; the one not having used due diligence to be apprized of the truth of the fact, and the other not having submitted or rendered himself to justice; yet in such a case *A.* might justify the imprisonment of *B.*" 1 Hale, 490; *supra*, 603.

(*o*) Fost. 271. 309; East's P. C. 298. *Jackson's Case*, 1 Hale, 464. 481. 489.

(*p*) Fost. 310; 1 Hale, 463; 1 Haw. c. 31, s. 44.

(*q*) Ibid.

(*r*) Fost. 272. 311.

(*s*) 2 Inst. 52; 2 Ld. Raym. 1501; Dalt. c. 1, s. 7.

(*t*) 2 Hale, 90. If a felony be threatened the party may be arrested.

(*u*) 1 Haw. c. 28, s. 19.

(*x*) *Supra*, 307.

Proof of authority.

dictment, if a legal authority to arrest, but not under the precept, be proved, the variance will not be material (*y*).

Where the deceased was killed in the execution of some authority derived from the articles of war, a copy of them, printed by the King's printer, ought to be produced (*z*). In several instances prisoners have been acquitted of the charge of murder for want of such evidence.

Notification of authority. Malice implied.

Using *lawful means*.—There must in all cases be a notification of the character and object of the party. Where a bailiff rushed abruptly into the bedchamber of a gentleman (*a*), not telling his business nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber and stabbed him, it was held to be but manslaughter at common law, &c.

Proof of lawful execution of authority.

So where a peace-officer interposes to suppress a riot; for otherwise the parties engaged in the heat and bustle may imagine that the officer takes a part in the riot (*b*). But a small notification in the case of a peace-officer is sufficient; as, if he command peace, or in any other way declare with what intent he interposes (*c*). If he announce his business, it is not necessary that he should produce his warrant, unless it be demanded (*d*); and he is in no case bound to part with the warrant out of his possession (*e*).

An officer cannot, in the execution of civil process, justify the breaking open an outward door or window (*f*); for, in the language of the books, every man's house is his castle, for safety and repose to himself and his family; but if the officer enter by an open door, he may then lawfully remove every obstruction to the execution of his duty (*g*).

The rule is confined to the protection of the owner and his family who are domiciled there; if a stranger take refuge there, it is not his castle, and he cannot claim the benefit of sanctuary within it (*h*).

The rule is also confined to the case of arrests in the first instance; for if a man be legally arrested, and then escape and take shelter in his own house, the officer may, on fresh suit, break open doors to retake him, having first given due notice of his business, and demanded admission, which has been refused (*i*).

It is also confined to civil cases; for in case of a felony committed, or dangerous wound given, or even where a minister of justice is armed with a warrant, in case of a breach of the peace, an outer door may be forced (*j*). But in no case can an outer door be legally broken, unless a previous notification and demand have been made, and a refusal given (*k*).

Indirect evidence.

Next as to indirect evidence.—Where the death has been occasioned *in secrecy*, a very important preliminary question arises, whether it has not resulted from accident, or the act of the party himself, who was *felo de se*.

It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dis-

(*y*) *Macally's Case*, 9 Co. 62; East's P. C. 345.

(*z*) *Supra*, Vol. I. tit. PUBLIC DOCUMENTS.

(*a*) 1 Hale, 470; Fost. 298. See also the cases cited *supra*, 716, 717.

(*b*) Fost. 310, 311; East's P. C. 314.

(*c*) Fost. 310; 1 Hale, 460, 1. *Gordon's Case*, Leach's C. C. L. 337.

(*d*) 1 Hale, 458. 583; 9 Co. 69.

(*e*) East's P. C. 319.

(*f*) Fost. 219; 2 Roll. Rep. 137; Palm. 52; 1 Hale, 458. *Lee* v. *Gansell*, Cowp. 1.

(*g*) *Lee* v. *Gansell*, Cowp. 1.

(*h*) 5 Co. 93; 2 Hale, 117; Fost. 320.

(*i*) Fost. 320; Salk. 79; 6 Mod. 173; Ld. Raym. 1028; 2 Roll. Rep. 138; 1 Hale, 459. Laying hold of the prisoner, and pronouncing words of an arrest, is an arrest. Fost. 320.

(*j*) Fost. 320. *Curtis's Case*, Ib. 135; *supra*, 596.

(*k*) Ibid.

honour, and to preserve his property from forfeiture. Instances have also occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder (*l*). On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth (*m*). Indirect evidence.

Where the circumstances are natural and real, and have not been *counterfeited* with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcileable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true (*n*). Proof of the prisoner's agency.

The question, whether a person has died a natural death, as from apoplexy, or a violent one from strangulation; whether the death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion (*o*); whether the drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, are questions usually to be decided by medical skill.

It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial evidence against him.

Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy: such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned.

Where it has been clearly established that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is of course for the consideration of the jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally,

1st, To the probable *motive* which might have urged the prisoner to commit so heinous a crime; for however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect Presumptive evidence.

(*l*) See the tria of *Spencer Cowper*, a barrister, for the alleged murder of Mrs. Stout, at Hertford, during the previous assizes. 5 St. Tr.

(*m*) Vide *supra*, Vol. I.

(*n*) Vide *supra*, Vol. I.

(*o*) See *Cowper's Case*, 5 St. Tr.

Presumptive evidence.

that some motive (*p*), and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal.

2dly, The means and opportunity which he possessed for the perpetrating the offence (*q*).

3dly, His conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence (*r*).

The case cited by Ld. Coke and Ld. Hale, and which has already been adverted to (*s*), is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced and injudicious person, ignorant of the nature of evidence, and unconscious that the truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to deceit and misrepresentation.

4thly, Circumstances which are peculiar to the nature of the crime; such as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence.

Upon the general nature and effect of circumstantial evidence, some observations have been already made; and it would be inconsistent with the limits of the present work to enlarge further upon the subject. It is essentially necessary to the security of mankind that juries should convict, where they can do so safely and conscientiously, upon circumstantial evidence which excludes all reasonable doubt; and that it should be well known and understood that the secrecy with which crimes are committed will not secure impunity to the criminal. In acting, however, upon circumstantial evidence, the just and humane rule upon which Lord Hale laid so much stress (*t*), cannot be too often repeated: *Tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.*

Evidence by the defendant.

It has been seen that the law infers malice from the act of killing, and that it is incumbent on the prisoner to prove those circumstances in his defence which *justify*, *excuse*, or *extenuate* the act.

Justification. Process of law.

1st. He may *justify* the act by proof that he acted in execution of the process of the law (*u*); that the death was occasioned by the resistance made by the deceased to the execution of a lawful authority (*v*). In such a case it is necessary to prove a lawful authority, and that the officer used legal means to enforce it (*x*), and that the death was unavoidably occasioned by the attempt to enforce the execution of the authority against the party who resisted it (*y*).

(*p*) *Supra*, Vol. I. tit. CIRCUMSTANTIAL EVIDENCE.

(*q*) *Ib.*

(*r*) *Ib.*

(*s*) *Ib.*, and 2 Hale, 290.

(*t*) 2 Hale, 290.

(*u*) Fost. 267; 4 Bl. Comm. 178; 1 Hale, 496. 502.

(*v*) Fost. 270.

(*x*) *Supra*, 594, *& seq.*; and 714.

(*y*) It has been said that an officer was guilty of manslaughter because he had not first given back, as far as he could, before he killed the party, who had escaped out of custody in execution for a debt, and resisted being retaken. 1 Roll. R. 189. But this case has since been disapproved of. Fost. 271; East's P. C. 307. In the case of resistance to officers of the customs and

Justification. Process of law.

If a party fly to avoid an arrest for a *felony* which has been committed, or where a dangerous wound has been given, or where an officer is armed with a lawful warrant to apprehend the party for felony, although no felony has been committed, and he *cannot otherwise be taken*, the killing him will be justifiable (*z*); but in the case of any misdemeanor short of felony, and in all civil cases, if the officer kill the party, who flies in order to avoid an arrest, he will be guilty of murder or manslaughter, according to the particular circumstances of the case (*a*).

Self-defence.

The accused may also show in justification that he committed the act in self-defence. If *A.* manifestly intends to commit a felony on the property or person of *B.* by violence or surprise, *B.* is not obliged to retreat, but may pursue his adversary till he find himself out of danger, and if in the conflict *A.* happeneth to die such killing is justifiable (*b*); but in the case of mutual conflict, the party, to excuse himself, must show that he retreated as far as he could before he gave the mortal stroke, and that he killed his adversary through mere necessity to avoid immediate death (*c*).

Excuse.

2dly. *In excuse.*—Proof that the death was not wilfully and intentionally occasioned by the prisoner will not, it has been seen, enure as a defence, unless he can show that the death was an inevitable accident, occasioned by the doing of a lawful act, which he could not, by the exercise of usual and ordinary caution, have avoided (*d*).

Evidence in extenuation.

3dly. The prisoner may, in certain instances, *extenuate* his crime, and reduce it from murder to manslaughter, by proof that the act was committed during a transport of passion and resentment excited by sudden provocation, which for the time subdued his reason; for such evidence repels the inference of that deliberate malice and malignity of heart which is essential to the offence (*e*).

Provocation.

Whenever the defendant seeks to shelter himself under the plea of *provocation*, he must prove his case to the satisfaction of the jury (*f*); the pre-

excise, see the stat. 9 Geo. 2, c. 35, s. 35, &c.

(*z*) 1 Hale, 489, 490; 1 Haw. c. 28, s. 11; Fost. 271. The pursuit is not barely warrantable; it is what the law requires, and will punish the neglect of. See the case of the *Marquis de Guiscard*, Fost. 271. *Semble*, the finding a bill of indictment by a grand jury for felony will warrant a private person in apprehending the party indicted. 1 Hale, 489, 490; East's P. C. 300, 301. So officers of justice are justified in killing rioters in endeavouring to suppress and disperse a mob (in case it cannot be otherwise suppressed), both at common law and under the Riot Act. See 1 Hale, 53. 494, 495; East's P. C. 304; 1 Geo. 1, stat. 2, c. 5. And so *semble* are private persons.

(*a*) Fost. 271; 1 Hale, 481.

(*b*) Fost. 273, 4; 1 Hale, 481. 484.

(*c*) Fost. 277.

(*d*) Vide *supra*, 715.

(*e*) Fost. 315; East's P. C. 232. It seems that the guilt of the offender is extenuated where the act being done under the influence of passion from sudden provocation, or of fear, or of alarm, which for the time suspends or weakens the ordinary powers of judgment and self-control, is attributable to transport of passion or defect of judgment so occasioned, and not to a deliberate intention to kill or do great bodily harm. See 4th Report of Crim. Law Commiss.

(*f*) Fost. 293. *Mason's Case*, ibid. 132; East's P. C. 230; 1 Hale, 451; 1 Haw. c. 31, s. 24. In *Mason's Case*, the deceased and prisoner first played at cudgels, then fought in good earnest; being parted, the prisoner left the room in anger, and repeatedly threatened to fetch something in order to stick his brother. In half an hour the prisoner returned: the deceased offered to play at cudgels, to which the prisoner assented, but dropped his cudgel as the deceased approached; the deceased then struck the prisoner two blows on the shoulder; the prisoner immediately put his right hand into his bosom, drew out the blade of a tuck sword, and immediately stabbed the deceased and killed him. The Judges held that the killing was wilful murder; the prisoner returned with a deliberate intention to take a deadly revenge for what had passed, and therefore neither the circumstance of the previous blows, nor of the quarrel, made any difference;

Evidence in extenuation. Provocation.

sumption of law is against him till that presumption be repelled by contrary evidence. What degree of provocation, and under what circumstances heat of blood, the *furor brevis*, will or will not avail the defendant, is usually a question of law arising upon the special facts of the case.

Where the sudden occasion is but a mere pretext and excuse to cover deliberate malice, it can never be available, even in extenuation (*g*). Where there is no evidence of any motive for the act, except the sudden provocation, upon which the defendant relies, then, although the criminal nature of the act depends upon the *malice* of the agent (that is, upon malice in its *legal sense*, as evidenced by the facts themselves), yet malice, in this sense, is a necessary legal result and inference from the facts as found by the jury.

The legal distinctions which range themselves under this head, seem to depend principally, if not entirely, upon the question, whether, in the absence of previous malice, the act of the defendant, under all the circumstances of the case, can be attributed to the general infirmity and weakness of our nature, or, on the contrary, the facts themselves evince a wicked and vindictive disposition, and malignant spirit, fatally bent upon mischief (*h*); for, as was observed by Sir Michael Foster, "It is to *human frailty*, and that alone, that the law indulgeth in every case of felonious homicide" (*i*). All those facts, therefore, are most material which show the nature and extent of the provocation, and the return made by the prisoner as compared with that provocation, and the interval which has occurred between the provocation and the return made. It is the *nature* of the provocation, and not the *mere effect* of it on the mind of the prisoner, which the law regards; and the sufficiency of the provocation to extenuate the prisoner's guilt is a question of law (*j*).

If one kill another immediately upon a *grave and serious* provocation (*k*) likely to excite great passion, the offence will amount to no more than manslaughter, although the defendant used a deadly weapon; as, where *A.* detects a man in adultery with his wife (*l*), and in the first transport of passion kills him; but even in such a case, if he killed the adulterer deliberately upon revenge, after the fact and sufficient cooling time, it would have been murder. So a severe blow, or wound, occasioning considerable pain and effusion of blood, has been held to be a sufficient provocation to extenuate an immediate act of killing, although by means of a deadly weapon, into manslaughter (*m*).

the blows were plainly a provocation sought on his part, that he might execute the wicked purpose of his heart with some colour of excuse.

(*g*) *Mason's Case*, see the last note.

(*h*) See Fost. Disc. 2, c. 5.

(*i*) Fost. 293.

(*j*) See Fost. Disc. 2, c. 5. Yet it is clearly a question of fact whether the killing be attributable to heat of blood occasioned by the provocation. The provocation must be such as the law recognizes, and not such a slight one that the return made is so excessive and disproportionate to the cause that the killing cannot be attributed to mere heat of blood; where, however, such excess and disproportion do not exist, then whether heat of blood was excited, and whether the act was attributable to heat of blood so excited, seem to be mere questions of fact. See 4th Report of the Crim. Law Commiss.

(*k*) See *Tooley's Case*, 2 Ld. Ray. 1296; 1 East's P. C. 325; Fost. 291; 1 Hale's P. C. 473; 1 Haw. P. C. c. 31, s. 34, 1 East's P. C. 236.

(*l*) 1 Hale, 486. 1 Vent. 158. Sir T. Raym. 212.

(*m*) *Stedman's Case*, Fost. 292; where a woman struck a soldier in the face with an iron patten, which drew a great deal of blood, upon which he struck her on the breast with the pommel of his sword, and afterwards pursued her and stabbed her in the back, and it was held to be but

Evidence in extenuation. Provocation.

In cases of slight and inferior provocation, much depends upon the nature of the return made, and the instrument used. Where a boy had been assaulted, and his father ran three-quarters of a mile, and beat and killed the assailant, it was held to be but manslaughter; but this was so held (*n*) because he struck with a wand or small cudgel, and not with a deadly weapon.

No trespass to land or goods, or words of reproach, or provoking or insulting actions or gestures, short of an assault (*o*), are sufficient to free an homicide from the guilt of murder; and this rule governs all cases where the prisoner uses a deadly weapon, or otherwise manifests an intention to kill or to do some great bodily harm (*p*). But if on such a provocation by words or gestures, the prisoner strike with a stick, or other weapon not likely to kill, and unluckily, and against the intention of the party, death ensue, it will be but manslaughter (*q*).

Where *A.* found *B.* trespassing on his land, and in the first transport of his passion beat and unluckily killed him, it was held to be manslaughter (*r*); but it would have been otherwise if he had betrayed malice by the instrument used, as if he had beaten the deceased with a hedge-stake (*s*).

In *Holloway's Case* (*t*), where a servant caught a boy in his master's grounds stealing wood, and tied him to a horse's tail, by means of which he was killed, it was held to be murder. In all cases of slight provocation the general rule is, that if it can be collected, from the weapon made use of, or from any other circumstance, that the party intended to kill, it will be murder (*u*).

Conflict.

Although it be a general rule that no words of reproach, or provoking words or gestures, will reduce the offence from murder to manslaughter, yet if upon a *sudden quarrel*, and not upon *preconceived malice* (*v*), parties fight in the heat of blood upon equal terms, and no *undue advantage* be taken by the party who kills the other, the offence will be but manslaughter; and it matters not who gave the first blow (*x*). But if *B.* draw his sword and make a pass at *A.*, whose sword is undrawn, and then a contest ensue, in which *A.* is killed, it will be murder in *B.*, for he sought the blood of *A.*;

manslaughter. But Lord Holt said, that a single box on the ear would not have been a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear. Mr. J. Foster observes upon this case, that the smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

(*n*) Fost. 294.

(*o*) *Brain's Case*, Hale, 455. Cro. Eliz. 778; Kel. 131.

(*p*) Fost. 290, 1, 2; 2 Hale, 456.

(*q*) Fost. 290. In *Brain's Case*, 1 Hale, 455, it is stated that Watts came along by the shop of Brain, and distorted his mouth, and smiled at him. Brain killed him; and held to be murder. But note, it does not appear how he killed him. See *Lord Morley's Case*, 1 Hale, 455; Kel. 55.

(*r*) 1 Hale, 473.

(*s*) Fost. 291; Ib. 94. Even if a deadly weapon be used, but not in such a way as to show malice, it will be but manslaughter. *R.* v. *Rowland Phillips*, Cowp. 830.

(*t*) Pal. 548.

(*u*) Fost. 291. See the case of *Tranter* v. *Reason*, Fost. 293, and Str. 499; where the case seems to have been erroneously reported, and where it is represented that Mr. Lutterel having struck a sheriff's officer a slight blow with a cane, the officer and his companion fell upon him, stabbed him in nine places, and shot him whilst he lay on the ground entreating for mercy; and Mr. J. Foster intimates his opinion in very strong terms, that the circumstances constitute wilful murder; but it appears that the facts were misreported. See also the case of *Willoughby & another*, East's P.C. 228, Bodmin Summ. Ass. 1791. Two soldiers were refused liquor by a publican at eleven o'clock at night; an hour and a half afterwards, when the door was opened to let out some company, one of them rushed in, and renewed his demand for beer, which was again refused, and on his refusing to depart, and offering to lay hold of the landlord, the latter at the same instant collared him, the one pushing and the other pulling, towards the outer door, where, when the landlord came, he received a violent blow on the head with some sharp instrument from the other soldier, which occasioned his death. Buller, J. held it to be murder in both, notwithstanding the previous struggle; for the landlord did no more in attempting to put the soldier out at that time of night and after the warning he had given, than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence that the prisoners came the second time with a deliberate intention to use personal violence. And see *Mason's Case*, *supra*, 721 (*f*).

(*v*) *Supra*, 721.

(*x*) 1 Hale, 456.

Conflict.

but if *B.* had first drawn, and waited till *A.* had drawn, it would have been manslaughter (*y*). So where *A.* threw a bottle with great force at the head of *B.* and immediately drew his sword, and *B.* returned the bottle at the head of *A.* and wounded him, and then *A.* stabbed *B.*, it was held to be murder; for *A.* in throwing the bottle manifested an intention to do some great mischief, and his drawing immediately showed that he intended to follow it up (*z*). The plea of provocation is in no case available where the offender either seeks the provocation as a pretext for killing or doing great bodily harm, or endeavours to kill or do great bodily harm before provocation given (*a*).

In every case of homicide upon provocation, if there be time for passion to subside, and reason to interpose, such homicide will amount to murder (*b*). Where, however, an interval has occurred between the quarrel and the combat, and there be a doubt whether the parties when they fought were still in heat of blood, it seems to be a question of fact rather than of law, whether they acted coolly and deliberately, or under the influence of passion. It seems, in all cases of a defence of this nature, to be a question of fact, whether the prisoner yielded to sudden infirmity of temper occasioned by a provocation recognized by law, or by a malicious and deliberate artifice sought the provocation for the purpose of wounding or destroying (*c*). If a man encourage another to destroy himself, and is present whilst he does so, he is guilty of murder as a principal (*d*).

Upon a prosecution for a murder committed abroad by one subject upon another, under 9 Geo. 4, c. 31, s. 7, the jury ought to be satisfied that the prisoner was a British-born subject; but the declaration of the prisoner as to his place of birth unexplained is, as against himself, evidence to go to the jury (*e*). Where the body of the infant was found in a bed amongst the feathers, but there was also proof of the mother having sent for a surgeon and provided clothes, held that it negatived the charge of concealment (*f*).

Accessories, &c.

If *A.* require *B.* to procure some one to murder *C.*, and *B.* procure *D.* to do it, *A.* is an accessory before the fact to *D.* (*g*). So it is a general rule, that if *A.* command *B.* to do an unlawful act, he is accessory to all that ensues upon the execution of that act. If he command *B.* to beat *C.* and *B.* kills *C.*, *A.* is accessory to the murder, for his command naturally tended to endanger the life of *C.* (*h*). So if *A.* command *B.* to do an unlawful act, and *B.* executes the act in substance, although he deviates in particular circumstances, *A.* is accessory to the offence; as, for instance, if *A.* command *B.* to poison *C.*, and he stab or shoot him (*i*). It is otherwise where *B.* departs from the command in *substance*; as where *A.* directs *B.* to beat *C.* with a small stick, and he beat him with a bludgeon, or wound him with a sword (*k*); for there was no command to do any thing which would probably occasion death.

(*y*) Post. 295; 1 Haw. c. 31, s. 27.

(*z*) *Mawgridge's Case*, Kel. 128, 9; Post. 295, 6. *Oneby's Case*, 2 Ld. Raym. 1485; 2 Str. 771.

(*a*) See 4th Report of the Crim. Law Commiss. p. 39.

(*b*) Post. 296, and *supra*, 721.

(*c*) As where *A.* bade *B.* take a pin out of his sleeve, with intent to take occasion to strike or wound (1 Hale, 457), or *A.* with the like intent offers *B.* a pint of ale to strike him. 1 Haw. c. 31, s. 24. *Mason's Case*, *supra*, 721.

(*d*) *R.* v. *Dyson*, Rus. & Ry. C.C.L. 523.

(*e*) *R.* v. *Helsham*, 4 C. & P. 394.

(*f*) *R.* v. *Highley*, 4 C. & P. 366.

(*g*) Post. 125.

(*h*) 2 Haw. P. C. c. 29, s. 18; 4 Bl. Com. 37; 1 Hale, 435. So if *A.* direct *B.* to rob *C.*, and *B.* kills *C.* in the attempt; or the death is the immediate effect of an act done in the execution of a felonious command. 2 Haw. c. 29, s. 18.

(*i*) 2 Haw. c. 29, s. 20; 4 Bl. Com. 37.

(*k*) 1 Hale, 436.

END OF VOL II.